



1 offered for sale by Settling Defendant in the State of California.

2 1.2 On October 31, 2014, CEH provided a 60-day Notice of Violation of Proposition  
3 65 to the California Attorney General, the District Attorneys of every county in California, the  
4 City Attorneys of every California city with a population greater than 750,000 and to Settling  
5 Defendant, alleging that Settling Defendant violated Proposition 65 by exposing persons to lead  
6 and lead compounds (“Lead”) contained in Covered Products without first providing a clear and  
7 reasonable Proposition 65 warning.

8 1.3 Settling Defendant is a corporation or other business entity that manufactures,  
9 distributes, sells or offers for sale Covered Products that are sold in the State of California or has  
10 done so in the past.

11 1.4 On April 7, 2015, CEH filed the Complaint in the above-captioned matter, naming  
12 Settling Defendant as a defendant in the action.

13 1.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court  
14 has jurisdiction over the allegations of violations contained in the Complaint and personal  
15 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper  
16 in the County of Alameda, and that this Court has jurisdiction to enter and enforce this Consent  
17 Judgment as a full and final resolution of all claims which were or could have been raised in the  
18 Complaint based on the facts alleged therein with respect to Covered Products manufactured,  
19 distributed, and/or sold by Settling Defendant.

20 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by the  
21 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with  
22 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,  
23 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall  
24 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any  
25 other pending or future legal proceedings. This Consent Judgment is the product of negotiation  
26 and compromise and is accepted by the Parties solely for purposes of settling, compromising, and  
27 resolving issues disputed in this Action.

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1       **2.       INJUNCTIVE RELIEF**

2               **2.1       Reformulation of Covered Products.** As of the date of approval of this Consent  
3 Judgment by the Court (the “Effective Date”), Settling Defendant shall not purchase,  
4 manufacture, ship, sell or offer for sale Covered Products that will be sold or offered for sale in  
5 California that contain a concentration of more than forty (40) parts per billion (“ppb”) Lead by  
6 weight (the “Reformulation Level”), such concentration to be determined by use of a test  
7 performed by an accredited laboratory using inductively coupled plasma mass spectrometry (ICP-  
8 MS) equipment with a level of detection of at least ten (10) ppb that meets standard laboratory  
9 QA/QC requirements.

10       **3.       ENFORCEMENT**

11               **3.1       General Enforcement Provisions.** CEH may, by motion or application for an  
12 order to show cause before this Court, enforce the terms and conditions contained in this Consent  
13 Judgment. Any action to enforce alleged violations of Section 2.1 by Settling Defendant shall be  
14 brought exclusively pursuant to this Section 3, and be subject to the meet and confer requirement  
15 of Section 3.2.4 if it’s applicable.

16               **3.2       Enforcement of Reformulation Commitment.**

17                       **3.2.1       Notice of Violation.** In the event that CEH identifies a Covered Product  
18 that was sold or offered for sale to California consumers with a best-by or sell-by (or equivalent)  
19 date or other code that reflects that the Covered Product was manufactured on or after the  
20 Effective Date, and for which CEH has laboratory test results showing that the Covered Product  
21 has a Lead level exceeding the Reformulation Level, CEH may issue a Notice of Violation  
22 pursuant to this Section.

23                               **3.2.2       Service of Notice of Violation and Supporting Documentation.**

24                                       **3.2.2.1**       Subject to Section 3.2.1, the Notice of Violation shall be sent to the  
25 person(s) identified in Section 7.2 to receive notices for Settling Defendant, and must be served  
26 within sixty (60) days of the date the Covered Products at issue were purchased or otherwise  
27 acquired by CEH, provided, however, that CEH may have up to an additional sixty (60) days to

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1 send the Notice of Violation if, notwithstanding CEH's good faith efforts, the test data required  
2 by Section 3.2.2.2 below cannot be obtained by CEH from its laboratory before expiration of the  
3 initial sixty (60) day period.

4           3.2.2.2    The Notice of Violation shall, at a minimum, set forth: (a) the date the  
5 alleged violation was observed; (b) the location at which the Covered Products were offered for  
6 sale; (c) a description of the Covered Products giving rise to the alleged violation, including the  
7 name and address of the retail entity from which the sample was obtained and if available  
8 information that identifies the product lot; and (d) all test data obtained by CEH regarding the  
9 Covered Products and supporting documentation sufficient for validation of the test results,  
10 including any laboratory reports, quality assurance reports and quality control reports associated  
11 with testing of the Covered Products.

