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10 WHITNEY R. LEEMAN, PH.D.

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF SAN FRANCISCO

14 UNLIMITED CIVIL JURISDICTION

15 WHITNEY R. LEEMAN, PH.D.,

16 Plaintiff,

17 v.

18 DEAN DISTRIBUTORS, INC.; and DOES 1-
19 150, inclusive,

20 Defendants.

Case No. CGC-13-533956

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Dr. Whitney R. Leeman and Dean Distributors, Inc.**

3 This Consent Judgment is entered into by and between Whitney R. Leeman, Ph.D. (“Dr.
4 Leeman” or “Plaintiff”) and Dean Distributors, Inc. (“Dean” or “Defendant”), with Dr. Leeman
5 and Dean collectively referred to as the “Parties,” and each individually referred to as a “Party.”

6 **1.2 Dr. Whitney R. Leeman**

7 Dr. Leeman is an individual residing in California who seeks to promote awareness of
8 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous
9 substances contained in consumer and commercial products.

10 **1.3 Dean Distributors, Inc.**

11 Dean employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
13 Code section 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 Dr. Leeman alleges that Dean has, directly or indirectly, sold food extracts, flavors and/or
16 colorings in the State of California containing 4-methylimidazole (“4-MEI”) without the requisite
17 Proposition 65 health hazard warning. Pursuant to Proposition 65, on January 7, 2011, California
18 identified and listed 4-MEI as a chemical known to cause cancer. 4-MEI became subject to the
19 “clear and reasonable warning” requirements of Proposition 65 one year later on January 7, 2012.
20 Cal. Code Regs., tit. 27, § 27001(c); Health & Safety Code §§ 25249.8, 25249.10(b).

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are food extracts, flavors and/or colorings
23 containing 4-MEI that are manufactured and sold or distributed for sale in California by Dean
24 using caramel color ingredients purchased by Dean from Sethness Products Company.
25 (“Products” or “Product”). Each of the Products is identified on Exhibit A hereto. Dean
26 represents that for at least the past two years it has not sold and does not sell Products directly
27 through any retail outlets, and does not offer the Products for sale through websites or mail order
28 catalogs.

1 **1.6 Notice of Violation**

2 On or about June 14, 2013, Dr. Leeman served Dean and the requisite public prosecutors
3 with a 60-Day Notice of Violation of the Safe Drinking Water and Toxic Enforcement Act of
4 1986 (“Notice”), identifying the Products and alleging that Dean was in violation of Proposition
5 65 for failing to warn its customers and consumers that food extracts, flavors and colorings
6 containing 4-MEI sold by Dean expose consumers in California to 4-MEI. To the best of the
7 Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the
8 allegations set forth in the Notice.

9 **1.7 Complaint**

10 On August 30, 2013, Dr. Leeman filed a complaint in San Francisco County Superior
11 Court against Dean in the above-entitled action (the “Complaint”), alleging violations of
12 Proposition 65, based on the alleged exposures of California consumers to 4-MEI contained in the
13 food extracts, flavors and colorings sold by Dean.

14 **1.8 No Admission**

15 Dean denies the material factual and legal allegations contained in the Notice and
16 maintains that all of the products they have sold, including the Products, have been, and are, in
17 compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission
18 by Dean of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall
19 compliance with this Consent Judgment constitute or be construed as an admission by Dean of
20 any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically
21 denied by Dean. This section shall not, however, diminish or otherwise affect Dean’s obligations,
22 responsibilities, and duties under this Consent Judgment.

23 **1.9 Consent to Jurisdiction**

24 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
25 jurisdiction over Dean as to the allegations contained in the Complaint, that venue is proper in
26 San Francisco County, and that this Court has jurisdiction to enter and enforce the provisions of
27 this Consent Judgment, pursuant to Code of Civil Procedure section 664.6, as a full and binding
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1 resolution of all claims that were or could have been raised in the Complaint against Dean based
2 on the facts alleged therein and in the Notice.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date the
5 this Consent Judgment is approved by the Court.

