

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ENDORSED
FILED
ALAMEDA COUNTY

OCT - 6 2016

CLERK OF THE SUPERIOR COURT
BY YOLANDA ESTRADA Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,)
Plaintiff,)
v.)
JAMES KEILLER & SONS LIMITED, *et al.*,)
Defendants.)

Case No. RG 15-765388

~~PROPOSED~~ CONSENT JUDGMENT
AS TO HISTON SWEET SPREADS
LIMITED

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center For Environmental Health (“CEH”), a California non-profit corporation, and Histon Sweet Spreads 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 jam, marmalade, and preservatives containing ginger that are, have been, or will be sold, distributed,

1 or offered for sale by Settling Defendant (“Covered Products”). The date this Consent Judgment
2 is entered by this Court is referred to herein as the “Effective Date.”

3 1.2 On January 16, 2015, CEH provided a 60-day Notice of Violation under
4 Proposition 65 to the California Attorney General, the District Attorneys of every county in
5 California, the City Attorneys of every California city with a population greater than 750,000 and
6 to Settling Defendant, alleging that Settling Defendant violated Proposition 65 by exposing
7 persons to lead and lead compounds (“Lead”) contained in Covered Products without first
8 providing a clear and reasonable Proposition 65 warning.

9 1.3 Settling Defendant is a corporation or other business entity that manufactures,
10 distributes, sells, or offers for sale Covered Products that are sold in the State of California or has
11 done so in the past. However, Settling Defendant is a U.K.-based company that manufactures,
12 distributes, and sells the Covered Products primarily for sale in the U.K. and Europe, and not
13 directly to California consumers.

14 1.4 On April 7, 2015, CEH filed the Complaint in the above-captioned matter, naming
15 Settling Defendant as a defendant in the action.

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

23 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by the
24 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
25 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
26 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
27 prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any

28

1 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
2 and compromise and is accepted by the Parties solely for purposes of settling, compromising, and
3 resolving issues disputed in this Action.

4 5 **2. INJUNCTIVE RELIEF**

6 **2.1 Reformulation of Covered Products.** Commencing on December 31, 2016 (the
7 “Compliance Date”), Settling Defendant shall not purchase, manufacture, ship, sell, or offer for
8 sale Covered Products that will be sold or offered for sale in California that contain a
9 concentration of more than forty (40) parts per billion (“ppb”) Lead by weight (the
10 “Reformulation Level”), such concentration to be determined by use of a test performed by an
11 accredited laboratory using inductively coupled plasma mass spectrometry (ICP-MS) equipment
12 with a level of detection of at least ten (10) ppb that meets standard laboratory QA/QC
13 requirements.

14 **2.2 Alternative Compliance.** As an alternative to meeting the Reformulation Level,
15 Settling Defendant may sell Covered Products that do not meet the Reformulation Level provided
16 that such sales made after the Compliance Date are only to entities that have represented to
17 Settling Defendant that they will not sell or distribute the Covered Products within the State of
18 California, and further provided that Settling Defendant has provided notice to all entities to
19 which it sells Covered Products that are reasonably known to sell or distribute the Covered
20 Products to California consumers that the Covered Products are not labeled for sale in California.
21 To the extent that Settling Defendant has actual knowledge that an entity is nonetheless selling or
22 offering for sale Covered Products that do not meet the Reformulation Level to consumers in the
23 State of California after the Compliance Date, Settling Defendant may not sell Covered Products
24 that do not meet the Reformulation Level to that entity.

1 **3. ENFORCEMENT**

2 **3.1 General Enforcement Provisions.** CEH may, by motion or application for an
3 order to show cause before this Court, enforce the terms and conditions contained in this Consent
4 Judgment. Any action to enforce alleged violations of Section 2.1 by Settling Defendant shall be
5 brought exclusively pursuant to this Section 3, and be subject to the meet and confer requirement
6 of Section 3.2.4, if applicable.

7 **3.2 Enforcement of Reformulation Commitment.**

8 **3.2.1 Notice of Violation.** In the event that CEH identifies a Covered Product
9 that does not comply with Section 2.1 that was sold or offered for sale to California consumers,
10 and for which CEH has laboratory test results showing that the Covered Product has a Lead level
11 exceeding the Reformulation Level, CEH may issue a Notice of Violation pursuant to this
12 Section.

