



FILED
San Francisco County Superior Court

JUN 8 - 2016

CLERK OF THE COURT

BY: [Signature] Deputy Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

CENTER FOR ENVIRONMENTAL HEALTH,)

Plaintiff,)

v.)

FAYEON DISTRIBUTORS, INC., *et al.*,)

Defendants.)

Case No. CGC-12-526396

**~~PROPOSED~~ CONSENT JUDGMENT
AS TO BUDERIM GINGER LIMITED**

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center For Environmental Health, a California non-profit corporation (“CEH”), and Buderim Ginger Limited (“Settling Defendant”). CEH and Settling Defendant (the “Parties”) enter into this Consent Judgment to settle certain claims asserted by CEH against Settling Defendant as set forth in the operative complaint (“Complaint”) in the above-captioned matter. This Consent Judgment covers the lead content of

1 ginger chews, candied or crystallized ginger snack foods and wholesale of bulk candied or
2 crystallized ginger ("Covered Products") sold or offered for sale by Settling Defendant. This
3 Consent Judgment and the term Covered Products do not cover or include baking ingredients,
4 whether or not made with candied ginger, crystallized ginger or any other type of ginger.

5 1.2 On November 30, 2012, CEH served a 60-day Notices of Violation under
6 Proposition 65, alleging that Settling Defendant violated Proposition 65 by exposing persons to
7 lead and lead compounds ("Lead") contained in ginger and fruit snack foods without first
8 providing a clear and reasonable Proposition 65 warning.

9 1.3 Settling Defendant is a corporation that manufactures, distributes, sells or offers for
10 sale Covered Products that are offered for sale in the State of California or has done so in the past.

11 1.4 On November 27, 2012, CEH filed the original Complaint in this matter. On
12 December 20, 2012, CEH filed the operative First Amended Complaint in this matter. The First
13 Amended Complaint was then amended on March 7, 2013 to add Settling Defendant as named
14 party.

15 1.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
16 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
17 over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County
18 of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a full and
19 final resolution of all claims which were or could have been raised in the Complaint based on the
20 facts alleged therein with respect to Covered Products manufactured, distributed, and/or sold by
21 Settling Defendant.

22 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by the
23 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
24 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
25 conclusion of law, issue of law, or violation of law except as expressly stated herein. Nothing in
26 this Consent Judgment shall prejudice, waive or impair any right, remedy, argument or defense the
27 Parties may have in any other pending or future legal proceedings. This Consent Judgment is the
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1 product of negotiation and compromise and is accepted by the Parties solely for purposes of
2 settling, compromising, and resolving issues disputed in this action.

3 **2. INJUNCTIVE RELIEF**

4 2.1 **Reformulation.** After the date of entry of this Consent Judgment (the "Effective
5 Date"), Settling Defendant shall not sell a Covered Product that: (a) will be sold or offered for
6 retail sale in California, either by Settling Defendant or any other person or entity, or (b) will be
7 incorporated into another product that will be sold or offered for retail sale in California, either by
8 Settling Defendant or any other person or entity, if that Covered Product contains a concentration
9 of lead that exceeds 17 parts per billion, unless Settling Defendant provides a warning on the
10 Covered Product in the following manner:

11 The warning shall state:

12 **"WARNING – THIS PRODUCT CONTAINS LEAD, A**
13 **CHEMICAL THAT IS KNOWN TO THE STATE OF**
14 **CALIFORNIA TO CAUSE BIRTH DEFECTS OR OTHER**
15 **REPRODUCTIVE HARM."**

16 2.1.1.1 The warning shall be displayed with such conspicuousness, as
17 compared with other words, statements, designs, or devices, as to render it likely to be read and
18 understood by an ordinary individual prior to purchase. The warning statement shall not be
19 preceded, followed, or surrounded by words, symbols, or other matter that reduces its
20 conspicuousness or that introduces, modifies, undermines, qualifies, obfuscates or explains the
21 required text.

22 2.1.1.2 In addition, if the Covered Product is sold in a package, the warning
23 must appear in bold face in at least 12 point type that is clearly visible on the package.

24 2.1.1.3 In addition, if the Covered Product is sold to a retailer for resale in
25 bulk to consumers, Buderim shall inform its customer that the warning must appear at the retail
26 store on a clearly visible sign, posted immediately adjacent to or on the bulk product container, in
27 36 point type.

28 2.1.1.4 In addition, if the Covered Product is sold wholesale to a customer
and Buderim knows or should know that such customer repackages the Covered Product or uses

1 the Covered Product as an ingredient in other consumer products, the warning shall be
2 accompanied by a letter in the form attached hereto as Exhibit A. The letter in the form attached
3 hereto as Exhibit A need be provided to a particular customer no more than once in any year that
4 Settling Defendant sells Covered Products to such a customer.

