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**ENDORSED
FILED
ALAMEDA COUNTY**

SEP 21 2020

CLERK OF THE SUPERIOR COURT
By JHALISA CASTANEDA Deputy

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,

Plaintiff,

v.

TOTAL SWEETENERS, INC., et al.,

Defendants.

Case No. RG 19-001951

**[PROPOSED] CONSENT
JUDGMENT AS TO TOTAL
SWEETENERS, INC.**

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1 1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court
2 has jurisdiction over the allegations of violations contained in the Complaint and personal
3 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in
4 the County of Alameda and that this Court has jurisdiction to enter and enforce this Consent
5 Judgment as a full and final resolution of all claims which were or could have been raised in the
6 Complaint based on the facts alleged therein with respect to Covered Products manufactured,
7 distributed and/or sold by Settling Defendant.

8 1.7 Nothing in this Consent Judgment is or shall be construed as an admission by the
9 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
10 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
11 conclusion of law, issue of law or violation of law. Nothing in this Consent Judgment shall
12 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
13 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
14 and compromise and is accepted by the Parties solely for purposes of settling, compromising and
15 resolving issues disputed in this Action.

16 **2. DEFINITIONS**

17 2.1 The “Effective Date” is the date of entry of this Consent Judgment.

18 2.2 The “Lead Level” shall mean a concentration level of no more than 35 parts per
19 billion (“ppb”) Lead by weight.

20 2.3 The “Acrylamide Level” shall mean a concentration level of no more than 325
21 parts per billion (“ppb”) acrylamide by weight.

22 **3. INJUNCTIVE RELIEF**

23 3.1 **Clear and Reasonable Warnings for Covered Products.** As of the Effective
24 Date, no Covered Product that will be sold or offered for sale to California consumers by Settling
25 Defendant or any other entity and that:

- 26 • contains acrylamide in a concentration exceeding the Acrylamide Level; or
- 27 • contains lead in a concentration exceeding the Lead Level,

shall be sold or offered for sale by Settling Defendant unless Settling Defendant provides a clear and reasonable warning as further specified in this Section 3.

3.2 **Warning Language.** The warning required by Section 3.1 for Covered Products shall state the following:

3.2.1 For Covered Products that contain acrylamide in a concentration exceeding the Acrylamide Level:

WARNING:

Consuming this product can expose you to chemicals including acrylamide, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov/food.

3.2.2 For Covered Products that contain Lead in a concentration exceeding the Lead Level:

WARNING:

Consuming this product can expose you to chemicals including lead, which is known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/food.

3.2.3 For Covered Products that contain both acrylamide in a concentration exceeding the Acrylamide Level and Lead in a concentration exceeding the Lead Level:

WARNING:

Consuming this product can expose you to chemicals including lead and acrylamide, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/food.

The word “**WARNING**” must be in all capital letters and bold print.

3.3 **Placement of Warning Language.** The warning language set forth in Section 3.2 must be displayed with such conspicuousness as compared with other words, statements, designs or devices as to render the warning likely to be read and understood by an ordinary consumer under customary conditions of purchase and use. The warning language shall appear on the

1 container's label, set off from other surrounding information or enclosed in a box. If the
2 product's label contains other warnings or nutritional information in a language other than
3 English, the warning language set forth in Section 3.2 must also be displayed on the label in that
4 language in addition to English. Alternatively, the warning may be communicated by sending it
5 with an order confirmation in the form attached hereto as Exhibit A ("Confirmation") that
6 Settling Defendant sends to a customer after it receives a purchase order but prior to shipment of
7 any Covered Product. The Confirmation may be sent via email in pdf format provided that it is
8 sent to the primary customer contact ordering the Covered Product.

