

FILED  
ALAMEDA COUNTY

JUN 05 2020

CLERK OF THE SUPERIOR COURT

By  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 BARKMAN  
HONEY, LLC**

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Complaint shall be deemed amended *nunc pro tunc* to assert additional claims under Proposition 65 for alleged exposures to acrylamide as to Covered Products sold by Settling Defendant.

1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County of Alameda and that this Court has jurisdiction to enter and enforce 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 distributed or sold by Settling Defendant.

1.7 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. DEFINITIONS**

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

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

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

## **3. INJUNCTIVE RELIEF**

3.1 **Clear and Reasonable Warnings for Covered Products.** As of ninety (90) days after the Effective Date, no Covered Product that:

- contains acrylamide in a concentration exceeding the Acrylamide Level; or

- 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](http://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](http://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](http://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 container's label, set off from other surrounding information or enclosed in a box. If the product's label contains other warnings or nutritional information in a language other than English, the warning language set forth in Section 3.2 must also be displayed on the label in that language in addition to English.

3.4 **Internet Sales.** With respect to internet sales of Covered Products, the warning language set forth in Section 3.2 must be prominently displayed in such a manner that it is likely to be read and understood as being applicable to the Covered Product being sold prior to the authorization of or actual payment by the purchaser. For purposes of this Section 3.4, the warning language is not prominently displayed if the customer must search for the warning language in the general content of Settling Defendant's website or if a reasonable consumer cannot determine the specific Covered Product to which the warning applies. If the product display page contains other warnings or nutritional information in a language other than English, the warning language set forth in Section 3.2 must also be displayed in that language in addition to English.

## 4. ENFORCEMENT

4.1 **Enforcement Procedures.** This Court shall have exclusive jurisdiction over all matters regarding enforcement of the Consent Judgment. 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 in an effort to try to reach agreement on an appropriate cure for the alleged violation. 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 Alameda, seek to enforce Proposition 65 or the terms and conditions contained in this Consent Judgment.

1     **5.     PAYMENTS**

2             **5.1     Payments by Settling Defendant.** On or before ten (10) days after the Effective  
3     Date, Settling Defendant shall pay the total sum of \$95,000 as a settlement payment as further set  
4     forth in this Section.

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

14                 **5.2.1**    A civil penalty of \$16,036 pursuant to Health & Safety Code §25249.7(b).  
15    The civil penalty payment shall be apportioned in accordance with Health & Safety Code  
16    §25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health  
17    Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty  
18    payment for \$12,027 shall be made payable to OEHHA and associated with taxpayer  
19    identification number 68-0284486. This payment shall be delivered as follows:

20                                 For United States Postal Service Delivery:

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

24                                 For Non-United States Postal Service Delivery:

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

28                                 The CEH portion of the civil penalty payment for 4,009 shall be made

1 payable to the Center for Environmental Health and associated with taxpayer identification  
2 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero  
3 Street, San Francisco, CA 94117.

4           5.2.2     An Additional Settlement Payment (“ASP”) of \$12,014 to CEH pursuant  
5 to Health & Safety Code §25249.7(b), and California Code of Regulations, Title 11, §3204. CEH  
6 intends to place these funds in CEH’s Toxics in Food Fund and used to support CEH programs  
7 and activities that seek to educate the public about toxic chemicals in food, to work with the food  
8 industry and agriculture interests to reduce exposure to toxic chemicals in food and to thereby  
9 reduce the public health impacts and risks of exposure to acrylamide, Lead and other toxic  
10 chemicals in food sold in California. CEH shall obtain and maintain adequate records to  
11 document that ASPs are spent on these activities and CEH agrees to provide such documentation  
12 to the Attorney General within thirty (30) days of any request from the Attorney General. The  
13 payment pursuant to this Section shall be made payable to the Center for Environmental Health  
14 and associated with taxpayer identification number 94-3251981. This payment shall be delivered  
15 to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

