

FILED
ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT

By *[Signature]* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation,

Plaintiff,

v.

GT'S LIVING FOODS, LLC; MILLENNIUM
PRODUCTS, INC.; ALBERTSON'S LLC; O
ORGANICS LLC; LUCERNE FOODS INC.;
SAFEWAY INC.; HUMM KOMBUCHA,
LLC; INC.; and DOES 1 through 100,
inclusive,

Defendants.

Case No. RG-19-047748

**[PROPOSED] CONSENT JUDGMENT AS
TO HUMM KOMBUCHA LLC**

1 **1. INTRODUCTION**

2 1.1 The Parties to this Consent Judgment are the Center for Environmental Health, a
3 California non-profit corporation ("CEH") and Humm Kombucha LLC ("Settling Defendant"). The
4 Parties enter into this Consent Judgment to settle certain claims asserted by CEH against Settling
5 Defendant as set forth in the operative complaint ("Complaint") in the above-captioned matter.
6 This Consent Judgment covers Kombucha drinks sold by Settling Defendant other than those sold
7 as alcoholic beverages that have been or will be sold or offered for sale to California consumers
8 ("Covered Products").

9 1.2 On September 30, 2019, CEH provided a 60-day Notice of Violation under
10 Proposition 65 to the California Attorney General, the District Attorneys of every county in
11 California, the City Attorneys of every California city with a population greater than 750,000 and
12 Settling Defendant, alleging that, by selling the Covered Products, Settling Defendant violated
13 Proposition 65 by exposing persons to ethyl alcohol in alcoholic beverages and alcoholic beverages
14 (collectively, "Alcohol") without first providing a clear and reasonable Proposition 65 warning.

15 1.3 Settling Defendant is a corporation or other business entity that manufactures,
16 distributes, sells or offers for sale Covered Products that are sold or offered for sale or has done so
17 in the past.

18 1.4 On December 20, 2019, CEH filed the Complaint in the above-captioned matter,
19 naming Settling Defendant as a defendant. Settling Defendant denies all the allegations in the
20 compliant.

21 1.5 For purposes of this Consent Judgment only, CEH and Settling Defendant (the
22 "Parties") stipulate that this Court has jurisdiction over the allegations of violations contained in the
23 Complaint and personal jurisdiction over each of the Settling Defendant as to the acts alleged in the
24 Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to
25 enter this Consent Judgment as a full and final resolution of all claims which were or could have
26 been raised in the Complaint based on the facts alleged therein with respect to Covered Products
27 manufactured, distributed, and/or sold by Settling Defendant.
28

1 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by the
2 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
3 Consent Judgment constitute or be construed as an admission by the Parties of any fact, conclusion
4 of law, issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive
5 or impair any right, remedy, argument or defense the Parties may have in any other pending or
6 future legal proceedings. This Consent Judgment is the product of negotiation and compromise and
7 is accepted by the Parties solely for purposes of settling, compromising, and resolving issues
8 disputed in this Action.

9 **2. DEFINITIONS**

10 2.1 The "Complaint" means the operative complaint in the above-captioned matter.

11 2.2 "Covered Products" means kombucha drinks manufactured, distributed or sold by
12 Settling Defendant other than kombucha drinks that are sold as alcoholic beverages.

13 2.3 "Effective Date" means the date on which notice of entry of this Consent Judgment
14 by the Court is served upon Settling Defendant.

15 2.4 "Expiration Date" means the best-by or sell-by date of a Covered Product.

16 2.5 "Compliance Level" means less than 0.5% Alcohol by volume.

17 2.6 "Type" means flavor. To the extent different flavors of Covered Products contain
18 identical ingredients, such products will be treated as the same Type for purposes of this Consent
19 Judgment.

20 **3. INJUNCTIVE RELIEF**

21 3.1 **Alcohol Content of Covered Products.** As of the Effective Date, Settling
22 Defendant shall not sell or offer for sale a Covered Product manufactured on or after the Effective
23 Date to California consumers if that Covered Product contains more than 0.5% Alcohol by volume
24 as measured at any time between the production date and the expiration date of the Covered Product
25 according to the results of the testing described in Section 3.2 below.