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

7 **2.1 Reformulation Commitment**

8 As of the Effective Date, Dean shall only manufacture, sell, or distribute for sale the
9 “Reformulated Product.” For purposes of this Consent Judgment, a Reformulated Product is
10 defined as a Product that contains “low levels” of 4-MEI (“Low 4-MEI”). “Low 4-MEI” is
11 defined as a Product containing less than or equal to 1 part per million (“ppm”) of 4-MEI.
12 Testing to verify that a Reformulated Product has Low 4-MEI shall be conducted using a
13 validated method for detecting the presence of 4-MEI in liquid or solid substance. The testing
14 shall be conducted in an accredited laboratory with qualified personnel. All analytical reports
15 must contain Quality Control data that verify the laboratory’s performance for the results in each
16 analytical report.

17 **2.2 Warnings**

18 Commencing on the Effective Date, for every sale and/or shipment by Dean in California
19 of any of the Products other than the Reformulated Product, Dean shall provide clear and
20 reasonable warnings as set forth in subsection 2.2(a) below. Each warning shall be prominently
21 placed with such conspicuousness as compared with other words, statements, designs, or devices
22 as to render it likely to be read and understood by an ordinary individual under customary
23 conditions before purchase or use. Each warning shall be provided in a manner such that the
24 consumer or user understands to which *specific* Product the warning applies, so as to minimize
25 the risk of consumer confusion. Dean only sells the Products directly to distributors, does not sell
26 the Products to any retailers, and does not offer the Products for sale through websites or mail
27 order catalogs.

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1 (a) **Sales to Distributors.** In the event that, after the Effective Date, Dean
2 sells Products that are not Reformulated Product to a distributor located in California or to a
3 customer that Dean reasonably believes will sell the Products to customers in California, Dean
4 shall, as specified in Section 2.2(a) above, provide a warning on the Products, or if it is
5 impractical to provide a warning directly on the Products, provide a warning on the packing
6 materials or invoice accompanying the Products. The following warning shall be prominently
7 placed on the packing materials accompanying the Products:

8 **WARNING:** This product contains 4-MEI, a chemical known to the
9 State of California to cause cancer.

10 If this product is added as an ingredient to another product, the new
11 product may contain sufficiently high levels of 4-MEI so as to require
12 a warning under California law. Unless you can establish that the
13 new product falls within one of the exceptions to Proposition 65's
14 warning requirements, you must include a clear and reasonable
15 warning on the new product. Accordingly, any product to which you
16 add this product as an ingredient should be tested to ensure that the
17 new product's levels of 4-MEI do not exceed the safe harbor set forth
18 by the State of California.

19 Warnings given to distributors alongside packing materials for other products shall identify the
20 *specific* Product to which the warning applies as further specified in Sections 2.2(a).

21 Where it is impracticable to provide the warning on a prominent location of the packing
22 material and alongside the Product, Dean may utilize a designated symbol to cross reference the
23 applicable warning and shall define the term "designated symbol" with the following language on
24 the front page of the packing material for the Product:

25 **WARNING:** Certain products identified with this
26 symbol ▼ and offered for sale in this
27 catalog contain 4-MEI, a chemical known
28 to the State of California to cause cancer.

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

1 **3. MONETARY TERMS**

2 **3.1 Civil Penalties**

3 In settlement of all the claims referred to in this Consent Judgment, Dean shall pay
4 \$10,000 in civil penalties on or before the Effective Date. The penalty payment will be allocated
5 in accordance with Health and Safety Code § 25249.12(c)(1) and (d), with 75% of the funds
6 remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”), in the
7 form of a check made payable to “OEHHA,” and the remaining 25% of the penalty remitted to
8 Dr. Leeman, in the form of a check made payable to “ Whitney R. Leeman, Client Trust
9 Account.”

10 **3.2 Reimbursement of Dr. Leeman’s Fees and Costs**

11 The parties acknowledge that Dr. Leeman and her counsel offered to resolve this dispute
12 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
13 this fee issue to be resolved after the material terms of the agreement had been settled. Dr.
14 Leeman expressed a desire to resolve the fee and cost issue shortly after the other settlement terms
15 had been finalized. The parties then attempted to (and did) reach an accord on the compensation
16 due to Dr. Leeman and her counsel under general contract principles and the private attorney
17 general doctrine, codified at Code of Civil Procedure section 1021.5, for all work performed
18 through the mutual execution of this agreement. On or before the Effective Date, Dean shall pay
19 \$25,000 for fees and costs, including without limitation, all attorneys’ fees, costs and expenses
20 incurred as a result of investigating, bringing this matter to Dean’s attention, and negotiating a
21 settlement in the public interest.

