

February 14, 2017

VIA ELECTRONIC MAIL

Maia Kats  
Director of Litigation  
Center for Science in the Public Interest  
1220 L Street NW, Suite 300  
Washington D.C. 20005

Michael R. Reese  
Reese LLP  
875 Avenue of the Americas  
Eighteenth Floor  
New York, NY 10001

Re: Stipulation of Settlement Regarding Naked Juice Product Labeling

Dear Ms. Kats and Mr. Reese:

This Stipulation of Settlement memorializes the agreement reached by PepsiCo, Inc. and Plaintiffs Dina Lipkind, Lyle Takeshita, and Chad Fenwick, by and through their respective counsel, concerning the putative class action lawsuit filed by Plaintiffs against PepsiCo in the United States District Court for the Eastern District of New York, Case No. 16-cv-05506 ("*Lipkind* Action"), challenging, *inter alia*, the advertising, labeling, or marketing of Naked Juice products (Dkt. No. 1).

While PepsiCo and Naked Juice expressly deny the allegations in the *Lipkind* Action, the parties have worked collaboratively together to resolve the matter in good faith, and we are pleased that we have reached agreement, as set forth below, on terms that reflect our principles of mutual interest and without any admission of wrongdoing. Accordingly, in consideration for and subject to the promises, terms, and conditions contained in this Stipulation of Settlement, Plaintiffs and PepsiCo, through their respective counsel, hereby stipulate and agree that: (a) the *Lipkind* Action is hereby fully compromised, settled, discharged and released as provided for in this Stipulation of Settlement; and (b) Plaintiffs, through their counsel, will file a voluntary notice of dismissal of the *Lipkind* Action with prejudice upon the terms set forth below.

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**I. DEFINITIONS**

As used in this Stipulation of Settlement, the following terms have the following meanings, unless this Stipulation of Settlement specifically provides otherwise:

1. "Defendant" shall mean PepsiCo, Inc. ("PepsiCo") and Naked Juice of Glendora, Inc. ("Naked Juice").
2. "Effective Date" means the date on which this Stipulation of Settlement becomes "Final." As used in this Stipulation of Settlement, Final means the business day following the execution of this Stipulation of Settlement by both Parties.
3. "Eligible Products" shall mean all Naked Juice-branded juice and juice smoothie products currently in market under the following "Family Name" categories: Veggie, Boosted, Protein and Pure Fruit, including but not limited to the juice and smoothie products set forth in Table 1 and Table 2 of the complaint (Dkt. No. 1) and Naked Coconut Water, as well as subsequent iterations of the same or reasonably like products and/or product line.
4. "Juice Products" shall mean 100% or 90%-100% single-species and multi-species fruit and/or vegetable blend or smoothie beverages.
5. "Parties" means Plaintiffs and Defendant, collectively, as each of those terms is defined in this Stipulation of Settlement.
6. "Plaintiffs" shall mean Dina Lipkind, Lyle Takeshita, and Chad Fenwick.
7. "Plaintiffs' Counsel" means the Center for Science in the Public Interest ("CSPI") and Reese LLP ("Reese").
8. "Release" means the release and waiver set forth in Section V.
9. "Released Claims" means and includes any and all claims, demands, rights, damages, obligations, suits, debts, liens, and causes of action under common or statutory law (federal, state, or local) of every nature and description whatsoever, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including unknown claims as of the Effective Date by the Plaintiffs (and Plaintiffs' respective heirs, guardians, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns) that:

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a. were asserted or could have been asserted in the *Lipkind* Action against Defendant relating to Naked Juice, and that arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged or referred to in the *Lipkind* Action (including, but not limited to, alleged violations of state consumer protection, unfair competition, and/or false or deceptive advertising statutes), breach of express or implied warranty, fraud, negligence, product liability, conspiracy, assault and battery, unjust enrichment, restitution, declaratory or injunctive relief, and other equitable claims or claims sounding in contract and tort; except as provided for in paragraph 13(a)(iv).