12           3.2.3    Notice of Election of Response. No more than thirty (30) days after  
13 effectuation of service of a Notice of Violation, Settling Defendant shall provide written notice to  
14 CEH whether it elects to contest the allegations contained in a Notice of Violation ("Notice of  
15 Election"). Failure to provide a Notice of Election within thirty (30) days of effectuation of  
16 service of a Notice of Violation shall be deemed an election to contest the Notice of Violation.

17           3.2.3.1   If a Notice of Violation is contested, the Notice of Election shall  
18 include all then-available documentary evidence regarding the alleged violation, including all test  
19 data, if any is available. If Settling Defendant or CEH later acquires additional test or other data  
20 regarding the alleged violation, it shall notify the other party and promptly provide all such data  
21 or information to the party.

22           3.2.4    Meet and Confer. If a Notice of Violation is contested, CEH and Settling  
23 Defendant shall meet and confer to attempt to resolve their dispute. Within thirty (30) days of  
24 serving a Notice of Election contesting a Notice of Violation, and if no enforcement action or  
25 application has been filed by CEH pursuant to Section 3.1, Settling Defendant may withdraw the  
26 original Notice of Election contesting the violation and serve a new Notice of Election to not  
27 contest the violation, provided, however, that, in this circumstance, Settling Defendant shall pay

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1 \$2,500 in addition to any payment required under this Consent Judgment. At any time, CEH may  
2 withdraw a Notice of Violation, in which case for purposes of this Section 3.2 the result shall be  
3 as if CEH never issued any such Notice of Violation. If no informal resolution of a Notice of  
4 Violation results within thirty (30) days of a Notice of Election to contest, CEH may file an  
5 enforcement motion or application pursuant to Section 3.1. In any such proceeding, CEH may  
6 seek whatever fines, costs, penalties, attorneys' fees or other remedies are provided by law for  
7 failure to comply with the Consent Judgment.

8           3.2.5    Non-Contested Notices. If Settling Defendant elects to not contest the  
9 allegations in a Notice of Violation, it shall identify on a confidential basis to CEH (by proper  
10 name, address of principal place of business and telephone number) the person or entity that sold  
11 the Covered Products to Settling Defendant and the manufacturer or ingredient suppliers and  
12 other entities in the upstream chain of distribution of the Covered Product, provided that such  
13 information is reasonably available. In addition, Settling Defendant shall undertake corrective  
14 action(s) and make payments, if any, as set forth below.

15           3.2.5.1   Settling Defendant shall include in its Notice of Election a detailed  
16 description with supporting documentation of the corrective action(s) that it has undertaken or  
17 proposes to undertake to address the alleged violation. Any such correction shall, at a minimum,  
18 provide reasonable assurance that all Covered Products having the same lot number as that of the  
19 Covered Product identified in CEH's Notice of Violation (the "Noticed Covered Products") will  
20 not be thereafter sold or offered for sale to California consumers, that the Noticed Covered  
21 Products are removed from the California market and that Settling Defendant has sent instructions  
22 to any of its stores and/or customers that offer the Noticed Covered Products for sale to cease  
23 offering the Noticed Covered Products for sale to California consumers and to either return all  
24 such Noticed Covered Products to Settling Defendant for destruction, or to directly destroy such  
25 Noticed Covered Products. Settling Defendant shall keep and make available to CEH for  
26 inspection and copying records any correspondence regarding the market withdrawal and  
27 destruction of the Noticed Covered Products. If there is a dispute over the corrective action,

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1 Settling Defendant and CEH shall meet and confer before seeking any remedy in court. In no  
2 case shall CEH issue more than one Notice of Violation per manufacturing lot of a type of  
3 Covered Product.

4 3.2.5.2 If the Notice of Violation is the first, second, third or fourth Notice of  
5 Violation received by Settling Defendant under Section 3.2.1 that was not successfully contested  
6 or withdrawn, then Settling Defendant shall pay \$15,000 for each Notice of Violation. If Settling  
7 Defendant has received more than four (4) Notices of Violation under Section 3.2.1 that were not  
8 successfully contested or withdrawn, then Settling Defendant shall pay \$25,000 for each Notice  
9 of Violation. If Settling Defendant produces with its Notice of Election test data for the Covered  
10 Product that: (i) was conducted prior to the date CEH purchased the Covered Product that is the  
11 subject of the Notice of Violation; (ii) was conducted on the same or same type of Covered  
12 Product; and (iii) demonstrates Lead levels below the Reformulation Level, then any payment  
13 under this Section shall be reduced by fifty percent (50%).