26 3.2 **Testing.** In order to ensure that the Covered Products meet the Compliance Level,
27 Settling Defendant shall conduct random testing of Covered Products from its production facility
28 and take the follow-up actions described in this section ("Validation Testing").

1 3.2.1 Covered Products To Be Tested. Validation Testing shall be performed
2 on a quarterly basis for each Type of Covered Product Settling Defendant manufacture or arrange to
3 be manufactured on or after the Effective Date; such Validation Testing shall be performed on
4 samples drawn randomly from single production lots of each Type of Covered Product
5 manufactured during that quarter. Three (3) samples of each Type of Covered Product shall be
6 tested at the beginning and end of the Covered Product's shelf-life, extending from a Covered
7 Product's manufacturing date to its expiration or "best-by" date (the "Testing Period").

8 3.2.2 Methods of Testing. Settling Defendant shall conduct Alcohol by
9 Volume Validation Testing pursuant to one of the following methods: (1) Ethanol Analysis by
10 Headspace Gas Chromatography with Mass Spectroscopy Detection; or (2) Ethanol Analysis by
11 Headspace Gas Chromatography with Flame Ionization Detector (AOAC 2016.12). Additionally,
12 Settling Defendant may use any other methodology for alcohol testing of kombucha products that is
13 accepted for First Action by the AOAC in the future.

14 3.2.3 Laboratories Conducting Validation Testing. Any Validation Testing
15 shall be performed by an independent, accredited third party laboratory.

16 3.2.4 Covered Products That Exceed Compliance Level. If the Validation
17 Testing result indicates that any of the tests for a type of a Covered Product exceeds the Compliance
18 Level, Settling Defendant shall, within ten days, select another production lot of the same Type and
19 sample three additional bottles for testing ("Secondary Testing"). Should this Secondary Testing
20 show an exceedance of a Compliance Level, Settling Defendant shall, within 10 days of the
21 exceedance: (a) notify CEH as set forth in Section 8; and (b) undertake a root cause analysis of the
22 formulation, production and storage of that Type of Covered Product to determine the cause of the
23 exceedance, and shall institute appropriate corrective measures to avoid future exceedances as
24 measured by the quarterly Validation Testing. Settling Defendant must provide CEH with notice
25 regarding the corrective measures taken.

26 3.2.5 Records. The testing reports and results of the Validation Testing and
27 Secondary Testing performed pursuant to this Consent Judgment shall be retained by Settling
28

1 Defendant for two (2) years and made available to CEH upon reasonable request, but no more than
2 twice per year.

3 **4. ENFORCEMENT**

4 4.1 CEH may, by motion or application for an order to show cause before the Superior
5 Court of the County of Alameda, enforce the terms and conditions contained in this Consent
6 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
7 above, CEH shall provide Settling Defendant with a Notice of Violation setting forth the basis for
8 the alleged violation. The Parties shall then meet and confer regarding the basis for CEH's
9 anticipated motion or application in an attempt to resolve it informally. Should such attempts at
10 meeting and conferring fail, CEH may file its enforcement motion or application. In ruling on any
11 motion to enforce the terms of this section, the Court may, in addition to ordering compliance with
12 the terms of this Judgment, employ such remedies as necessary to ensure compliance with
13 Proposition 65 including, but not limited to, requiring Settling Defendant to provide warnings.
14 Should CEH prevail on any motion or application to enforce a material violation of this Consent
15 Judgment under this Section, CEH shall be entitled to its reasonable attorneys' fees and costs
16 incurred as a result of such motion or application. Should Settling Defendant prevail on any motion
17 or application under this Section, Settling Defendant may be awarded their reasonable attorneys'
18 fees and costs as a result of such motion or application upon a finding by the court that CEH's
19 prosecution of the motion or application was not in good faith.

20 **5. PAYMENTS**

21 5.1 **Payments by Settling Defendant.** Within fifteen (15) calendar days of the Effective
22 Date, Settling Defendant shall pay the total sum of \$25,000 as a settlement payment as further set
23 forth in this Section.

24 5.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
25 be paid in five (5) separate checks in the amounts specified below and delivered as set forth below.
26 Any failure by Settling Defendant to comply with the payment terms herein shall be subject to a
27 joint and several stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each
28 day the full payment is not received after the applicable payment due date set forth in Section 5.1.