10. "Released Party" shall be defined and construed broadly to effectuate a complete and comprehensive release, and means:

a. PepsiCo and its past, present, and future employees, assigns, attorneys, agents, advertising agencies, consultants, officers, and directors;

b. all of PepsiCo's past, present, and future parents, subsidiaries (including but not limited to Naked Juice), divisions, affiliates, predecessors, and successors, and each of their respective employees, assigns, attorneys, agents, resellers, officers, and directors; and

c. any and all persons, entities, or corporations involved in any way in the development, creation, sale, advertising, labeling, or marketing of the Eligible Products or their ingredients, or any other vendor or any company that supplied any ingredients to Naked Juice or PepsiCo.

11. "Releasing Parties" means Plaintiffs and each of their heirs, guardians, executors, administrators, representatives, agents, partners, successors, predecessors-in-interest, and assigns.

## II. SETTLEMENT CONSIDERATION

12. In consideration for the Release contained in this Stipulation of Settlement, and as a result of the efforts of the Plaintiffs and Plaintiffs' Counsel, PepsiCo will agree to abide by mutually agreed-upon "Transparency Principles" enumerated in Section III of this Agreement, and will provide financial consideration in an amount as set forth in the letter agreement between the Parties dated February 14, 2017 ("Letter Agreement").

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### III. TRANSPARENCY PRINCIPLES

In recognition of the shared commitment to transparent labeling by CSPI and PepsiCo, PepsiCo hereby commits to amend its labeling and marketing of Eligible Products through the adoption and implementation of the principles of transparency listed below (“Transparency Principles”). PepsiCo’s willingness to adhere to the following principles reflects PepsiCo’s commitment to transparency. Plaintiffs agree that the labeling and marketing of Naked Juice products that align with the Transparency Principles resolves their claims:

#### 13. Front Panel

a. Naked Juice will enhance the information provided to consumers through the front-panel labeling of Eligible Products by improving the depiction of the nature and content of Eligible Products. Naked Juice commits to enhancing the front-panel labeling by enacting the specific amendments described below.

i. Revised family naming conventions. To the extent Naked Juice continues to utilize a family naming system to classify Naked Juice varieties, the top-banner family names on Naked Juice products will correspond directly to the nature of the product. With respect to the Eligible Products currently in market, the new naming system will be as follows: “Fruit Juice,” “Fruit Smoothie,” “Fruit & Veggie Juice,” “Fruit & Veggie Smoothie,” “Boosted Smoothie,” and “Protein Smoothie.”

ii. Statements of identity/Juice content. The statement of identity (“SOI”) will be located in one place and displayed in larger, prominent font that is contrasting and at least half the size of the product’s fanciful name. Each SOI will reflect the product’s composition and indicate characterizing flavors (as flavors). For example, the SOI for Kale Blazer will be “Kale Flavored Blend Of 8 Juices With Other Natural Flavors.” To the extent certain Naked Juice products continue to display a front-of-pack description of the juice content (e.g., “100% Juice”), the juice content will appear in smaller and less prominent font relative to the SOI. In the event that Naked Juice ceases using the ingredient imagery discussed in subpart (iii) below, the SOI shall be displayed in such a manner as to make notice of the predominant ingredients at least equally prominent when compared with current labels (with imagery)—compensating for any material role the images played in consumer understanding of product contents. Alternatively, either the fanciful name and SOI may be displayed on the front of pack in equally prominent font with respect to color, contrast and size, or they may be displayed adjacent to one another with the SOI at least half the size of the fanciful name.

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iii. Enhanced ingredient imagery. To the extent Naked Juice continues to utilize vignettes or images on Naked Juice products, the images on the front of each Eligible Product will reflect predominant ingredients, as determined by weight, and characterizing flavors. The visual will be displayed in such a manner that a consumer can reasonably identify the items being depicted and their proportionate representation, or reasonable approximation, in the Eligible Product.

iv. Amendments to “No Sugar Added” Claim. The Parties are in disagreement about the proper interpretation of the Food & Drug Administration (“FDA”) regulations governing the use of “No Sugar Added” claims. The Parties have determined to compromise their respective claims and defenses with respect to these disputes, and agree to the following amendments to the “No Sugar Added” claims on the Eligible Products.