14 3.2.6 Payments. Any payments under Section 3.2 shall be made by check  
15 payable to the "Lexington Law Group" and shall be paid within thirty (30) days of service of a  
16 Notice of Election triggering a payment and which shall be used as reimbursement for costs for  
17 investigating, preparing, sending and prosecuting Notices of Violation, and to reimburse  
18 attorneys' fees and costs incurred in connection with these activities.

19 3.3 **Repeat Violations.** If Settling Defendant has received four (4) or more Notices of  
20 Violation concerning the same type of Covered Product that were not successfully contested or  
21 withdrawn in any twelve (12) month period then, at CEH's option, CEH may seek whatever  
22 fines, costs, penalties, attorneys' fees or other remedies that are provided by law for failure to  
23 comply with the Consent Judgment. Prior to seeking such relief, CEH shall meet and confer with  
24 Settling Defendant for at least thirty (30) days to determine if Settling Defendant and CEH can  
25 agree on measures that Settling Defendant can undertake to prevent future violations.

26 **4. PAYMENTS**

27 4.1 **Payments by Settling Defendant.** On or before the later of five (5) days after the  
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1 entry of this Consent Judgment or June 15, 2016, Settling Defendant shall pay the total sum of  
2 \$65,000 as a settlement payment as further set forth in this Section.

3           4.2    **Allocation of Payments.** The total settlement amount for Settling Defendant shall  
4 be paid in four (4) separate checks in the amounts specified below and delivered as set forth  
5 below. Any failure by Settling Defendant to comply with the payment terms herein shall be  
6 subject to a stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each  
7 day the full payment is not received after the applicable payment due date set forth in Section 4.1.  
8 The late fees required under this Section shall be recoverable, together with reasonable attorneys'  
9 fees, in an enforcement proceeding brought pursuant to Section 3 of this Consent Judgment. The  
10 funds paid by Settling Defendant shall be allocated as set forth below between the following  
11 categories and made payable as follows:

12                   4.2.1    \$8,600 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).  
13 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §  
14 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health  
15 Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty  
16 payment for \$6,450 shall be made payable to OEHHA and associated with taxpayer identification  
17 number 68-0284486. This payment shall be delivered as follows:

18                               For United States Postal Service Delivery:

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

22                               For Non-United States Postal Service Delivery:

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

26                               The CEH portion of the civil penalty payment for \$2,150 shall be made  
27 payable to the Center For Environmental Health and associated with taxpayer identification

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1 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero  
2 Street, San Francisco, CA 94117.

3 4.2.2 \$12,900 as a payment in lieu of civil penalty to CEH pursuant to Health &  
4 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH shall  
5 use such funds to continue its work educating and protecting people from exposures to toxic  
6 chemicals, including heavy metals. In addition, as part of its Community Environmental Action  
7 and Justice Fund, CEH will use four percent (4%) of such funds to award grants to grassroots  
8 environmental justice groups working to educate and protect people from exposures to toxic  
9 chemicals. The method of selection of such groups can be found at the CEH web site at  
10 www.ceh.org/justicefund. The payment pursuant to this Section shall be made payable to the  
11 Center For Environmental Health and associated with taxpayer identification number 94-  
12 3251981.

13 4.2.3 \$43,500 as a reimbursement of a portion of CEH's reasonable attorneys'  
14 fees and costs. The attorneys' fees and cost reimbursement check shall be made payable to the  
15 Lexington Law Group and associated with taxpayer identification number 94-3317175. This  
16 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA  
17 94117.

## 18 **5. MODIFICATION AND DISPUTE RESOLUTION**

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

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

## 25 **6. CLAIMS COVERED AND RELEASE**

26 6.1 Provided that Settling Defendant complies in full with its obligations under  
27 Section 4 hereof, this Consent Judgment is a full, final and binding resolution between CEH on

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1 behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries,  
2 affiliated entities that are under common ownership, directors, officers, employees, agents,  
3 shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities to  
4 which Settling Defendant distributes or sells Covered Products such as distributors, wholesalers,  
5 customers, retailers, franchisees, licensors and licensees, including but not limited to International  
6 Food Associates, Inc., KeHE Distributors, LLC and Walmart.com USA LLC (“Downstream  
7 Defendant Releasees”), of any violation of Proposition 65 based on failure to warn about alleged  
8 exposure to Lead contained in Covered Products that were sold, distributed or offered for sale by  
9 Settling Defendant prior to the Effective Date.

