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CENTER FOR ENVIRONMENTAL HEALTH

FILED
ALAMEDA COUNTY
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By _____ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH, a non-profit corporation,

Plaintiff,

v.

WHOLE FOODS MARKET CALIFORNIA, INC., *et al.*,

Defendant.

Case No. RG 19-026800

CONSENT JUDGMENT AS TO WHOLE FOODS MARKET CALIFORNIA, INC. AND ALLEGRO COFFEE COMPANY

1. INTRODUCTION

1.1 On July 12, 2019, plaintiff Center for Environmental Health (hereinafter "CEH"), a non-profit corporation, filed a complaint in Alameda County Superior Court entitled *Center for Environmental Health v. Whole Foods Market California, Inc., et al.,* for civil penalties and injunctive relief pursuant to the provisions of Cal. Health & Safety Code ("Health & Safety Code") §25249.5, *et seq.* ("Proposition 65") naming Whole Foods Market California, Inc. ("WFM") and Allegro Coffee Company ("Allegro") as defendants (the "Action")[1]. On September 12, 2019, CEH filed the operative First Amended Complaint (the "Complaint") in the

[1] Both Whole Foods Market California, Inc. and Allegro Coffee Company are wholly owned subsidiaries of Whole Foods Market, Inc.

Action. CEH, WFM and Allegro are referred to collectively as the "Parties."

1.2 WFM and Allegro (together, "Settling Defendants") are corporations that each employ more than ten persons and that manufacture, distribute and sell bottled Starkey Spring Water under the Starkey Spring Water brand name. Starkey Spring Water is a private label brand owned by Allegro. CEH alleges that arsenic (inorganic arsenic compounds) and arsenic (inorganic oxides) (referred to collectively herein as "Arsenic") is present in Starkey Spring Water and that consumers who purchase and drink Starkey Spring Water will be exposed to Arsenic. This Consent Judgment resolves CEH's claims against Settling Defendants, as described further herein, with respect to Arsenic in Starkey Spring Water.

1.3 Settling Defendants have implemented a state of the art filtration system that ensures that Starkey Spring Water will not contain Arsenic at levels requiring a warning under Proposition 65 as further described herein.

1.4 More than sixty days prior to filing the Action, CEH served Settling Defendants and the appropriate public enforcement agencies with the requisite 60-day notice (the "Notice") alleging that Settling Defendants are in violation of Proposition 65. CEH's Notice and its Complaint allege that Settling Defendants sells Starkey Spring Water that contains and exposes consumers to Arsenic, chemicals known to the State of California to cause cancer and birth defects or other reproductive harm, without providing any clear and reasonable warning to purchasers of the Starkey Spring Water regarding the carcinogenicity and reproductive toxicity of Arsenic, in violation of Health & Safety Code §25249.6.

1.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over the allegations of violations contained in CEH's Complaint and personal jurisdiction over Settling Defendants as to the acts alleged in CEH's Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims that were or could have been raised in the Complaint against Settling Defendants based on the facts alleged therein.

1.6 For the purposes of resolving this dispute by compromise and avoiding prolonged litigation, CEH and Settling Defendants enter into this Consent Judgment as a full and final

settlement of all claims that were raised in the Notice and Complaint, or that could have been raised in the Complaint, arising out of the facts or conduct alleged therein. By executing this Consent Judgment and agreeing to provide the relief and remedies specified herein, Settling Defendants do not admit any issue of fact or law, including but not limited to any violations of Proposition 65 or any other law or legal duty, and in fact deny that any violations whatsoever have occurred. By executing this Consent Judgment and agreeing to the injunctive relief set forth herein, CEH does not admit any issue of fact or law. Except as provided in Section 5 of this Consent Judgment, nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or any other current or future legal proceedings. This Consent Judgment is the product of negotiation and is accepted by the Parties for purposes of settling and resolving issues disputed in this Action, including future compliance by Settling Defendants with Section 2 of this Consent Judgment. Nothing in this Consent Judgment shall prohibit CEH from seeking, or the Court from ordering, different injunctive or other relief from entities that are not parties to this Consent Judgment.

2. **COMPLIANCE**

2.1. **Arsenic Reduction**. As of the date this Consent Judgment is entered (the "Effective Date"), Settling Defendants shall not manufacture, distribute, ship or sell, or cause to be manufactured, distributed, shipped or sold, any Starkey Spring Water that will be sold or offered for sale by Settling Defendants or any other entity to California consumers, that contains Arsenic in concentrations greater than 2.3 parts per billion ("ppb") (the "Reformulation Level"). In determining the Arsenic level in the Starkey Spring Water, testing shall be by a laboratory accredited by the National Environmental Laboratory Accreditation Program (NELAP) or a similar United States accreditation program using EPA Method 1638 or an equivalently sensitive test methodology for the detection of Arsenic in water with a detection level of no more than 1 ppb (the "Test Protocol").