5 2.1.1.5 In addition, for internet purchases, the warning message must be
6 prominently displayed to the purchaser before the purchaser completes his or her purchase of the
7 Covered Product. By way of example, a warning is not prominently displayed if the purchaser
8 must: (i) click on a hyperlink to view the warning; (ii) search for the warning in the general
9 content of the website; or (iii) take some other affirmative action to view the warning.

10 2.3 **Food Quality Auditing.** Settling Defendant shall implement internal quality
11 control measures under the supervision of personnel who (a) are familiar with the good
12 manufacturing practices and food safety measures necessary to prevent lead contamination in the
13 Covered Products and (b) periodically evaluate the potential contribution of lead from the
14 ingredients used in manufacturing the Products. These measures must be sufficient to ensure that
15 Covered Products continue to satisfy the terms of this Consent Judgment.

16 3. **ENFORCEMENT**

17 3.1 **Enforcement Procedures.** Prior to bringing any motion or order to show cause to
18 enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the violating
19 party thirty (30) days advanced written notice of the alleged violation. The Parties shall meet and
20 confer during such thirty (30) day period, exchanging any relevant information, in an effort to try
21 to reach agreement on an appropriate cure for the alleged violation absent Court intervention.
22 After such thirty (30) day period, the Party seeking to enforce may, by new action, motion or order
23 to show cause before the Superior Court of San Francisco, seek to enforce the terms and
24 conditions contained in this Consent Judgment.

25 4. **PAYMENTS**

26 4.1 **Payments by Settling Defendant.** Within ten (10) business days of the Effective
27 Date, Settling Defendant shall pay the sum set forth on Exhibit B as further set forth in this
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1 Section and on Exhibit B.

2 4.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
3 be paid in four separate checks in the amounts specified on Exhibit B and delivered as set forth
4 below. Any failure by Settling Defendant to comply with the payment terms herein shall be
5 subject to a stipulated late fee in the amount of \$100 for each day after the delivery date the
6 payment is received. The late fees required under this Section shall be recoverable, together with
7 reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 3 of this
8 Consent Judgment. The funds paid by Settling Defendant shall be allocated as set forth on Exhibit
9 B between the following categories and made payable as follows:

10 4.2.1 A civil penalty pursuant to Health & Safety Code § 25249.7(b). The civil
11 penalty payment shall be apportioned in accordance with Health & Safety Code § 25249.12 (25%
12 to CEH and 75% to the State of California's Office of Environmental Health Hazard Assessment
13 ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty payment for the amount
14 designated for Settling Defendant on Exhibit B as "Civil Penalty OEHHA Portion" shall be made
15 payable to OEHHA and associated with taxpayer identification number 68-0284486. This
16 payment shall be delivered as follows:

17 For United States Postal Service Delivery:

18 Attn: Mike Gyurics
19 Fiscal Operations Branch Chief
20 Office of Environmental Health Hazard Assessment
21 P.O. Box 4010, MS #19B
22 Sacramento, CA 95812-4010

23 For Non-United States Postal Service Delivery:

24 Attn: Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
27 1001 I Street, MS #19B
28 Sacramento, CA 95814

24 The CEH portion of the civil penalty payment for the amount designated for each Settling
25 Defendant on Exhibit B as "Civil Penalty CEH Portion" shall be made payable to the Center For
26 Environmental Health and associated with taxpayer identification number 94-3251981. This
27 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA

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1 94117.

2 A payment in lieu of civil penalty to CEH pursuant to Health & Safety Code § 25249.7(b),
3 and California Code of Regulations, Title 11, § 3203(b). CEH shall use such funds to continue its
4 work educating and protecting people from exposures to toxic chemicals, including heavy metals.
5 In addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
6 percent of such funds to award grants to grassroots environmental justice groups working to
7 educate and protect people from exposures to toxic chemicals. The method of selection of such
8 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to
9 this Section shall be made payable to the Center For Environmental Health and associated with
10 taxpayer identification number 94-3251981. This payment shall be delivered to Lexington Law
11 Group, 503 Divisadero Street, San Francisco, CA 94117.

12 4.2.2 A reimbursement of a portion of CEH's reasonable attorneys' fees and
13 costs. The attorneys' fees and cost reimbursement check shall be made payable to the Lexington
14 Law Group and associated with taxpayer identification number 94-3317175. This payment shall
15 be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

16 **5. MODIFICATION AND DISPUTE RESOLUTION**

17 5.1 **Modification.** This Consent Judgment may be modified from time to time by
18 express written agreement of the Parties, with the approval of the Court, or by an order of this
19 Court upon motion and in accordance with law.

20 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
21 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
22 modify the Consent Judgment.