10           6.2     Provided that Settling Defendant complies in full with its obligations under  
11 Section 4 hereof, CEH, for itself, its agents, successors and assigns, releases, waives, and forever  
12 discharges any and all claims against Settling Defendant, Defendant Releasees, and Downstream  
13 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or  
14 common law claims that have been or could have been asserted by CEH individually or in the  
15 public interest regarding the failure to warn about exposure to Lead arising in connection with  
16 Covered Products manufactured, distributed or sold by Settling Defendant prior to the Effective  
17 Date.

18           6.3     Provided that Settling Defendant complies in full with its obligations under  
19 Section 4 hereof, compliance with the terms of this Consent Judgment by Settling Defendant and  
20 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,  
21 Defendant Releasees and Downstream Defendant Releasees with respect to any alleged failure to  
22 warn about Lead in Covered Products manufactured, distributed or sold by Settling Defendant  
23 after the Effective Date.

24 **7.     PROVISION OF NOTICE**

25           7.1     When CEH is entitled to receive any notice under this Consent Judgment, the  
26 notice shall be sent by first class and electronic mail to:

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1 Eric S. Somers  
2 Lexington Law Group  
3 503 Divisadero Street  
4 San Francisco, CA 94117  
5 esomers@lexlawgroup.com

6 7.2 When Settling Defendant is entitled to receive any notice under this Consent  
7 Judgment, the notice shall be sent by first class and electronic mail to:

8 Matthew S. Kenefick  
9 Jeffer Mangels Butler & Mitchell LLP  
10 2 Embarcadero Center, 5<sup>th</sup> Floor  
11 San Francisco, CA 94111  
12 mkenefick@jmbm.com

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

15 **8. COURT APPROVAL**

16 8.1 This Consent Judgment shall become effective upon the date signed by CEH and  
17 Settling Defendant, whichever is later, provided however, that CEH shall prepare and file a  
18 Motion for Approval of this Consent Judgment and Settling Defendant shall support approval of  
19 such Motion.

20 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or  
21 effect and shall not be introduced into evidence or otherwise used in any proceeding for any  
22 purpose.

23 **9. GOVERNING LAW AND CONSTRUCTION**

24 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of  
25 California.

26 **10. ATTORNEYS' FEES**

27 10.1 A Party who unsuccessfully brings or contests an action arising out of this Consent  
28 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

1 Consent Judgment, the term substantial justification shall carry the same meaning as used in the  
2 Civil Discovery Act of 1986, Code of Civil Procedure §§2016.010, *et seq.*

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

9 10.3 Nothing in this Section 10 shall preclude a party from seeking an award of  
10 sanctions pursuant to law.

## 11 **11. ENTIRE AGREEMENT**

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

## 26 **12. RETENTION OF JURISDICTION**

27 12.1 This Court shall retain jurisdiction of this matter to implement or modify the  
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1 Consent Judgment.

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

3 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized  
4 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and  
5 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

7 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim  
8 against an entity that is not Settling Defendant on terms that are different than those contained in  
9 this Consent Judgment.

10 **15. EXECUTION IN COUNTERPARTS**

11 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by  
12 means of facsimile or portable document format (pdf), which taken together shall be deemed to  
13 constitute one document.

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15 **IT IS SO ORDERED, ADJUDGED,  
16 AND DECREED**

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18 Dated:           OCT - 6 2016          

GEORGE C. HERNANDEZ, JR.

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Judge of the Superior Court

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**IT IS SO STIPULATED:**

Dated: <u>15 April</u> 2016	<b>CENTER FOR ENVIRONMENTAL HEALTH</b>   _____ Signature  <u>Christine Pizzano</u> _____ Printed Name  <u>Associate Director</u> _____ Title
Dated: _____, 2016	<b>MACKAY'S LTD.</b>  _____ Signature  _____ Printed Name  _____ Title

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**IT IS SO STIPULATED:**

Dated: _____, 2016	<b>CENTER FOR ENVIRONMENTAL HEALTH</b>  _____ Signature  _____ Printed Name  _____ Title
Dated: <u>4<sup>th</sup> April</u> , 2016	<b>MACKAY'S LTD.</b>  _____ Signature  <u>MARTIN GRANT</u> Printed Name  <u>CEO</u> Title