22 **3.3 Sales Data**

23 Dean understands that the sales data it provided to Dr. Leeman was a material factor upon
24 which Dr. Leeman has relied to determine the amount of civil penalties assessed pursuant to
25 Health & Safety Code § 25249.7 in this Consent Judgment. To the best of Dean’s knowledge, the
26 sales data provided by Dean to Dr. Leeman is full and complete, and is a true and accurate
27 reflection of any and all sales of the Products in California by Dean during the relevant period.
28

1 If, within nine months of the Effective Date, Dr. Leeman discovers and presents to Dean
2 evidence that prior to execution of this Consent Judgment the Products have been distributed by
3 Dean in sales volumes materially different than those identified by Dean prior to execution of this
4 Consent Judgment, then Dean may be liable for an additional penalty amount as well as additional
5 attorney fees expended by Dr. Leeman in the public interest. In the event Dr. Leeman has
6 evidence that the Products have been distributed by Dean in sales volumes materially different
7 than those identified by Dean, Dr. Leeman shall provide Dean with a written demand for
8 additional penalties and attorney fees under this section. After service of such demand, Dean
9 shall have 30 days to meet and confer regarding the demand and submit such payment to Dr.
10 Leeman in accordance with the method of payment of penalties and attorney's fees identified in
11 this Section 3. Should this 30 day period pass without any such resolution between the Parties
12 regarding payment of such additional penalties and fees, Dr. Leeman shall be entitled to enforce
13 or otherwise address the violation through mediation and if unsuccessful, through binding
14 arbitration.

15 3.4 Payment Procedures

16 3.4.1 Issuance of Payments

17 (a) **Funds Held In Trust.** The civil penalty payment required by Section 3.1
18 and the reimbursement of Dr. Leeman's fees and costs required by Section 3.2 shall be held in
19 trust by counsel for Dean pending the Court's approval of this Consent Judgment. Dean agrees to
20 tender the above settlement payments to its attorney on or before December 15, 2014. Dean's
21 counsel shall provide Dr. Leeman's attorneys with written confirmation upon receiving said
22 funds.

23 (b) Within five days of the Effective Date, all payments owed to Dr. Leeman
24 and her attorneys, pursuant to Sections 3.1 and 3.2, shall be delivered to the following address:

25 The Chanler Group
26 Attn: Proposition 65 Controller
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710

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

4 For United States Postal Service:

5 Mike Gyurics
6 Fiscal Operations Branch Chief
7 Office of Environmental Health Hazard Assessment
8 P.O. Box 4010
9 Sacramento, CA 95812-4010

10 For delivery by other than the United States Postal Service:

11 Mike Gyurics
12 Fiscal Operations Branch Chief
13 Office of Environmental Health Hazard Assessment
14 1001 I Street
15 Sacramento, CA 95814

16 **3.4.2 Proof of Payment**

17 A copy of each check payable to OEHHA shall be mailed, simultaneous with
18 payment, to The Chanler Group at the address set forth above in Section 3.6.1(b), as proof of
19 payment to OEHHA.

20 **3.4.3 Tax Documentation**

21 Upon making each payment required by this Section 3.6, Dean shall issue separate
22 1099 forms as follows: for each penalty payment to OEHHA, a 1099 shall be issued to the Office
23 of Environmental Health Hazard Assessment, 1001 I Street, Sacramento, CA 95814 (EIN: 68-
24 0284486); for each penalty payment to Whitney Leeman, a 1099 shall be issued to "Whitney R.
25 Leeman," whose address and tax identification number shall be furnished upon request after this
26 consent judgment is fully executed by the Parties; for each payment in reimbursement of fees and
27 costs, Dean shall issue a separate 1099 form to "The Chanler Group" (EIN: 94-3171522).