13 **3.2.2 Service of Notice of Violation and Supporting Documentation.**

14 **3.2.2.1** Subject to Section 3.2.1, the Notice of Violation shall be sent to the
15 person(s) identified in Section 7.2 to receive notices for Settling Defendant, and must be served
16 within sixty (60) days of the later of the date the Covered Products at issue were purchased or
17 otherwise acquired by CEH or the date that CEH can reasonably determine that the Covered
18 Products at issue were manufactured, shipped, sold or offered for sale by Settling Defendant,
19 provided, however, that CEH may have up to an additional sixty (60) days to send the Notice of
20 Violation if, notwithstanding CEH's good faith efforts, the test data required by Section 3.2.2.2
21 below cannot be obtained by CEH from its laboratory before expiration of the initial sixty (60)
22 day period.

23 **3.2.2.2** The Notice of Violation shall, at a minimum, set forth: (a) the date
24 the alleged violation was observed; (b) the location at which the Covered Products were offered
25 for sale; (c) a description of the Covered Products giving rise to the alleged violation, including
26 the name and address of the retail entity from which the sample was obtained and if available
27 information that identifies the product lot; and (d) all test data obtained by CEH regarding the

28

1 Covered Products and supporting documentation sufficient for validation of the test results,
2 including any laboratory reports, quality assurance reports and quality control reports associated
3 with testing of the Covered Products.

4 3.2.3 Notice of Election of Response. No more than thirty (30) days after
5 effectuation of service of a Notice of Violation, Settling Defendant shall provide written notice to
6 CEH stating whether it elects to contest the allegations contained in a Notice of Violation
7 (“Notice of Election”). Failure to provide a Notice of Election within thirty (30) days of
8 effectuation of service of a Notice of Violation shall be deemed an election to contest the Notice
9 of Violation.

10 3.2.3.1 If a Notice of Violation is contested, the Notice of Election shall
11 include all then-available documentary evidence regarding the alleged violation, including all test
12 data, if any is available. Alternatively, if Settling Defendant is asserting the alternate compliance
13 provision under Section 2.2, it shall provide all documentary evidence supporting its assertion,
14 along with the identity of all of its direct or indirect customers of the Covered Products subject to
15 the Notice of Violation about which it has actual knowledge. If Settling Defendant or CEH later
16 acquires additional test or other data regarding the alleged violation, it shall notify the other Party
17 and promptly provide all such data or information to the Party.

18 3.2.4 Meet and Confer. If a Notice of Violation is contested, CEH and Settling
19 Defendant shall meet and confer to attempt to resolve their dispute. Within thirty (30) days of
20 serving a Notice of Election contesting a Notice of Violation, and if no enforcement action or
21 application has been filed by CEH pursuant to Section 3.1, Settling Defendant may withdraw the
22 original Notice of Election contesting the violation and serve a new Notice of Election to not
23 contest the violation, provided, however, that, in this circumstance, Settling Defendant shall pay
24 \$2,500 in addition to any payment required under this Consent Judgment. At any time, CEH may
25 withdraw a Notice of Violation, in which case for purposes of this Section 3.2 the result shall be
26 as if CEH never issued any such Notice of Violation. If no informal resolution of a Notice of
27 Violation results within thirty (30) days of a Notice of Election to contest, CEH may file an

28

1 enforcement motion or application pursuant to Section 3.1. In any such proceeding, CEH may
2 seek whatever fines, costs, penalties, attorneys' fees, or other remedies are provided by law for
3 failure to comply with the Consent Judgment.

4 3.2.5 Non-Contested Notices. If Settling Defendant elects to not contest the
5 allegations in a Notice of Violation and Settling Defendant did not manufacture the Covered
6 Product identified in the Notice of Violation, it shall identify on a confidential basis to CEH (by
7 proper name, address of principal place of business, and telephone number) the person or entity
8 that sold the Covered Products to Settling Defendant and the manufacturer or ingredient suppliers
9 and other entities in the upstream chain of distribution of the Covered Product, provided that such
10 information is reasonably available. In addition, Settling Defendant shall undertake corrective
11 action(s) and make payments, if any, as set forth below.

12 3.2.5.1 Settling Defendant shall include in its Notice of Election a detailed
13 description with supporting documentation of the corrective action(s) that it has undertaken or
14 proposes to undertake to address the alleged violation. Any such correction shall, at a minimum,
15 provide reasonable assurance that all Covered Products having the same lot number as that of the
16 Covered Product identified in CEH's Notice of Violation will not be thereafter sold or offered for
17 sale to California consumers. If Settling Defendant is conceding a failure to comply with the
18 alternative compliance provisions of Section 2.2, such corrective actions shall additionally
19 include, at a minimum, that Settling Defendant take reasonable steps to determine whether a
20 direct or indirect customer is responsible for the violation (and, if the latter, to make reasonable
21 inquiries to determine which indirect customer), to notify all such customers in writing that the
22 Covered Products are not labeled for legal sale in California, and to supply the identity of all such
23 customers to CEH. If there is a dispute over the corrective action, Settling Defendant and CEH
24 shall meet and confer before seeking any remedy in court. In no case shall CEH issue more than
25 one Notice of Violation per manufacturing lot of a type of Covered Product.