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1 **6. CLAIMS COVERED AND RELEASE**

2 6.1 This Consent Judgment is a full, final and binding resolution between CEH on
3 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries,
4 affiliated entities that are under common ownership, predecessors, successors and assigns,
5 directors, officers, employees, and attorneys (“Defendant Releasees”), and all entities, other than
6 those listed on Exhibit C, to which Settling Defendant distributes or sells Covered Products,
7 including but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors
8 and licensees (“Downstream Defendant Releasees”), of any violation of Proposition 65 based on
9 failure to warn about alleged exposure to Lead contained in Covered Products that were sold by
10 Settling Defendant prior to the Effective Date.

11 6.2 CEH, for itself releases, waives, and forever discharges any and all claims against
12 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
13 violation of Proposition 65 or any other statutory or common law claims that have been or could
14 have been asserted in the public interest regarding the failure to warn about exposure to Lead
15 arising in connection with Covered Products sold by Settling Defendant prior to the Effective
16 Date.

17 6.3 Compliance with the terms of this Consent Judgment by Settling Defendant and
18 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
19 Defendant Releasees and Downstream Defendant Releasees with respect to any alleged failure to
20 warn about Lead in Covered Products manufactured, distributed or sold by Settling Defendant
21 after the Effective Date, provided that: (i) Settling Defendant, Defendant Releasees and
22 Downstream Defendant Releasees must provide any reasonably necessary cooperation in the
23 implementation of this Judgment, and (ii) Downstream Defendant Releasees who offer the Product
24 for sale to the public must provide any warnings required by Section 2.

25 **7. PROVISION OF NOTICE**

26 7.1 When CEH is entitled to receive any notice under this Consent Judgment, the
27 notice shall be sent by first class and electronic mail to:

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Eric S. Somers
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117
esomers@lexlawgroup.com

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4 7.2 When Settling Defendant is entitled to receive any notice under this Consent
5 Judgment, the notice shall be sent by first class or electronic mail to the person(s) identified in
6 Exhibit B for Settling Defendant.

7 7.3 Any Party may modify the person and address to whom the notice is to be sent by
8 sending the other Party notice by first class and electronic mail.

9 **8. COURT APPROVAL**

10 8.1 This Consent Judgment shall become effective on the Effective Date, provided
11 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
12 Settling Defendant shall support approval of such Motion.

13 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect
14 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

15 **9. GOVERNING LAW AND CONSTRUCTION**

16 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
17 California.

18 **10. ATTORNEYS' FEES**

19 10.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
20 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
21 unless the unsuccessful Party has acted with substantial justification. For purposes of this Consent
22 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
23 Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, *et seq.*

24 10.2 Notwithstanding Section 10.1, a Party who prevails in a contested enforcement
25 action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of
26 Civil Procedure § 1021.5 against a Party that acted with substantial justification. The Party
27 seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and this
28 provision shall not be construed as altering any procedural or substantive requirements for

1 obtaining such an award.

2 10.3 Nothing in this Section 10 shall preclude a party from seeking an award of
3 sanctions pursuant to law.

4 **11. ENTIRE AGREEMENT**

5 11.1 This Consent Judgment contains the sole and entire agreement and understanding
6 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
7 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
8 and therein. There are no warranties, representations, or other agreements between the Parties
9 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
10 other than those specifically referred to in this Consent Judgment have been made by any Party
11 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
12 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
13 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
14 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
15 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
16 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
17 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
18 whether or not similar, nor shall such waiver constitute a continuing waiver.

19 **12. RETENTION OF JURISDICTION**

20 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
21 Consent Judgment.

22 **13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

23 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
25 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

26 **14. NO EFFECT ON OTHER SETTLEMENTS**

27 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
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1 against any entity other than Settling Defendant on terms that are different than those contained in
2 this Consent Judgment.

3 **15. EXECUTION IN COUNTERPARTS**

4 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by
5 means of facsimile or portable document format (pdf), which taken together shall be deemed to
6 constitute one document.


7 **IT IS SO ORDERED, ADJUDGED,
8 AND DECREED**

9 Dated: June 8 2016



Judge of the Superior Court of the State of California

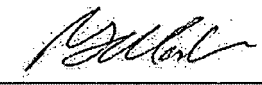
11 **IT IS SO STIPULATED:**

12 Dated: <u>11 May, 2016</u>	13 CENTER FOR ENVIRONMENTAL HEALTH 14  15 _____ 16 <u>CHARLIE PIZZANO</u> 17 Printed Name 18 _____ 19 <u>ASSOCIATE DIRECTOR</u> 20 Title
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for and on behalf of

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Dated: <u>March 17, 2016</u>	BUDERIM GINGER LIMITED
	
	By ROGER MASFERU
	Printed Name CEO
	Title



1 EXHIBIT A

2 Letter to Wholesale/Repackage Customers
3 [Buderim Letterhead]

4 IMPORTANT LEGAL NOTICE

5 Date:

6 Attention: Purchasers of Buderim Ginger Products

7 Subject: California Proposition 65 Warnings

8 *****

9 This letter is to advise you that the Buderim candied or crystalized ginger products
10 in this order contain lead, a chemical known to cause birth defects or other reproductive harm.
11 Accordingly, these products may only be sold or offered for sale in California with warnings
12 required by the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65").