a) Each “No Sugar Added” claim on the front label of a Naked Juice product will (1) be reduced in font size to at most 75% of the font size for the “No Sugar Added” claim on labels currently in market and (2) appear in font size that is no larger than the font size of the SOI. In addition, the “No Sugar Added” claim will be accompanied by an asterisk that references the disclaimer, “Not a low calorie food. See nutrition panel for information on sugar and calorie count.” The disclaimer will appear on the side panel in a wrap-around, bolded and prominent font, set off in a high contrast color block. In the event of label changes pursuant to paragraph 20, Naked Juice labels will continue to, through conspicuous visual cues, draw the consumers’ attention to the referenced disclaimer, which shall be unobscured and prominent, including but not limited to potentially continuing to use a wrap-around color block. Naked Juice also commits to continue its voluntary decision to display a bolded and prominent calorie disclosure on the front label for as long as the front label contains a “No Sugar Added” claim.

b) In the event that (1)(i) the FDA issues a definitive statement through a final Guidance to Industry or a Warning Letter to PepsiCo or other producers of Juice Products, and/or other reasonable approximations of the same, that Juice Products cannot make a “No Sugar Added” claim, or (ii) at least two federal courts in different circuits require removal of “No Sugar Added” claims on Juice Products—either through a judicial decision holding the presence of a “No Sugar Added” claim on Juice Products has deceived and/or misled consumers, or through voluntary, court-approved class-wide injunctive settlements—and (2) such authority pursuant to paragraph 13(iv)(b)(1)(i) or (ii) is unambiguously based on the interpretation that Juice Products cannot meet the requirements under 21 C.F.R. § 101.60(c)(2), then within six (6) months of notification of the same in writing to

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PepsiCo's signatory, PepsiCo will take appropriate action as necessary to conform the "No Sugar Added" label on Eligible Products. If PepsiCo omits the "No Sugar Added" claim from Eligible Products, it shall also be entitled to omit the "not a low calorie food" disclaimer. If PepsiCo determines that it will take no action within six (6) months of receiving notice as set forth in this subpart, PepsiCo will provide prompt (within 30 days) notice to CSPI of its decision not to amend Naked Juice labels, and the parties will meet in good faith in an attempt to renegotiate their agreement to compromise their respective claims and defenses so as to avoid, if reasonably possible, any proceeding for alleged breach of this Stipulation of Settlement.

#### 14. Side Panel

a. As utilized, the side-panel labeling will be enhanced through the specific amendments described below.

i. Revised brand-content panel wording. The descriptive product statements included in the side brand-content panels (i.e., the "Romance language") will be revised to reflect predominant ingredients, if not currently reflected. For example, "Kale is king of the garden. And when it's blended with cucumber, spinach, celery and a pinch of ginger, you get a royal roundtable of yum. Long live greens," will be amended to state "Kale is the king of the garden. When it's blended with orange, apple, cucumber, spinach, celery and a pinch of ginger, you get a royal roundtable of yum."

ii. Redesigned "goodness inside" panel. On each "goodness inside" panel, the label will specify that the product contains "juices from" the listed fruit or vegetable ingredients, and will list the ingredients in order of predominance. In addition, the font size of the "juices from" text will match the font size, style, color, and contrast of the listed ingredients. For those certain products from the "Boosted Smoothie" family, the product will feature on the "goodness inside" panel a list of the ingredients that the product is "boosted with," listed in order of volume. The font size of the "boosted with" text will match the font size, style, color, and contrast of the listed ingredients.

#### 15. Ingredient Panel

a. PepsiCo commits to complying with all current and future FDA regulations in identifying and listing Naked Juice ingredients in the back-panel ingredient list.

i. Updated ingredient panel. In compliance with the FDA's most recent rule-making, the ingredient panel for all Naked Juice products will list

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the amount of calories in enlarged and bolded font. Under the terms of this Stipulation of Settlement, the Naked Juice ingredient labels would comply with the FDA's rule-making as soon as reasonably feasible, including before the effective date of the rule.