26 3.2.5.2 If the Notice of Violation is the first Notice of Violation received
27 by Settling Defendant that was not successfully contested or withdrawn, no payment shall be
28

1 required by Settling Defendant. If the Notice of Violation is the second, third, or fourth Notice of
2 Violation received by Settling Defendant under Section 3.2.1 that was not successfully contested
3 or withdrawn, then Settling Defendant shall pay \$10,000 for each Notice of Violation. If Settling
4 Defendant has received more than four (4) Notices of Violation under Section 3.2.1 that were not
5 successfully contested or withdrawn, then Settling Defendant shall pay \$17,500 for each Notice
6 of Violation. If Settling Defendant produces with its Notice of Election test data for the Covered
7 Product that: (i) was conducted prior to the date CEH purchased the Covered Product that is the
8 subject of the Notice of Violation; (ii) was conducted on the same or same type of Covered
9 Product; and (iii) demonstrates Lead levels below the Reformulation Level, then any payment
10 under this Section shall be reduced by fifty percent (50%).

11 3.2.6 Payments. Any payments under Section 3.2 shall be made by check
12 payable to the “Lexington Law Group” and shall be paid within thirty (30) days of service of a
13 Notice of Election triggering a payment and which shall be used as reimbursement for costs for
14 investigating, preparing, sending, and prosecuting Notices of Violation, and to reimburse
15 attorneys’ fees and costs incurred in connection with these activities.

16 3.3 **Repeat Violations**. If Settling Defendant has received four (4) or more Notices of
17 Violation concerning the same type of Covered Product that were not successfully contested or
18 withdrawn in any twelve (12) month period then, at CEH’s option, CEH may seek whatever
19 fines, costs, penalties, attorneys’ fees, or other remedies that are provided by law for failure to
20 comply with the Consent Judgment. Prior to seeking such relief, CEH shall meet and confer with
21 Settling Defendant for at least thirty (30) days to determine if Settling Defendant and CEH can
22 agree on measures that Settling Defendant can undertake to prevent future violations.

23
24 **4. PAYMENTS**

25 4.1 **Payments by Settling Defendant**. Within five (5) days of the Effective Date,
26 Settling Defendant shall pay the total sum of \$43,875 as a settlement payment as further set forth
27 in this Section.

28

1 4.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
2 be paid in four (4) separate checks in the amounts specified below and delivered as set forth
3 below. Any failure by Settling Defendant to comply with the payment terms herein shall be
4 subject to a stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each
5 day the full payment is not received after the applicable payment due date set forth in Section 4.1.
6 The late fees required under this Section shall be recoverable, together with reasonable attorneys'
7 fees, in an enforcement proceeding brought pursuant to Section 3 of this Consent Judgment. The
8 funds paid by Settling Defendant shall be allocated as set forth below between the following
9 categories and made payable as follows:

10 4.2.1 \$5,780 as a civil penalty pursuant to Health & Safety Code § 25249.7(b).
11 The civil penalty payment shall be apportioned in accordance with Health & Safety Code §
12 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
13 Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty
14 payment for \$4,335 shall be made payable to OEHHA and associated with taxpayer identification
15 number 68-0284486. This payment shall be delivered as follows:

16 For United States Postal Service Delivery:

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

20 For Non-United States Postal Service Delivery:

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

24 The CEH portion of the civil penalty payment for \$1,445 shall be made
25 payable to the Center For Environmental Health and associated with taxpayer identification
26 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
27 Street, San Francisco, CA 94117.

28

1 4.2.2 \$8,675 as a payment in lieu of civil penalty to CEH pursuant to Health &
2 Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH shall
3 use such funds to continue its work educating and protecting people from exposures to toxic
4 chemicals, including heavy metals. In addition, as part of its Community Environmental Action
5 and Justice Fund, CEH will use four percent (4%) of such funds to award grants to grassroots
6 environmental justice groups working to educate and protect people from exposures to toxic
7 chemicals. The method of selection of such groups can be found at the CEH web site at
8 www.ceh.org/justicefund. The payment pursuant to this Section shall be made payable to the
9 Center For Environmental Health and associated with taxpayer identification number 94-
10 3251981.

