

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Anthony E. Held, Ph.D., P.E. and North American Food Distributing Company, Inc.**

This Settlement Agreement is entered into by and between Anthony E. Held, Ph.D., P.E. (“Held”) and North American Food Distributing Company, Inc. (“NAFDC”), with Held and NAFDC collectively referred to as the “Parties.” Held is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. NAFDC employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.5 *et seq.* (“Proposition 65”).

### **1.2 General Allegations**

Held alleges that NAFDC has manufactured, imported, sold and/or distributed for sale in California dried seaweed containing arsenic (inorganic arsenic compounds) (hereinafter “arsenic”) without the requisite Proposition 65 health hazard warnings. Arsenic is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer.

### **1.3 Product Description**

The product that is covered by this Settlement Agreement is “*Kaneryo*” *Me Hijiki (Dried Seaweed)*, UPC #4 975041 200749 that is manufactured, imported, sold and/or distributed for sale in California by NAFDC (hereinafter the “Products”).

### **1.4 Notice of Violation**

On October 18, 2013, Held served NAFDC and certain requisite public enforcement agencies with a “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice of alleged violations of Proposition 65 based on NAFDC’s alleged failure to warn its customers, consumers, workers and other individuals that the Products exposed users in California to

arsenic. 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**

NAFDC denies the material factual and legal allegations contained in Held's Notice and maintains that all products that it has manufactured, imported, distributed, and/or sold in California, including the Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by NAFDC of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by NAFDC of any fact, finding, conclusion, issue of law, or violation of law. However, this section shall not diminish or otherwise affect NAFDC's obligations, responsibilities, and duties under this Settlement Agreement.

**1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean June 15, 2014.

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

**2.1 Reformulation Standards**

Reformulated Products are defined as Products containing arsenic in concentrations less than 5 parts per billion ("ppb") when analyzed pursuant to U.S. Environmental Protection Agency ("EPA") testing methodology 3050B, 6010B, 6020 inductively coupled plasma-mass spectrometry, or any other methodology utilized by federal or state agencies for the purpose of determining the arsenic content in a solid substance.

**2.2 Reformulation Commitment**

As of the Effective Date, all Products sold by, or on behalf of, NAFDC in the State of California shall be Products that qualify as Reformulated Products as defined in Section 2.1 above or shall carry appropriate Proposition 65 health hazard warnings as described in Section 2.3 below.

### 2.3 Product Warnings

Commencing on the Effective Date, for all Products other than Reformulated Products, NAFDC shall provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b). Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

**(a) Retail Store Sales.**

**(i) Product Labeling.** NAFDC shall affix a warning to the packaging, labeling, or directly on each Product sold in retail outlets in California by NAFDC or any person selling the Products, that states:

**WARNING:** This product contains arsenic, a chemical known to the State of California to cause cancer.

For Products that also contain one or more reproductive toxicants, the warning label NAFDC shall use in lieu of the above warning shall state:

**WARNING:** This product contains a chemical known to the State of California to cause cancer, as well as chemicals known to cause birth defects or other reproductive harm.

**(ii) Point-of-Sale Warnings.** Alternatively, NAFDC may provide warning signs in the form below to its customers in California with instructions to post the warnings in close proximity to the point of display of the Products. Such instruction sent to NAFDC's customers shall be sent by certified mail, return receipt requested.

**WARNING:** This product contains arsenic, a chemical known to the State of California to cause cancer.

For Products that also contain one or more reproductive toxicants, the warning label NAFDC shall use in lieu of the above warning shall state:

**WARNING:** This product contains a chemical known to the State of California to cause cancer, as well as chemicals known to cause birth defects or other reproductive harm.

Where more than one Product is sold in proximity to other like items or to those that do not require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement shall be used:<sup>1</sup>

**WARNING:** The following products contain arsenic, a chemical known to the State of California to cause cancer:

*[list products for which warning is required]*

For Products that also contain one or more reproductive toxicants, the warning label NAFDC shall use in lieu of the above warning shall state:

**WARNING:** The following products contains a chemical known to the State of California to cause cancer, as well as chemicals known to cause birth defects or other reproductive harm.

*[list products for which warning is required]*

**(b) Mail Order Catalog and Internet Sales.** In the event that NAFDC sells Products via mail order catalog and/or the internet, to customers located in California, after the Effective Date, that are not Reformulated Products, NAFDC shall provide warnings for such Products sold via mail order catalog or the internet to California residents. Warnings given in the mail order catalog or on the internet shall identify the *specific* Product to which the warning applies as further specified in Sections 2.3(b)(i) and (ii).

