ENDORSED
FILED
San Francisco County Superior Court

MAR 2 6 2014

CLERK OF THE COURT
BY: ERICKA LARNAUTI
Deputy Clerk

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**

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center For Environmental Health, a California non-profit corporation ("CEH"), and the companies listed on Exhibit A (collectively, the "Settling Defendants"). The Parties enter into this Consent Judgment to settle certain claims asserted by CEH against Settling Defendants as set forth in the operative complaint ("Complaint") in the above-captioned matter. This Consent Judgment covers the lead content of ginger and plum snack foods ("Covered Products") sold or offered for sale by Settling Defendants.

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1.2 Beginning on September 14, 2012, CEH served multiple 60-day Notices of Violation under Proposition 65, alleging that Settling Defendants violated Proposition 65 by exposing persons to lead and lead compounds ("Lead") contained in Covered Products without first providing a clear and reasonable Proposition 65 warning.

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

1.4 On November 27, 2012, CEH filed the original Complaint in this matter. On December 20, 2012, CEH filed the operative First Amended Complaint in this matter. The First Amended Complaint has since been amended to add additional named defendants.

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

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

2. INJUNCTIVE RELIEF

2.1 **Specification Compliance Date.** To the extent it has not already done so, no more than fifteen days after the date of entry of this Consent Judgment ("Effective Date"), each Settling

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Defendant that purchases Covered Products from a third party shall provide the reformulation specification set in Section 2.2 to each of such Covered Products suppliers and shall instruct each such Covered Products supplier to provide it with Covered Products that comply with the reformulation specification set forth in Section 2.2. If in the future a Settling Defendant purchases Covered Products from a new third party that it has not previously provided with instructions regarding the reformulation specification set forth in Section 2.2, the Settling Defendant shall provide the reformulation specification set forth in Section 2.2 prior to placing an initial order for Covered Products and instruct the new Covered Products supplier to provide it with Covered Products that comply with the reformulation specification set forth in Section 2.2. Each Settling Defendant shall retain records of communications sent to and received from suppliers that are related to the requirement of this Section 2.1 for a period of five years from the Effective Date.

2.2 **Reformulation of Covered Products.** After the Effective Date, a Settling Defendant shall not purchase, manufacture, ship, sell or offer for sale Covered Products that will be sold or offered for sale in California that contain a concentration of more than seventeen (17) parts per billion ("ppb") Lead by weight, such concentration to be determined by use of a test performed by an accredited laboratory using inductively coupled plasma mass spectrometry (ICP-MS) equipment with a level of detection of at least ten (10) ppb that meets standard laboratory QA/QC requirements (the "Reformulation Level"). Subject to Section 7 below, no allocation is made for naturally occurring Lead in food pursuant to 22 Cal. Code of Regs. §25501.

2.3 **Market Withdrawal of Covered Products.** On or before the Effective Date, Settling Defendants shall: (i) cease shipping the specific Covered Products identified next to their name on Exhibit A (the "Recall Covered Products") to stores and/or customers in California; (ii) withdraw the Recall Covered Products from the market in California; and (iii) send instructions to any of their stores and/or customers that offer the Recall Covered Products for sale in California to cease offering such Recall Covered Products for sale and to either return all Recall Covered Products to Settling Defendants for destruction, or to directly destroy the Recall Covered Products. Any destruction of the Recall Covered Products shall be in compliance with all applicable laws. Settling Defendants shall keep and make available to CEH for inspection and

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copying records and correspondence regarding the market withdrawal and destruction of the Recall Covered Products. If there is a dispute over the corrective action, the Parties shall meet and confer before seeking any remedy in court.

2.4 **Supplier and Product Information.** Upon execution of this Consent Judgment and to the extent not already completed, each Settling Defendant shall provide full and complete information and supporting documentation as to each Covered Product as further specified on Exhibit B. Such information shall be provided and attested to under oath by an authorized officer of each such Settling Defendant. Each Settling Defendant shall cooperate and work in good faith to promptly answer any follow-up questions or requests for supporting documentation from CEH about the information and documents to be provided pursuant to this section.

3. ENFORCEMENT

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

4. PAYMENTS

4.1 **Payments by Settling Defendants.** Within five (5) days of the entry of this Consent Judgment, each Settling Defendant shall pay the sum set forth for that Settling Defendant on Exhibit A as further set forth in this Section and on Exhibit A.