28 **4. CLAIMS COVERED AND RELEASED**

4.1 Dr. Leeman's Release of Proposition 65 Claims

Dr. Leeman, acting on her own behalf and in the public interest, and on behalf of each of
her predecessors, successors, partners, partnerships, agents, representatives, insurers, attorneys,

1 heirs, assignors and assignees, accountants and all persons and entities acting or claiming by,
2 through, under or in concert with any of them, hereby irrevocably releases and forever discharges
3 Dean, its parents, subsidiaries, affiliated entities under common ownership, directors, officers,
4 employees, attorneys, and, with the exception of any existing claims involving 4-MEI alleged in
5 any 60-Day Notices or complaints served by Dr. Leeman against any entity except Dean, any
6 entity to whom Dean directly or indirectly distributes or sells the Products, including, without
7 limitation, its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative
8 members, and licensees (“Releasees”) from all claims, demands, suits, liabilities, causes of action
9 or actions, arising up to and including the Effective Date, for violations of Proposition 65 based
10 on alleged exposures to 4-MEI from the Products (“Claim”). Any existing claims involving 4-
11 MEI alleged in any 60-Day Notices or complaints served by Dr. Leeman against any entity except
12 Dean are expressly exempt from this release. It is further specifically understood and agreed to
13 by the Parties, including Dean’s Releasees, that Dr. Leeman is not releasing any upstream
14 suppliers (e.g., manufacturers) of the Products or ingredients and/or components used in the
15 Products. Compliance with the terms of this Consent Judgment constitutes compliance with
16 Proposition 65 with respect to exposures to 4-MEI from the Products.

17 **4.2 Dr. Leeman’s Individual Release of the Claim**

18 In addition, Dr. Leeman, in her individual capacity only and *not* in her representative
19 capacity, provides a release herein which shall be effective as a full and final accord and
20 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,
21 damages, losses, claims, liabilities and demands of Dr. Leeman of any nature, character or kind,
22 whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or
23 actual exposures to 4-MEI in the Products sold by Dean, except for any products containing 4-
24 MEI manufactured, distributed, and/or sold by any entity that is the subject of any existing claims
25 involving 4-MEI alleged in any 60-Day Notices or complaints served by Dr. Leeman against any
26 entity except Dean. Any existing claims involving 4-MEI alleged in any 60-Day Notices or
27 complaints served by Dr. Leeman against any entity except Dean are expressly exempt from this
28 release. It is further specifically understood and agreed to by the Parties, including Dean’s

1 Releasees, that Dr. Leeman is not releasing any upstream suppliers (e.g., manufacturers) of the
2 Products or ingredients and/or components used in the Products.

3
4 **4.3 Dean's Release of Dr. Leeman**

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

11 **5. COURT APPROVAL**

12 This Consent Judgment is not effective until it is approved and entered by the Court and
13 shall be null and void if, for any reason, it is not approved and entered by the Court within one
14 year after it has been fully executed by the Parties, in which event any monies that have been paid
15 to Dr. Leeman or her counsel pursuant to Section 3 above shall be refunded within fifteen days of
16 Dr. Leeman's receipt of written notice from Dean that the one-year period has expired.

17 **6. SEVERABILITY**

18 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
19 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
20 provisions remaining shall not be adversely affected.

21 **7. GOVERNING LAW**

22 The terms of this Consent Judgment shall be governed by the laws of the State of
23 California.

24 **8. NOTICES**

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

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For Dean:

Eric Weiss, Esq.
Murchison & Cumming LLP
801 South Grand Avenue, 9th Floor
Los Angeles, California 90017
Attorneys for Dean Distributors, Inc.

For Dr. Leeman:

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Attorneys for Dr. Whitney R. Leeman

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.

9. COUNTERPARTS; FACSIMILE SIGNATURES

This Consent Judgment 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.

10. POST EXECUTION ACTIVITIES

Dr. Leeman agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). In addition, the Parties acknowledge that, pursuant to Health and Safety Code section 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment. Dr. Leeman shall prepare and file such motion to approve this Consent Judgment, and Dean shall not oppose such motion. In furtherance of obtaining such approval, Dr. Leeman and Dean and their respective counsel agree to mutually employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner.

11. MODIFICATION

This Consent Judgment may be modified only by written agreement of the Parties.