**(i) Mail Order Catalog Warning.** Any warning provided in a mail order catalog shall be in the same type size or larger than the Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product:

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<sup>1</sup> For purposes of the Settlement Agreement, "sold in proximity" shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

**WARNING:** This product contains arsenic, a chemical known to the State of California to cause cancer.

For Products that also contain one or more reproductive toxicants, the warning label NAFDC shall use in lieu of the above warning shall state:

**WARNING:** This product contains a chemical known to the State of California to cause cancer, as well as chemicals known to cause birth defects or other reproductive harm.

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Product, NAFDC may utilize a designated symbol to cross reference the applicable warning and shall define the term “designated symbol” with the following language on the inside of the front cover of the catalog or on the same page as any order form for the Product(s):

**WARNING:** Certain products identified with this symbol ▼ and offered for sale in this catalog contain arsenic, a chemical known to the State of California to cause cancer.

For Products that also contain one or more reproductive toxicants, the warning label NAFDC shall use in lieu of the above warning shall state:

**WARNING:** Certain products identified with this symbol ▼ and offered for sale in this catalog contain a chemical known to the State of California to cause cancer, as well as chemicals known to cause birth defects or other reproductive harm.

The designated symbol must appear on the same page and in close proximity to the display and/or description of the Product. On each page where the designated symbol appears, NAFDC must provide a header or footer directing the consumer to the warning language and definition of the designated symbol.

(ii) **Internet Website Warning.** A warning shall be given in conjunction with the sale of the Products via the internet, which warning shall appear either: (a) on the same web page on which a Product is displayed; (b) on the same web page as the order form for a

Product; (c) on the same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. The following warning statement shall be used and shall appear in any of the above instances adjacent to or immediately following the display, description, or price of the Product for which it is given in the same type size or larger than the Product description text:

**WARNING:** This product contains arsenic, a chemical known to the State of California to cause cancer.

For Products that also contain one or more reproductive toxicants, the warning label NAFDC shall use in lieu of the above warning shall state:

**WARNING:** This product contains a chemical known to the State of California to cause cancer, as well as chemicals known to cause birth defects or other reproductive harm.

Alternatively, the designated symbol may appear adjacent to or immediately following the display, description, or price of the Product for which a warning is being given, provided that the following warning statement also appears elsewhere on the same web page, as follows:

**WARNING:** Products identified on this page with the following symbol ▼ contain arsenic, a chemical known to the State of California to cause cancer.

For Products that also contain one or more reproductive toxicants, the warning label NAFDC shall use in lieu of the above warning shall state:

**WARNING:** Products identified on this page with the following symbol ▼ contain a chemical known to the State of California to cause cancer, as well as chemicals known to cause birth defects or other reproductive harm.

### **3. MONETARY PAYMENTS**

#### **3.1 Civil Penalties Pursuant To Health & Safety Code § 25249.7(B)**

In settlement of all the claims referred to in this Settlement Agreement, NAFDC shall pay a total of \$10,000 in civil penalties in accordance with this Section. Each penalty payment will

be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Held.

**3.1.1 Initial Civil Penalty**

On or before June 15, 2014, NAFDC shall pay an initial civil penalty in the amount of \$2,000. NAFDC shall provide its payment in two checks to: (a) “OEHHA” in the amount of \$1,500; and (b) “Dr. Anthony E. Held, Ph.D., P.E., Client Trust Account” in the amount of \$500. All penalty payments shall be delivered to the addresses listed in Section 3.3 below.

**3.1.2 Final Civil Penalty**

On or before January 1, 2015, NAFDC shall pay a final civil penalty in the amount of \$8,000. The final civil penalty shall be waived in its entirety, however, if an Officer of NAFDC provides Held with written certification that as of the date of such certification and continuing into the future, to the extent that NAFDC continues to sell the Products in California, all Products manufactured, imported, distributed, sold and offered for sale in California by, or on behalf of, NAFDC will be Reformulated Products. Held must receive any such certification on or before December 15, 2014, and time is of the essence. Unless waived, the final civil penalty shall be apportioned in accordance with California Health & Safety Code § 25249.12 (c)(1) & (d), with 75% of these funds remitted to OEHHA and the remaining 25% of the penalty remitted to Held, as provided by California Health & Safety Code § 25249.12(d). Unless waived, NAFDC shall provide its payment in two checks to: (a) “OEHHA” in the amount of \$6,000; and (b) “Dr. Anthony E. Held, Ph.D., P.E., Client Trust Account” in the amount of \$2,000. All penalty payments shall be delivered to the addresses listed in Section 3.3 below.