**16. Marketing**

a. PepsiCo is committed and further commits to truthful advertising for all PepsiCo products. PepsiCo will not engage in advertising of Naked Juice products that is contrary to this principle. PepsiCo commits to ensuring that marketing of Naked Juice products is accurate, transparent, and fair.

i. Health-based claims. PepsiCo will not use or sanction the use of unsubstantiated health-content or health-based claims in connection with the marketing, labeling, or advertising of Naked Juice products. This includes but is not limited to refraining from advertising Naked Juice products as a source of antioxidants that can combat aging.

ii. Label-based advertising. Where Naked Juice advertising features a Naked Juice label, the advertising will feature an image of the depicted label without obstruction or omission that is material to the Transparency Principles outlined herein.

b. PepsiCo reserves the right to engage in the vibrant and playful marketing that has become an integral part of the Naked Juice brand provided it does not conflict with any of the commitments set forth above, or with the governing principles concerning transparency of predominant ingredients and nutritional benefits.

**IV. TIMING OF IMPLEMENTATION AND FUTURE LABELING CHANGES**

17. The Eligible Products will be re-labeled in accordance with the Transparency Principles set forth in this Stipulation of Settlement no more than eight (8) months after the Effective Date ("Implementation Date"). Provided PepsiCo is exercising reasonable best efforts, variations in the Implementation Date may include trial line availability, production schedules, or raw material availability. In the event that PepsiCo determines that it will not meet the eight-month deadline, it will notify Plaintiff's Counsel promptly and provide an explanation.

18. Notwithstanding the terms set forth in Section III, this Stipulation of Settlement does not impose any obligation on the part of PepsiCo or Naked Juice to withdraw or remove any Eligible Products from the market that do not bear the new labeling and which were sold or distributed in advance of the Implementation Date. PepsiCo agrees

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that once it implements the label changes set forth in Section III, it will cease producing Eligible Products utilizing prior versions of the labels.

19. PepsiCo commits that any new marketing campaigns will be in accordance with paragraph 16(a), and will undertake commercially reasonable efforts to impact existing marketing campaigns accordingly; notwithstanding the foregoing, Plaintiffs understand and agree that to the extent advertising or point-of-sale material displays actual product labels, PepsiCo will be able to display images of the actual labels currently in trade pursuant to paragraph 18 at the time of such advertisement. Further, this Stipulation of Settlement does not impose any obligation on the part of PepsiCo or Naked Juice to immediately withdraw, remove or modify any advertising or marketing materials (including in-store displays) from retailers or other third-parties, or to modify the exterior of any merchandising equipment (e.g., coolers) or to recall (or cause removal or destruction of) any materials that are beyond PepsiCo's control. PepsiCo also commits, however, to undertake commercially reasonable efforts to ensure consistency of third-party advertising with any new Naked Juice marketing campaigns in accordance with paragraph 16(a).

20. Nothing in this Stipulation of Settlement shall prevent PepsiCo from implementing the changes referenced in Section III (or other product changes) prior to the Implementation Date, and PepsiCo commits to using good faith efforts to effect such changes as expeditiously as reasonably possible.

21. Plaintiffs acknowledge and understand that PepsiCo and Naked Juice routinely update and/or make changes to product labels for reasons wholly unrelated to regulatory or legal requirements. PepsiCo's commitment to the Transparency Principles is enduring, and to the extent PepsiCo undertakes voluntary changes to its labels unrelated to legal requirements, PepsiCo will continue to comply with this Stipulation of Settlement and the Transparency Principles enunciated herein. The Parties agree to work and negotiate in good faith over any concerns that Naked Juice is not meeting the terms of this Stipulation of Settlement.

22. The commitments described in Section III shall expire on the earliest of the following dates: (a) five (5) years after the Implementation Date; (b) the date upon which there are such material changes in the formulation or manufacture of Naked Juice products and/or the product ingredients that would render the labeling, marketing, and advertising described in Section III inaccurate; or (c) the date upon which there are changes to any applicable statute, regulation, or other law that PepsiCo reasonably believes would require a modification to the labeling, advertising, and/or marketing described in Section III in order to comply with the applicable statute, regulation, or law (however, to the extent that there are changes to any applicable law that do not preempt or otherwise render inaccurate all



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commitments described in Section III, the remaining lawful commitments shall remain enforceable and implemented to the extent reasonably feasible).