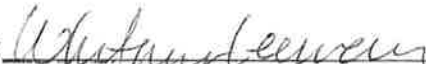
ATTN. ERIC WEISS

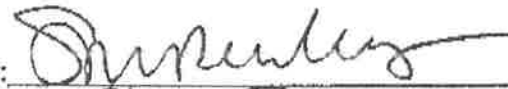
1 **12. AUTHORIZATION**

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

5
6 **AGREED TO:**

AGREED TO:

7
8 By: 
9 WHITNEY R. LEEMAN, PH.D.

By: 
Name: Stacy Risley
Title: Controller, CFO
DEAN DISTRIBUTORS INC.

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11 Date: 10/3/14

Date: 10/2/14

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EXHIBIT A TO CONSENT JUDGMENT

Product Name	SKU/Item/Model Number	Customer/Releasees
Strawberry Flavor Syrup	105310	Sysco Corp. US Foods
Tamarindo Sno Cone Syrup	4021	Pat Foods Levon
Maple HC&W Syrup	123521	Bi-Rite Foodservice US Foods
Imitation Maple Syrup	129012	Farmer Brothers
Farmers Imitation Rum Flavor	130591	Farmer Brothers
Farmers Imitation Maple Flavor	130782	Farmer Brothers
Farmers Imitation Vanilla Flavor	131010	Farmer Brothers
Farmers Caramel Color Syrup	131292	Farmer Brothers
Deluxe Imitation Maple Syrup	156021	Real Mex Foods Bi-Rite Foodservice US Foods Ledyard Company Tama Trading Company Viele & Sons
Premium 5% Pure Maple Syrup	174021	All Fresh Products Bi-Rite Foodservice Jordano's Inc. US Foods Food Service of America Viele & Sons
2% Pure Maple Syrup	174321	Bi-Rite Foodservice US Foods

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Product Name	SKU/Item/Model Number	Customer/Releasees
Breakfast Syrup	201602	Sysco Corp. Dairy King F&W Foodservices Jordano's, Inc. US Foods
S/F Breakfast Syrup	201621	Sysco Corp. Dairy King F&W Foodservices Jordano's, Inc. US Foods
Worcestershire Sauce	300021	Sysco Corp. Bakery & Restaurant Foods Bi-Rite Foodservice Cerenzia Foods Butte Produce US Foods BEF Foods Jordano's Inc. Ledyard Company Food Service of America Nicholas & Company Tama Trading
Soy Sauce	300121	Sysco Corp. Bakery & Restaurant Foods US Foods Jordano's Inc. Ledyard Company Food Service of America
Gluten Free Worcestershire Sauce	300621	Bi-Rite Foodservice Sysco Corp.
Steak Sauce (discontinued)	304110	Cerenzia Foods

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Product Name	SKU/Item/Model Number	Customer/Releasees
Teriyaki Sauce	304310	Bakery & Restaurant Foods Butte Produce Lloyd McLenithan Sysco Corp.
Teriyaki Marinade	313521	Sysco Corp.
Worcestershire Sauce	324121	Wallace Foods
Imitation Maple Flavor	401308	All Fresh Products Sysco Corp. World Spice Company
Imitation Vanilla Flavor SX	402406	Cerenzia Foods US Foods
Imitation Vanilla Flavor #2 Auto	402502	Sysco Corp.
Imitation Vanilla Flavor #2	402505	Dairy King
Imitation Vanilla Flavor #2	402508	All Fresh Products Bi-Rite Foodservice Coastal Pacific Food Dairy King Tama Trading Company
Imitation Vanilla Flavor #2	402510	Auby Trading Co. Bi-Rite Foodservice HFM Foodservice
Imitation Vanilla Flavor #2	402521	Sysco
Imitation Vanilla Flavor #3 Auto	402603	Sysco Corp.
Imitation Vanilla Flavor #3	402608	Bakery & Restaurant Foods Butte Produce HFM Foodservice

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Product Name	SKU/Item/Model Number	Customer/Releasees
Imitation Vanilla Flavor #3	402610	Bakery & Restaurant Foods
Imitation Vanilla Flavor #3	402621	Adolph Foods Sysco Corp. Bakery & Restaurant Foods Butte Produce Jalimex Foods
Imitation Caramel Flavor	403006	California Correctional Center
Imitation Vanilla #3 Plus	403608	Jordano's Inc.
Imitation Vanilla #3 Plus	403610	Jordano's Inc. US Foods
State Maple Flavor	408210	Adolph Foods