4.2 **Allocation of Payments.** The total settlement amount for each Settling Defendant shall be paid in four separate checks in the amounts specified on Exhibit A and delivered as set forth below. Any failure by a Settling Defendant to comply with the payment terms herein shall be subject to a stipulated late fee in the amount of $100 for each day after the delivery date the payment is received. The late fees required under this Section shall be recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 3 of this

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Consent Judgment. The funds paid by each Settling Defendant shall be allocated as set forth on Exhibit A for each Settling Defendant between the following categories and made payable as follows:

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

For United States Postal Service Delivery:
Attn: Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010, MS #19B
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:
Attn: Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street, MS #19B
Sacramento, CA 95814

The CEH portion of the civil penalty payment for the amount designated for each Settling Defendant on Exhibit A as "Civil Penalty CEH Portion" shall be made payable to the Center For Environmental Health and associated with taxpayer identification number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

4.2.2 A payment in lieu of civil penalty to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH shall use such funds to continue its work educating and protecting people from exposures to toxic chemicals, including heavy metals. In addition, as part of its Community Environmental Action and Justice Fund, CEH will use four percent of such funds to award grants to grassroots environmental justice

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groups working to educate and protect people from exposures to toxic chemicals. The method of selection of such groups can be found at the CEH web site at www.ceh.org/justicefund. The payment pursuant to this Section shall be made payable to the Center For Environmental Health and associated with taxpayer identification number 94-3251981.

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

5. MODIFICATION AND DISPUTE RESOLUTION

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

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

6. CLAIMS COVERED AND RELEASE

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

6.2 CEH, for itself releases, waives, and forever discharges any and all claims against each Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any violation of Proposition 65 or any other statutory or common law claims that have been or

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could have been asserted in the public interest regarding the failure to warn about exposure to Lead arising in connection with Covered Products manufactured, distributed or sold by a Settling Defendant prior to the Effective Date.

6.3 Compliance with the terms of this Consent Judgment by a Settling Defendant and that Settling Defendant's Defendant Releasees shall constitute compliance with Proposition 65 by such Settling Defendant, that Settling Defendant's Defendant Releasees and that Settling Defendant's Downstream Defendant Releasees with respect to any alleged failure to warn about Lead in Covered Products manufactured, distributed or sold by that Settling Defendant after the Effective Date.

7. EFFECT OF SUBSEQUENT SETTLEMENTS

7.1 The parties contemplate that future Consent Judgments entered with other defendants including farmers, processors and manufacturers may involve a higher Reformulation Level due to an allocation of Lead that is naturally occurring under 22 Cal. Code Regs. §22501. This higher Reformulation Level may also include additional injunctive requirements that will ensure that the Lead in the Covered Products is not avoidable by good agricultural or good manufacturing practices and that the producer, manufacturer, distributor, or holder of the food is at all times utilizing quality control measures that reduce natural occurring Lead to the lowest level currently feasible, as such term is defined in 22 Cal. Code Regs. §22501.

7.2 Accordingly, if on or before January 1, 2019, the Court enters a Judgment or a Consent Judgment to which CEH or the Attorney General is a party that resolves Proposition 65 claims regarding failure to warn about Lead in Covered Products that: (i) sets forth a Reformulation Level containing an allocation of Lead that is naturally occurring under 22 Cal. Code Regs. §22501; or (ii) includes injunctive relief designed to ensure that the Lead in the Covered Products is not avoidable by good agricultural or good manufacturing practices and that the producer, manufacturer, distributor, or holder of the food is at all times utilizing quality control measures that reduce natural occurring Lead to the "lowest level currently feasible" as such term is defined in 22 Cal. Code Regs. §22501; or (iii) a combination of both, then a Settling Defendant may move the Court to modify the Reformulation Level in this Consent Judgment so that it is

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consistent with the reformulation requirement of such future Judgment or Consent Judgment. Prior to filing any such Motion the parties shall meet and confer in an attempt to agree on specific language regarding the modification pursuant to this Section. To the extent a Settling Defendant is a retailer or otherwise not involved in the farming, manufacture or processing of Covered Products, the modification may require that the Settling Defendant only purchase Covered Products from entities that comply with the injunctive requirements of such future Judgment or Consent Judgment. If the parties are unable to agree on specific language the Settling Defendant shall inform the Court of both parties position in the papers filed in support of the Motion to Modify this Consent Judgment.

8. PROVISION OF NOTICE

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

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

8.2 When a Settling Defendant is entitled to receive any notice under this Consent Judgment, the notice shall be sent by first class and electronic mail to the person(s) identified in Exhibit A for each such Settling Defendant.

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

9. COURT APPROVAL

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

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

10. GOVERNING LAW AND CONSTRUCTION

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

11. ATTORNEYS' FEES

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

11.2 Notwithstanding Section 11.1, a Party who prevails in a contested enforcement action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of Civil Procedure §1021.5 against a Party that acted with substantial justification. The Party seeking such an award shall bear the burden of meeting all of the elements of §1021.5, and this provision shall not be construed as altering any procedural or substantive requirements for obtaining such an award.