11 4.2.3 \$29,420 as a reimbursement of a portion of CEH's reasonable attorneys'
12 fees and costs. The attorneys' fees and cost reimbursement check shall be made payable to the
13 Lexington Law Group and associated with taxpayer identification number 94-3317175. This
14 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA
15 94117.

16

17 **5. MODIFICATION AND DISPUTE RESOLUTION**

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

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

24

25 **6. CLAIMS COVERED AND RELEASE**

26 6.1 This Consent Judgment is a full, final, and binding resolution between CEH on
27 behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries,

28

1 affiliated entities that are under common ownership, directors, officers, employees, agents,
2 shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities to
3 which Settling Defendant directly or indirectly distributes or sells Covered Products, including
4 but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors, and
5 licensees (“Downstream Defendant Releasees”), of any violation of Proposition 65 based on
6 failure to warn about alleged exposure to Lead contained in Covered Products that were sold,
7 distributed, or offered for sale by Settling Defendant prior to the Compliance Date.

8 6.2 CEH, for itself, its agents, successors, and assigns, releases, waives, and forever
9 discharges any and all claims against Settling Defendant, Defendant Releasees, and Downstream
10 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or
11 common law claims that have been or could have been asserted by CEH individually or in the
12 public interest regarding the failure to warn about exposure to Lead arising in connection with
13 Covered Products manufactured, distributed, or sold by Settling Defendant prior to the Effective
14 Date.

15 6.3 Compliance with the terms of this Consent Judgment by Settling Defendant and
16 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
17 Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to
18 warn about Lead in Covered Products manufactured, distributed, or sold by Settling Defendant
19 after the Compliance Date.

20
21 **7. PROVISION OF NOTICE**

22 7.1 When CEH is entitled to receive any notice under this Consent Judgment, the
23 notice shall be sent by first class and electronic mail to:
24
25
26
27
28

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 Trenton H. Norris
9 Arnold & Porter LLP
10 Three Embarcadero Center, 10th Floor
11 San Francisco, CA 94111
12 trent.norris@aporter.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 as a contract upon the date signed
17 by CEH and Settling Defendant, whichever is later, provided however, that CEH shall prepare
18 and file a Motion for Approval of this Consent Judgment and Settling Defendant shall support
19 approval of 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.

1 **10. ATTORNEYS' FEES**

2 10.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
3 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
4 unless the unsuccessful Party has acted with substantial justification. For purposes of this
5 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
6 Civil Discovery Act of 1986, Code of Civil Procedure §§2016.010, *et seq.*

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

13 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
14 sanctions pursuant to law.

15
16 **11. ENTIRE AGREEMENT**

17 11.1 This Consent Judgment contains the sole and entire agreement and understanding
18 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
19 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
20 and therein. There are no warranties, representations, or other agreements between the Parties
21 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
22 other than those specifically referred to in this Consent Judgment have been made by any Party
23 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
24 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
25 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
26 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
27 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in

28

1 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
2 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
3 whether or not similar, nor shall such waiver constitute a continuing waiver.
4

5 **12. RETENTION OF JURISDICTION**

6 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
7 Consent Judgment.
8

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

10 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
11 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
12 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.
13

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

15 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
16 against an entity that is not Settling Defendant on terms that are different than those contained in
17 this Consent Judgment.
18

19 **15. EXECUTION IN COUNTERPARTS**

20 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by
21 means of facsimile or portable document format (pdf), which taken together shall be deemed to
22 constitute one document.
23

24 **IT IS SO ORDERED, ADJUDGED,
25 AND DECREED**

26 **OCT - 6 2016**
27 Dated: _____

GEORGE C. HERNANDEZ, JR.

Judge of the Superior Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO STIPULATED:

Dated: <u>22 July</u> , 2016	CENTER FOR ENVIRONMENTAL HEALTH  _____ Signature <u>CHARLIE PIZZANO</u> _____ Printed Name <u>ASSOCIATE DIRECTOR</u> _____ Title
Dated: _____, 2016	HISTON SWEET SPREADS LIMITED _____ Signature _____ Printed Name _____ Title

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO STIPULATED:

Dated: _____, 2016	CENTER FOR ENVIRONMENTAL HEALTH _____ Signature _____ Printed Name _____ Title
Dated: <u>7/22</u> , 2016	HISTON SWEET SPREADS LIMITED _____ Signature _____ Debbie Faltschek Printed Name _____ Director Title