23. Plaintiffs and Plaintiffs' Counsel agree that this Stipulation of Settlement does not preclude PepsiCo or Naked Juice from making further changes to Naked Juice product labels: (a) that PepsiCo or Naked Juice reasonably believes are necessary to comply with any statute, regulation, or other law of any kind; (b) that are necessitated by material product and/or ingredient changes, and/or that are necessary to ensure that PepsiCo provides accurate descriptions of its products; or (c) that are more detailed than those required by this Stipulation of Settlement.

#### V. GENERAL RELEASE OF CLAIMS

24. Each of the Releasing Parties hereby expressly acknowledges, through their counsel, that they have been informed of this Stipulation of Settlement, and that they hereby expressly waive and relinquish all claims defined herein as Released Claims against PepsiCo.

25. While nothing in this Stipulation of Settlement is meant to or shall be construed to restrict, in contravention of any federal or state laws, CSPI's or Reese's rights to practice law (or good-faith actions to enforce this Stipulation of Settlement), the Releasing Parties also warrant that they do not intend to pursue, or request or assist any other person or entity in pursuing, any action making substantially similar allegations as the *Lipkind* Action concerning Naked Juice products.

26. Each of the Parties hereby expressly, knowingly, and voluntarily waives the provisions of Section 1542 of the California Civil Code, which provides as follows:

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

27. Each of the Parties expressly waive and relinquish any and all rights and benefits that they may have under, or that may be conferred upon them by, the provisions of Section 1542 of the California Civil Code, or any other law of any state or territory that is similar, comparable, or equivalent to Section 1542, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the Released Claims. In connection with this waiver and relinquishment, each Releasing Party acknowledges that he or she may

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hereafter discover facts in addition to or different from those that they now know or believe to exist with respect to the Released Claims, but that it is their intention to hereby fully, finally, and forever settle and release all of the Released Claims, including all of the matters, disputes and differences, known or unknown, suspected or unsuspected, contingent or noncontingent, which now exist, may exist, or heretofore have existed between the Released Parties and Releasing Parties arising out of or relating to any matter, transaction, and/or action alleged in the *Lipkind* Action. In furtherance of this intention, the Release shall be and remain in effect as a full and complete general release of the Released Claims, notwithstanding the discovery or existence of any such additional or different claims or facts. Each of the Parties expressly acknowledges that he/she/it has been advised by his/her/its attorney of the content and effect of Section 1542, and with knowledge, each of the Parties hereby expressly waives whatever benefits he/she/it may have had pursuant to such section. Plaintiffs are not releasing any claims for personal injuries.

28. Upon the Effective Date, the *Lipkind* Action shall be dismissed with prejudice. Plaintiffs' Counsel shall have the responsibility for ensuring that the *Lipkind* Action is dismissed with prejudice in accordance with the terms of this Stipulation of Settlement. The provisions contained in this Stipulation of Settlement are not and shall not be deemed a presumption, concession, or admission by PepsiCo of any default, liability, or wrongdoing as to any facts or claims alleged or asserted in the *Lipkind* Action, or in any other action or proceeding, whether civil, criminal, or administrative.

## VI. INTEGRATED AGREEMENT

29. This Stipulation of Settlement, together with the Letter Agreement referenced in paragraph 12, is the entire understanding of the Parties and supersedes all prior understanding, oral, written or otherwise, related to the subject matter of this Stipulation of Settlement, and the Parties shall not have any obligation to the other. This Stipulation of Settlement shall not be modified in any respect except by a writing executed by the signatories of this Stipulation of Settlement.

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**STIPULATED AND AGREED:**

CENTER FOR SCIENCE IN THE PUBLIC  
INTEREST

PEPSICO, INC.

For Plaintiffs:

By: 

Date: 2/15/17

By: 

Date: 2/15/17

REESE LLP

By: \_\_\_\_\_

Date: \_\_\_\_\_