16           5.2.3     A payment of \$66,950 as a reimbursement of a portion of CEH’s  
17 reasonable attorneys’ fees and costs (including but not limited to expert and investigative costs).  
18 The attorneys’ fees and cost reimbursement shall be made by check payable to the Lexington Law  
19 Group and associated with taxpayer identification number 94-3317175. This payment shall be  
20 delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

21           5.2.1     To summarize, Settling Defendant shall deliver four (4) checks made out  
22 to the payees in the amounts set forth below:

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$12,027	OEHHA per Section 5.2.1
Center For Environmental Health	Penalty	\$4,009	LLG
Center For Environmental Health	ASP	\$12,014	LLG
Lexington Law Group	Fee and Cost	\$66,950	LLG

5.3 **Failure to Comply With Payment Obligations.** Notwithstanding the provisions of the Enforcement of Judgments Law and Code of Civil Procedure §708.160, 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, retailers, franchisees, licensors and licensees (“Downstream Defendant Releasees”), of any



1 violation of Proposition 65 based on failure to warn about alleged exposure to acrylamide or Lead  
2 contained in Covered Products that were sold by Settling Defendant prior to the Effective Date.

3 7.2 Provided that Settling Defendant complies in full with its obligations under  
4 Section 5, CEH, for itself, its agents, successors and assigns, releases, waives and forever  
5 discharges any and all claims against Settling Defendant, Defendant Releasees and Downstream  
6 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or  
7 common law claims that have been or could have been asserted by CEH individually or in the  
8 public interest regarding the failure to warn about exposure to acrylamide or Lead contained in  
9 Covered Products sold by Settling Defendant prior to the Effective Date.

10 7.3 Provided that Settling Defendant complies in full with its obligations under  
11 Section 5 hereof, compliance with the terms of this Consent Judgment by Settling Defendant,  
12 Defendant Releasees and Downstream Defendant Releasees shall constitute compliance with  
13 Proposition 65 by Settling Defendant, Defendant Releasees and Downstream Defendant  
14 Releasees with respect to any alleged failure to warn about acrylamide or Lead in Covered  
15 Products sold by Settling Defendant after the Effective Date.

16 7.4 Nothing in this Consent Judgment covers or releases a Downstream Defendant  
17 Releasee from any liability that may arise when a Covered Product is used as an ingredient in a  
18 different product such as a cookie.

## 19 **8. PROVISION OF NOTICE**

20 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the  
21 notice shall be sent by first class and electronic mail to:

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

27 8.2 When Settling Defendant is entitled to receive any notice under this Consent  
28 Judgment, the notice shall be sent by first class and electronic mail to:

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Kevin T. Haroff  
Marten Law LLP  
555 Montgomery St., #820  
San Francisco, CA 94111  
kharoff@martenlaw.com

Any Party may modify the person and/or 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 upon the date signed by CEH and Settling Defendant, whichever is later, provided however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant shall support approval of such Motion.

9.2 If this Consent Judgment is not entered by the Court, it shall be of no further 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 4 may seek an award of attorneys' fees pursuant to Code of 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 sanctions pursuant to law.

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**16. NO EFFECT ON OTHER SETTLEMENTS**


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

**17. EXECUTION IN COUNTERPARTS**

17.1 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: 6/5/21

  
\_\_\_\_\_  
Judge of the Superior Court

1 **IT IS SO STIPULATED:**

2  
3 Dated: 2/7/20

**CENTER FOR ENVIRONMENTAL  
HEALTH**

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6   
7 Signature

8 Michael Green  
9 Printed Name

10 CEO  
11 Title

12  
13 Dated: \_\_\_\_\_

**BARKMAN HONEY, LLC**

14  
15  
16 Signature

17  
18 Printed Name

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20 Title

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IT IS SO STIPULATED:

Dated: \_\_\_\_\_

**CENTER FOR ENVIRONMENTAL  
HEALTH**

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Printed Name

\_\_\_\_\_  
Title

Dated: 2-17-2020

**BARKMAN HONEY, LLC**

  
\_\_\_\_\_  
Signature

Brent Barkman  
Printed Name

CEO  
Title