2.2. **Ongoing Compliance Requirements**. After the Effective Date but prior to the manufacture, distribution, shipment or sale by Settling Defendants of any Starkey Spring Water that will be sold or offered for sale by Settling Defendants or any other entity to California

consumers, Settling Defendants shall perform the following actions:

2.2.1. Settling Defendants shall implement a Quality Assurance/Quality Control ("QA/QC") program designed to ensure that all Settling Defendants Starkey Spring Water contains Arsenic at levels below the Reformulation Level. Settling Defendants shall provide a copy of the QA/QC protocol to CEH within thirty days of the Effective Date. Settling Defendants shall keep written records regarding compliance with the QA/QC Protocol and make such records available to CEH upon request for the duration of the testing period set forth in section 2.2.2.1. In addition to ensuring that the Arsenic levels in Settling Defendants Starkey Spring Water will be equal to or lower than the Reformulation Level, the QA/QC program shall ensure that good manufacturing practices are utilized at all levels of Settling Defendants Starkey Spring Water production and that Settling Defendants will at all times utilize quality control measures that reduce Arsenic levels to the lowest level currently feasible. The QA/QC program shall at a minimum include a program of testing, adapting refined manufacturing techniques, and implementing filtration or other systems to ensure that the Arsenic level in all Settling Defendants Starkey Spring Water is both at the lowest level feasible and equal to or lower than the Reformulation Level.

2.2.2. As part of the QA/QC program, Settling Defendants shall implement the following testing program.

2.2.2.1. Settling Defendants shall test random samples of its Starkey Spring Water using the Test Protocol at the frequency set forth in this Section. Settling Defendants shall only be able to reduce the frequency pursuant to the next level of the schedule below if all tests from the then current schedule demonstrate Arsenic levels at or below the Reformulation Level.

(a) The first testing period shall extend for a year or more after the Effective Date. During this period Settling Defendants shall perform testing required by this Section once per week (when the Starkey Spring Water is being bottled) until it has produced at least fifty-two weeks of consecutive test results that are at or below the Reformulation Level.

(b) The second testing period shall extend for a year or more after

the end of the first testing period under Section (a) above. During this period Settling Defendants shall perform testing required by this Section 1 time per month (when the Starkey Spring Water is being bottled) until it has produced at least fifty-two weeks of consecutive test results that are at or below the Reformulation Level.

(c) In the event that Settling Defendants complete each of the two testing cycles set forth above in consecutive fashion, they shall no longer be required to conduct testing pursuant to this Section but must continue to comply with the QA/QC program and any testing requirements contained therein.

2.2.2.2. Starkey Spring Water That Exceeds Reformulation Standard: After the Final Compliance Date, if Settling Defendants obtain test results indicating that a Starkey Spring Water product sold in California contains Arsenic in concentrations greater than the Reformulation Level, Settling Defendants shall, within 15 days of receiving such results, provide to CEH a Notice with: (a) a copy of the test results and any related QA/QC or other documentation regarding the production of the Starkey Spring Water and the testing; (b) an itemization of all Starkey Spring Water from the same production lot, including the SKU and lot numbers, number of units affected, and distribution status of those units; (c) a plan of correction to cure the violation, including a detailed description of the specific corrective actions to be taken, the dates such actions will be completed, and the scope of such actions (including, but not limited to, which Starkey Spring Water product(s) will be addressed by the action); and (d) a description of what changes, if any, Settling Defendants propose to make to the QA/QC Program to ensure future compliance with the Reformulation Level. If the Notice is the first or second Notice sent by Settling Defendants under this Section, there shall be no further action. If the Notice is not the first or second Notice sent under this Section (i.e., the third or later Notice), the Parties shall meet and confer regarding the scope of any corrective action, including but not limited to corrective action to cure and remedy the violations. If the Parties cannot agree on the sufficiency or timing of Settling Defendants' proposed corrective action, or if the Parties are unable to agree as to what changes, if any, need to be made to the QA/QC program, CEH may seek enforcement of this Consent Judgment in accordance with Section 5. Notwithstanding the foregoing, if the results

from any testing conducted pursuant to this Consent Judgment show Arsenic levels exceeding 10 ppb, Settling Defendants shall immediately notify CEH, the California Department of Public Health – Food and Drug Branch and the Federal Food and Drug Administration and institute a voluntary recall at the consumer and retail level of all Bottled Water from the same production lot. Settling Defendants shall coordinate with CEH in good faith on any such recall effort.

2.3. **Documentation.** The certifications and results of all testing performed pursuant to this Consent Judgment shall be retained by Settling Defendants for a period of five years from the date of the certification or testing and shall be provided to CEH quarterly during the two testing periods subject to the QA/QC program and annually thereafter.

3. ENFORCEMENT OF CONSENT JUDGMENT

CEH may, by motion or application for an order to show cause before the Superior Court of the County of Alameda, enforce the terms and conditions contained in this Consent Judgment. Prior to bringing any motion or application to enforce the requirements of Section 2 above, CEH shall provide Settling Defendants with a Notice of Violation setting forth the basis for the alleged violation. The Parties shall then meet and confer regarding the basis for CEH's anticipated motion or application in an attempt to resolve it informally. Should such attempts at meeting and conferring fail, CEH may file its enforcement motion or application. Should CEH prevail on any motion or application to enforce a material violation of this Consent Judgment under this Section, CEH shall be entitled to its reasonable attorneys' fees and costs incurred as a result of such motion or application. Should Settling Defendants prevail on any motion or application under this Section, Settling Defendants may be awarded their reasonable attorneys' fees and costs as a result of such motion or application upon a finding by the court that CEH's prosecution of the motion or application was not in good faith.