11.3 Nothing in this Section 11 shall preclude a party from seeking an award of sanctions pursuant to law.

12. ENTIRE AGREEMENT

12.1 This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. There are no warranties, representations, or other agreements between the Parties except as expressly set forth herein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Consent Judgment have been made by any Party hereto. No other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,

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modification, waiver, or termination of this Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

13. RETENTION OF JURISDICTION

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

14. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

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

15. NO EFFECT ON OTHER SETTLEMENTS

15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim against an entity that is not a Settling Defendant on terms that are different than those contained in this Consent Judgment.

16. EXECUTION IN COUNTERPARTS

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

IT IS SO ORDERED, ADJUDGED, AND DECREED

Dated: MAR 2 6 2014

ERNEST H. GOLDSMITH
Judge of the Superior Court of the State of California

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IT IS SO STIPULATED:

Dated: JAN 30, 2014	**CENTER FOR ENVIRONMENTAL HEALTH** By CHANCE PIZZANO Printed Name ASSOCIATE DIRECTOR Title

Dated: 27/1/, 2014	**WALKERS CHOCOLATES, LTD.** By Neil Rose Printed Name NEIL ROSE Title FINANCE DIRECTOR

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EXHIBIT A
Settling Defendant

Settling Defendant: Walkers Chocolates, Ltd.

1. **Covered Product(s) To Be Withdrawn From Market:**

   Walkers Chocolates of London Luxury Chocolate Gingers; SKU No. 5-011555-031222

2. **Defendant's Settlement Payment and Allocation:**

Total Settlement Payment	$50,000
Civil Penalty OEHHA Portion	$ 4,950
Civil Penalty CEH Portion	$ 1,650
Payment in Lieu of Civil Penalty	$ 9,900
Attorneys' Fees and Costs	$33,500

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

   Lee Marshall
   Haight Brown & Bonesteel LLP
   555 South Flower Street
   Forty-Fifth Floor
   Los Angeles, CA 90071
   lmarshall@hbblaw.com

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EXHIBIT B

Product and Supplier Information

For each Covered Product sold by your company in the two years prior to the Effective Date, please provide the following information and documents:

1. Covered Product name.
2. Covered Product Description.
3. SKU or UPC number.
4. Name, address, contact person, phone, e-mail and web site of the company from which each Covered Product was purchased.
5. Name, address, contact person, phone, e-mail and web site of importer or distributor.
6. Name, address, contact person, phone, e-mail and web site of product manufacturer.
7. Name, address, contact person, phone, e-mail and web site of any other know entity in the upstream chain of distribution.
8. Date and number of units ordered for each order of a Covered Product purchased from the date two years prior to the Effective Date to the Effective Date. Please attach copies of each Purchase Order or other documentation from each sale.
9. Units of each Covered Product sold from the date two years prior to the Effective Date to the Effective Date.
10. Indicate if any Proposition 65 warnings were provided with each of the Covered Products and if so, provide a copy of such warning.
11. Identify the country of origin of each Covered Product.
12. Identify and attach any test results in your possession for any of the Covered Products.

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EXHIBIT C

(LIST OF ENTITIES NOT SUBJECT TO DOWNSTREAM DEFENDANT RELEASE)

- Albertson's, LLC
- B & V Enterprises, Inc.
- Buderim Ginger Limited
- Chocolate Signatures LP
- Cost Plus, Inc.
- Dakota Brothers, Inc.
- Draeger's Super Markets
- Foodnet Supermarkets, Inc.
- Garden Grove Superstore Inc.
- Goldstar Supermarket
- Grand BK Corp.
- H Mart, Inc.
- Hosada Bros., Inc.
- Island Pacific Supermarkets, Inc.
- Jade Food Products, Inc.
- Kam Lee Yuen Trading Co., Inc.
- Korean Farm, Inc.
- Longchamp Corporation dba Lion Supermarket
- Marra Bros. Dist., Inc.
- Maruhana U.S.A. Corporation
- Mitsuwa Corporation
- Mrs. Gooch's Natural Food Markets, Inc.
- Nature's World LLC
- Next Generation Products, Inc.
- Oto's Japan Food, Inc.

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- Piedmont Grocery Company
- Reed's, Inc.
- Rhee Bros., Inc.
- Roxy Trading Inc.
- Safeway Inc.
- San Pablo Supermarket, Inc.
- San Young Market, Inc.
- Shun Fat Supermarket, Inc.
- Sun Hop Fat Corporation
- Sunflower Farmers Markets, LLC
- Tawa Supermarket, Inc.
- Trader Joe's Company
- Whole Foods Market California, Inc.
- Wholesale Unlimited, Inc.

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