13 The ginger products that you purchased from Buderim have a compliant
14 Proposition 65 Warning affixed to the packaging. You are required to pass this warning on with
15 any product that will be offered for sale in California. That means that if you repackage the
16 products, you will have to put a warning on the new packaging. The warning reads as follows:

17 "WARNING – THIS PRODUCT CONTAINS LEAD, A
18 CHEMICAL THAT IS KNOWN TO THE STATE OF
19 CALIFORNIA TO CAUSE BIRTH DEFECTS OR OTHER
20 REPRODUCTIVE HARM."

21 The warning shall be displayed with such conspicuousness, as compared with
22 other words, statements, designs, or devices, as to render it likely to be read and understood by an
23 ordinary individual prior to purchase. The warning statement shall not be preceded, followed, or
24 surrounded by words, symbols, or other matter that reduces its conspicuousness or that
25 introduces, modifies, undermines, qualifies, obfuscates or explains the required text.

26 Failure to provide a Proposition 65 warning for these products may subject you to
27 legal action by the California Attorney General, County District Attorneys or various citizen
28 groups, wherein monetary penalties of up to \$2,500 per violation could be sought.

Should you have any questions or concerns about this matter, please do not
hesitate to contact _____ at 1-800-XXX-XXXX by phone, or by mail at the
above address.

Sincerely,

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EXHIBIT B
Settling Defendants

Settling Defendant: Buderim Ginger Limited

1. Defendant's Settlement Payment and Allocation:

Total Settlement Payment	\$110,000
Total Civil Penalty	\$ 14,564
Civil Penalty OEHHA Portion	\$ 10,923
Civil Penalty CEH Portion	\$ 3,641
Payment in Lieu of Civil Penalty	\$ 21,850
Attorneys' Fees and Costs	\$ 73,586

2. Person(s) to Receive Notices Pursuant to Section 8:

Mark E. Elliott
Pillsbury Winthrop Shaw Pittman LLP
725 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-5406
mark.elliott@pillsburylaw.com

and

Corrie Plant
Pillsbury Winthrop Shaw Pittman LLP
725 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-5406
corrie.plant@pillsburylaw.com

EXHIBIT C

**(LIST OF ENTITIES NOT SUBJECT
TO DOWNSTREAM DEFENDANT RELEASE)**

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- ACH Food Companies, Inc.
- Albertson's LLC
- Amazon.com, Inc.
- American Roland Food Corporation
- B & V Enterprises, Inc.
- Blue Marble Brands, LLC
- Brinkhoff & Monoson, Inc.
- The C.F. Sauer Company
- Dakota Brothers, Inc.
- Draeger's Super Markt ets
- Food Market Management, Inc.
- Foodnet Supermarket, Inc.
- Fresh & Easy LLC fka Y-Opco LLC
- Food Castle, Inc.
- Frieda's, Inc.
- Frontier Distribution LLC
- Frontier Natural Products Co-op
- Garden Grove Superstore Inc.
- Gelson's Markets
- Goldstar Supermarket
- Hosada Bros. Inc.
- Island Pacific Supermarkets, Inc.
- JFC International Inc.
- Kam Lee Yuen Trading Co., Inc.
- KeHE Distributors, LLC

1 KeHE Enterprises, LLC
2 KeHE Distributors, Inc.
3 Longchamp Corporation dba Lion Supermarket
4 Marra Bros. Dist., Inc.
5 McCormick & Company, Incorporated
6 Mrs. Gooch's Natural Food Markets, Inc.
7 PANOS Brands, LLC
8 Reed's, Inc.
9 Safeway Inc.
10 San Pablo Supermarket, Inc.
11 Save Mart Supermarkets
12 Shun Fat Supermarket, Inc.
13 Sincerely Nuts, Inc.
14 The Spice Hunter, Inc.
15 Sunflower Farmers Markets, LLC
16 Target Corporation
17 Tawa Supermarket, Inc.
18 Torn & Glasser, Inc.
19 Trader Joe's Company
20 Unbeatable Sale. Com Inc.
21 United Natural Foods, Inc.
22 United Natural Trading, LLC
23 Vanns Spices Ltd.
24 The Von's Companies, Inc.
25 Wal-Mart Stores, Inc. and Walmart.com USA LLC
26 Whole Foods Market California, Inc.

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CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On **JUN 10 2016**, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **JUN 10 2016**

T. Michael Yuen, Clerk

By: 

DANIAL LEMIRE, Deputy Clerk