4. PAYMENTS BY SETTLING DEFENDANTS.

4.1. **Total Settlement Payment.** Within 10 days of the Effective Date, Settling Defendants shall jointly pay the total sum of $145,000 as a settlement payment as further set forth in this Section.

4.2. **Allocation of Payments.** The total settlement amount for Settling Defendants

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

4.2.1. A civil penalty in the amount of $19,464 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 $14,598 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 $4,866 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. An Additional Settlement Payment ("ASP") in the amount of $14,596 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 use them 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 Arsenic 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.

4.2.3. Settling Defendants shall pay $110,940 as a reimbursement of a portion of CEH's reasonable attorneys' fees and costs. The attorneys' fees and cost reimbursement shall be made in two separate checks as follows: (a) $93,825 payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175; and (b) $17,115 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.

4.2.4. To summarize, Settling Defendants shall deliver checks made out to the payees and in the amounts set forth below:

Payee	**Type**	**Amount**	**Deliver To**
OEHHA	Penalty	$14,598	OEHHA per Section 5.2.1
Center For Environmental Health	Penalty	$4,866	LLG
Center For Environmental Health	ASP	$14,596	LLG
Lexington Law Group	Fee and Cost	$93,825	LLG
Center For Environmental Health	Fee and Cost	$17,115	LLG

5. CLAIMS COVERED AND RELEASE

5.1. Provided that Settling Defendants comply in full with their obligations under Section 4, this Consent Judgment is a full, final and binding resolution between CEH on behalf of

itself and the public interest and Settling Defendants and their 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 Defendants distribute or sell Covered Products, such as distributors, wholesalers, customers, subsidiaries, related companies and retailers ("Downstream Defendant Releasees"), of any violation of Proposition 65 based on failure to warn about alleged exposure to Arsenic contained in Starkey Spring Water that was sold or distributed by Settling Defendants prior to the Effective Date (the "Released Products").

5.2. Provided that Settling Defendants comply in full with their obligations under Section 4, CEH, for itself, its agents, successors and assigns, releases, waives and forever discharges any and all claims against Settling Defendants, 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 could have been asserted by CEH individually or in the public interest regarding the failure to warn about exposure to Arsenic in the Released Products.

5.3. Provided that Settling Defendants complies in full with its obligations under Section 2 hereof, compliance with the terms of this Consent Judgment by Settling Defendants shall constitute compliance with Proposition 65 by Settling Defendants, Defendant Releasees and Downstream Defendant Releasees with respect to any alleged failure to warn about Arsenic in Starkey Spring Water sold by Settling Defendants after the Effective Date.

6. MODIFICATION

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 the other Party prior to filing a motion to modify the Consent Judgment.

7. PROVISION OF NOTICE

7.1. 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

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

Wells Blaxter
Blaxter Blackman LLP
601 California Street, Suite 1505
San Francisco, CA 94108
wblaxter@blaxterlaw.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.

8. **COURT APPROVAL**

8.1. This Consent Judgment shall become effective upon the date signed by CEH and Settling Defendants, whichever is later, 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.

8.2. 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.

9. **GOVERNING LAW AND CONSTRUCTION**

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

10. **ENTIRE AGREEMENT**

10.1. 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 and to bind any of the Parties hereto only to the extent that they are expressly incorporated herein. 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.

11. **RETENTION OF JURISDICTION**

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

12. **AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

12.1. 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 to legally bind that Party.

13. **SUCCESSORS AND ASSIGNS**

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

14. **NO EFFECT ON OTHER SETTLEMENTS**

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

15. **EXECUTION IN COUNTERPARTS**

15.1. 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.

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Dated: September 10, 2021

Michael Green

Printed Name

CEO

Title

SETTLING DEFENDANTS

WHOLE FOODS MARKET CALIFORNIA, INC.

Dated: _____

Printed Name

Title

ALLEGRO COFFEE COMPANY

DocuSign Envelope ID: C364C94F-CD50-4673-94F5-30FD73F1A328

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

_____ Dated: _____

_____

Printed Name

_____

Title

SETTLING DEFENDANTS

WHOLE FOODS MARKET CALIFORNIA, INC.

DocuSigned by:
John H. Hempfling
D6F916184E674FE...

Dated: September 2, 2021

John H. Hempfling

Printed Name

VP & AGC Litigation

Title

ALLEGRO COFFEE COMPANY

DocuSign Envelope ID: C364C94F-CD50-4673-94F5-30FD73F1A328

DocuSigned by:
John H. Hempfling
D6F916164E574FE...

Dated: September 2, 2021

John H. Hempfling

Printed Name

VP & AGC Litigation

Title

JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Settling Defendants, this Consent Judgment settlement is approved, and judgment is hereby entered according to the terms herein.

Dated: 12-15-2021

JUDGE
Superior Court of the State of California