**3.2 Reimbursement of Fees and Costs**

The parties acknowledge that Held and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee reimbursement issue to be resolved after the material terms of the agreement had been settled.

Shortly after the other settlement terms had been finalized, NAFDC expressed a desire to resolve the fee and cost issue. The parties then attempted to (and did) reach an accord on the compensation due to Held and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed through the mutual execution of this agreement. NAFDC shall pay \$25,000 for fees and costs incurred as a result of investigating, bringing this matter to NAFDC's attention, negotiating a settlement in the public interest, and seeking court approval. NAFDC shall make the check payable to "The Chanler Group" and shall deliver payment on or before June 15, 2014, to the address listed in Section 3.3.1(a) below.

### **3.3 Payment Procedures**

#### **3.3.1 Issuance of Payments**

(a) All payments owed to Held and his counsel, pursuant to Sections 3.1 and 3.2 shall be delivered to the following payment address:

The Chanler Group  
Attn: Proposition 65 Controller  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

(b) All payments owed to OEHHHA, pursuant to Section 3.1, shall be delivered directly to OEHHHA (Memo line "Prop 65 Penalties") at one of the following addresses, as appropriate:

For United States Postal Service Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010  
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

**3.3.2 Proof of Payment.** A copy of each check payable to OEHHA shall be mailed, simultaneous with payment, to The Chanler Group at the address set forth in Section 3.3.1(a) above, as proof of payment to OEHHA.

#### **4. CLAIMS COVERED AND RELEASED**

##### **4.1 Held's Release of NAFDC**

This Settlement Agreement is a full, final and binding resolution between Held and NAFDC of any violation of Proposition 65 that was or could have been asserted by Held on behalf of himself his past and current agents, representatives, attorneys, successors and/or assignees, against NAFDC, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys and each entity to whom NAFDC directly or indirectly distributes or sells Products including, but not limited to, downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees ("Releasees"), based on their failure to warn about alleged exposures to arsenic contained in the Products that were manufactured, imported, distributed, sold and/or offered for sale by NAFDC in California before the Effective Date. This release is provided in Held's individual capacity and is not a release on behalf of the public.

In further consideration of the promises and agreements herein contained, Held on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, hereby waives all of his rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that he may have 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, but exclusive of fees and costs on appeal -- limited to and arising under Proposition 65 with respect to arsenic in the Products manufactured, imported distributed, sold and/or offered for sale by NAFDC before the Effective Date (collectively "claims"), against NAFDC and Releasees.

#### **4.2 NAFDC's Release of Held**

NAFDC, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Held and his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Held and his attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Products.

#### **5. SEVERABILITY**

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

#### **6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this Settlement Agreement are rendered inapplicable or are no longer required as a result of any such repeal or preemption, or rendered inapplicable by reason of law generally as to the Products, then NAFDC shall provide written notice to Held of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected. Nothing in this Settlement Agreement shall be interpreted to relieve NAFDC from any obligation to comply with any pertinent state or federal law, including all toxic control laws.

#### **7. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail, return receipt requested; or (iii) overnight courier to any party by the other party at the following addresses:

To North American Food Distributing  
Company, Inc.:

Harley Inaba, President  
North American Food Distributing  
Company Inc.  
3969 Industrial Boulevard  
West Sacramento, CA 95691

To Anthony E. Held, Ph.D., P.E.:

Proposition 65 Coordinator  
The Chanler Group  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

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

**8. COUNTERPARTS; FACSIMILE AND SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document. A facsimile or pdf signature shall be as valid as the original.

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

Held and his attorneys agree to comply with the reporting form requirements referenced in California Health & Safety Code section 25249.7(f).

**10. MODIFICATION**

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

11. **AUTHORIZATION**

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

**AGREED TO:**

**AGREED TO:**

Date: May 30, 2014

Date: June 3, 2014

By: Anthony E. Held  
Anthony E. Held, Ph.D., P.E.

By: Harley Inaba  
Harley Inaba, President  
North American Food Distributing  
Company, Inc.