9 **3.4 Internet Sales.** Settling Defendant does not currently sell Covered Products
10 through its website. If Settling Defendant in the future sells Covered Products over the internet,
11 the warning language set forth in Section 3.2 must be prominently displayed in such a manner
12 that it is likely to be read and understood as being applicable to the Covered Product being sold
13 prior to the authorization of or actual payment by the purchaser. For purposes of this Section 3.4,
14 the warning language is not prominently displayed if the customer must search for the warning
15 language in the general content of Settling Defendant's website or if a reasonable consumer
16 cannot determine the specific Covered Product to which the warning applies. If the product
17 display page contains other warnings or nutritional information in a language other than English,
18 the warning language set forth in Section 3.2 must also be displayed on the label in that language
19 in addition to English.

20 **4. ENFORCEMENT**

21 **4.1 Enforcement Procedures.** This Court shall have exclusive jurisdiction over all
22 matters regarding enforcement of the Consent Judgment. Prior to bringing any motion or order to
23 show cause to enforce the terms of this Consent Judgment, a Party seeking to enforce shall
24 provide the violating party thirty (30) days advanced written notice of the alleged violation. The
25 Parties shall meet and confer during such thirty (30) day period in an effort to try to reach
26 agreement on an appropriate cure for the alleged violation. After such thirty (30) day period, the
27 Party seeking to enforce may, by new action, motion or order to show cause before the Superior
28

1 Court of Alameda, seek to enforce Proposition 65 or the terms and conditions contained in this
2 Consent Judgment.

3 **5. PAYMENTS**

4 5.1 **Payments by Settling Defendant.** On or before the Effective Date, Settling
5 Defendant shall pay the total sum of \$55,000 as a settlement payment as further set forth in this
6 Section.

7 5.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
8 be paid in five (5) separate checks in the amounts specified below and delivered as set forth
9 below. Any failure by Settling Defendant to comply with the payment terms herein shall be
10 subject to a stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each
11 day the full payment is not received after the applicable payment due date set forth in Section 5.1.
12 The late fees required under this Section shall be recoverable, together with reasonable attorneys'
13 fees, in an enforcement proceeding brought pursuant to Section 4 of this Consent Judgment. The
14 funds paid by Settling Defendant shall be allocated as set forth below between the following
15 categories and made payable as follows:

16 5.2.1 \$7,440 as a civil penalty pursuant to Health & Safety Code §25249.7(b).
17 The civil penalty payment shall be apportioned in accordance with Health & Safety Code
18 §25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
19 Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty
20 payment for \$5,580 shall be made payable to OEHHA and associated with taxpayer identification
21 number 68-0284486. This payment shall be delivered as follows:

22 For United States Postal Service Delivery:

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

26 For Non-United States Postal Service Delivery:

27 Attn: Mike Gyurics
28 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 \$1,860 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.

5.2.2 \$5,575 as an Additional Settlement Payment ("ASP") to CEH pursuant to Health & Safety Code §25249.7(b), and California Code of Regulations, Title 11, §3204. CEH intends to place these funds in CEH's Toxics in Food Fund and used to support CEH programs and activities that seek to educate the public about toxic chemicals in food, to work with the food industry and agriculture interests to reduce exposure to toxic chemicals in food and to thereby reduce the public health impacts and risks of exposure to acrylamide, Lead and other toxic chemicals in food sold in California. CEH shall obtain and maintain adequate records to document that ASPs are spent on these activities and CEH agrees to provide such documentation to the Attorney General within thirty days of any request from the Attorney General. The payment pursuant to this Section 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.

5.2.1 Settling Defendant shall pay \$41,985 as a reimbursement of a portion of CEH's reasonable attorneys' fees and costs (including but not limited to expert and investigative costs). The attorneys' fees and cost reimbursement shall be made in two separate checks as follows: (a) \$35,400 payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175; and (b) \$6,585 payable to the Center For Environmental Health and associated with taxpayer identification number 94-3251981. Both of these payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.2.2 To summarize, Settling Defendant shall deliver five checks made out to the payees in the amounts set forth below:

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$5,580	OEHHA per Section 5.2.1
Center For Environmental Health	Penalty	\$1,860	LLG
Center For Environmental Health	ASP	\$5,575	LLG
Lexington Law Group	Fee and Cost	\$35,400	LLG
Center For Environmental Health	Fee and Cost	\$6,585	LLG

5.3 **Failure to Comply With Payment Obligations.** Notwithstanding the provisions of the Enforcement of Judgments Law and CCP §780.160, in the event that Settling Defendant does not comply fully with its payment obligations under Section 5, in addition to any other enforcement mechanism available to CEH, CEH may obtain an order requiring Settling Defendant to submit to a debtors exam. In the event that Settling Defendant fails to submit to any such Debtors Exam ordered by the Court, CEH may seek an order holding Settling Defendant in contempt of Court.

6. MODIFICATION AND DISPUTE RESOLUTION

6.1 **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.

6.2 **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.

7. CLAIMS COVERED AND RELEASE

7.1 Provided that Settling Defendant complies in full with its obligations under Section 5, this Consent Judgment is a full, final and binding resolution between CEH on behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, agents, shareholders, successors, assigns, and attorneys ("Defendant Releasees"), and all entities to which Settling Defendant distributes or sells Covered Products, such as distributors, wholesalers, customers,

1 retailers, franchisees, licensors and licensees ("Downstream Defendant Releasees"), of any
2 violation of Proposition 65 based on failure to warn about alleged exposure to acrylamide or Lead
3 contained in Covered Products that were sold by Settling Defendant prior to the Effective Date.
4 Nothing in this Consent Judgment covers or releases a Downstream Defendant Releasee from any
5 liability that may arise when a Covered Product is used as an ingredient in a different product
6 such as a cookie.

7 7.2 Provided that Settling Defendant complies in full with its obligations under
8 Section 5, 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 acrylamide or Lead contained in
13 Covered Products sold by Settling Defendant prior to the Effective Date.

14 7.3 Provided that Settling Defendant complies in full with its obligations under
15 Section 5 hereof, compliance with the terms of this Consent Judgment by Settling Defendant,
16 Defendant Releasees and Downstream Defendant Releasees shall constitute compliance with
17 Proposition 65 by Settling Defendant, Defendant Releasees and Downstream Defendant
18 Releasees with respect to any alleged failure to warn about acrylamide or Lead in Covered
19 Products sold by Settling Defendant after the Effective Date.

20 **8. PROVISION OF NOTICE**

21 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
22 notice shall be sent by first class and electronic mail to:

23 Eric S. Somers
24 Lexington Law Group
25 503 Divisadero Street
26 San Francisco, CA 94117
27 esomers@lexlawgroup.com

28 8.2 When Settling Defendant is entitled to receive any notice under this Consent

1 Judgment, the notice shall be sent by first class and electronic mail to:

2 James G. Scadden
3 Gordon Rees Scully Mansukhani, LLP
4 1111 Broadway, Suite 1700
5 Oakland, CA 94607
6 jscadden@grsm.com

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

9 **9. COURT APPROVAL**

10 9.1 This Consent Judgment shall become effective upon the date signed by CEH and
11 Settling Defendant, whichever is later, provided however, that CEH shall prepare and file a
12 Motion for Approval of this Consent Judgment and Settling Defendant shall support approval of
13 such Motion.

14 9.2 If this Consent Judgment is not entered by the Court, it shall be of no further force
15 or effect and shall not be introduced into evidence or otherwise used in any proceeding for any
16 purpose.

17 **10. GOVERNING LAW AND CONSTRUCTION**

18 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
19 California.

20 **11. ATTORNEYS' FEES**

21 11.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
22 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
23 unless the unsuccessful Party has acted with substantial justification. For purposes of this
24 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
25 Civil Discovery Act of 1986, Code of Civil Procedure §§2016.010, *et seq.*

26 11.2 Notwithstanding Section 11.1, a Party who prevails in a contested enforcement
27 action brought pursuant to Section 4 may seek an award of attorneys' fees pursuant to Code of
28 Civil Procedure §1021.5 against a Party that acted with substantial justification.

11.3 Nothing in this Section 11 shall preclude a party from seeking an award of

1 sanctions pursuant to law.

2 **12. ENTIRE AGREEMENT**

3 12.1 This Consent Judgment contains the sole and entire agreement and understanding
4 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
5 negotiations, commitments or understandings related thereto, if any, are hereby merged herein
6 and therein. There are no warranties, representations or other agreements between the Parties
7 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
8 other than those specifically referred to in this Consent Judgment have been made by any Party
9 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
10 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
11 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
12 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
13 modification, waiver or termination of this Consent Judgment shall be binding unless executed in
14 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
15 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
16 whether or not similar, nor shall such waiver constitute a continuing waiver.

17 **13. SUCCESSORS AND ASSIGNS**

18 13.1 This Consent Judgment shall apply to and be binding upon CEH and Settling
19 Defendant, and their respective divisions, subdivisions and subsidiaries, and the successors or
20 assigns of any of them.

21 **14. RETENTION OF JURISDICTION**

22 14.1 This Court shall retain jurisdiction of this matter to implement or modify the
23 Consent Judgment.

1 **15. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

2 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
3 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
4 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

5 **16. NO EFFECT ON OTHER SETTLEMENTS**

6 16.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
7 against an entity that is not Settling Defendant on terms that are different than those contained in
8 this Consent Judgment.

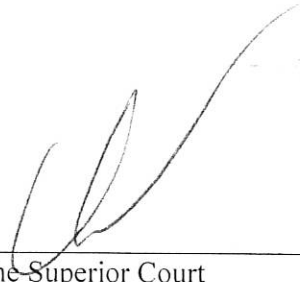
9 **17. EXECUTION IN COUNTERPARTS**

10 17.1 The stipulations to this Consent Judgment may be executed in counterparts and by
11 means of facsimile or portable document format (pdf), which taken together shall be deemed to
12 constitute one document.

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

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17 Dated: _____

9/21/20

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Judge of the Superior Court

1 IT IS SO STIPULATED:

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3 Dated: 10/31, 2019

CENTER FOR ENVIRONMENTAL
HEALTH

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Michael Green

Printed Name

CEO

Title

Dated: _____, 2019

TOTAL SWEETENERS, INC.

Signature

Printed Name

Title

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IT IS SO STIPULATED:

Dated: _____, 2019

CENTER FOR ENVIRONMENTAL
HEALTH

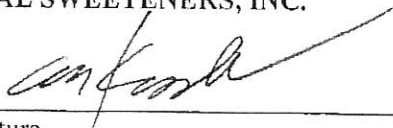
Signature

Printed Name

Title

Dated: _____, 2019

TOTAL SWEETENERS, INC.



Signature

Alan Kessler
Printed Name

CFO
Title

Batory Foods
10255 W. HIGGINS ROAD, SUITE 500
Rosemont, IL 60018
USA

Sales order
Date
Page

Ship To:

Store:

Purchase Order #	Cust Account	Ship Via	Payment Terms	Delivery Date	Warehouse

Ordered	Weight LBS	Item number	Description	UOM	Sales price	Amount

Subtotal

Freight/FSC

Total

Please be aware that other than as stated in Batory's Standard Terms and Conditions, Batory does no sampling, no testing and no verification whatsoever of the products we distribute for our vendors. Batory can assure you of its commitment to selling only top quality products in accordance with all applicable laws and regulations, including the Food Safety Modernization Act (FSMA). Batory cannot, however, accept responsibility for manufacturer defects, and any product-related issues must be handled with the product's manufacturer.

WARNING – CONSUMING MOLASSES CAN EXPOSE YOU TO CHEMICALS INCLUDING LEAD AND ACRYLAMIDE, WHICH ARE KNOWN TO THE STATE OF CALIFORNIA TO CAUSE CANCER AND BIRTH DEFECTS OR OTHER REPRODUCTIVE HARM. FOR MORE INFORMATION GO TO WWW.P65WARNINGS.CA.GOV/FOOD