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 Defendant shall be allocated as set forth below between the following categories and made payable as follows:

5.2.1 \$3,300 as a civil penalty 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 \$2,475 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 \$825 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 \$2,470 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, which is used to support CEH programs and activities that seek to educate the public about alcohol and other toxic chemicals in food, to work with the food industry and agriculture interests to reduce exposure to alcohol and other toxic

chemicals in food, and to thereby reduce the public health impacts and risks of exposure to acrylamide 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 (30) 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.

5.2.3 \$19,230 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) \$16,150 payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175; and (b) \$3,080 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.

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

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$2,475	OEHHA per Section 5.2.1
Center For Environmental Health	Penalty	\$825	LLG
Center For Environmental Health	ASP	\$2,470	LLG
Lexington Law Group	Fee and Cost	\$16,150	LLG
Center For Environmental Health	Fee and Cost	\$3,080	LLG

5.2.5 Notwithstanding the provisions of the Enforcement of Judgments Law and Code of Civil Procedure § 780.160, in the event that Settling Defendant do not comply fully

with its payment obligations under this Section 5, in addition to any other enforcement mechanism available to CEH, CEH may seek an order requiring Settling Defendant to submit a debtor's examination in the Alameda County Superior Court. In the event that Settling Defendant fail to submit to any such debtor's examination 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.

6.3 Change in Proposition 65. In the event that: (1) Proposition 65 or its implementing regulations (including but not limited to any safe harbor "no significant risk level" and/or "maximum allowable dose level" or any "alternative risk level" adopted by regulation or California Supreme Court decision) are changed from their terms as they exist on the date of entry of this Consent Judgment in a manner that impacts the applicability of Proposition 65 to any of the Covered Products; (2) after entry of this Consent Judgment, OEHHA takes some other final regulatory action for beverages similar to the Covered Products and such final regulatory action impacts the applicability of Proposition 65 to the Covered Products; (3) after entry of this Consent Judgment, OEHHA adopts a regulation that eliminates the requirement for warnings for alcoholic beverages; or (4) there is a full or partial repeal of Proposition 65 through legislative, regulatory or judicial means that affects Proposition 65's applicability to the Covered Products, then either party may seek to modify this Consent Judgment.

7. CLAIMS COVERED AND RELEASE

7.1 This Consent Judgment is a full, final and binding resolution between CEH on behalf of itself and the public interest and Settling Defendant and Settling Defendant's 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 directly or indirectly distribute or sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors and licensees ("Downstream Defendant Releasees"), of any violation of Proposition 65 based on failure to warn about alleged exposure to Alcohol contained in Covered Products that were sold, distributed or offered for sale by Settling Defendant prior to the Effective Date.

7.2 CEH, for itself, its agents, successors and assigns, releases, waives, and forever discharges any and all claims against Settling Defendant, 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 Alcohol arising in connection with Covered Products manufactured by or for Settling Defendant prior to the Effective Date .

7.3 Compliance with the terms of this Consent Judgment by Settling Defendant shall constitute compliance with Proposition 65 by Settling Defendant, their Defendant Releasees and their Downstream Defendant Releasees with respect to any alleged failure to warn about Alcohol in Covered Products manufactured, distributed or sold by Settling Defendant after the Effective Date for as long as Settling Defendant continue testing in accordance with Section 3.2.

8. PROVISION OF NOTICE

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

Mark N. Todzo
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117
mtodzo@lexlawgroup.com

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

David Kwasniewski
Braun Hagey & Borden
352 California Street, 10th Floor
San Francisco, CA 94104
kwasniewski@braunhagey.com

8.3 Any Party may modify the person and 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 as a contract upon the date signed by CEH and Settling Defendant, whichever is later, provided however, that CEH shall also 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 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.

11.2 Nothing in this Section 11 shall preclude a party from seeking an award of sanctions pursuant to law.

12. ENTIRE AGREEMENT

12.1 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 or to bind any of the Parties hereto only to the extent that they are expressly incorporated herein. No supplementation, modification, waiver, or

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

5 **13. SUBMISSION OF REPORTS AND DATA TO CEH**

6 13.1 For any report or information that Settling Defendant submit to CEH pursuant to this
7 Consent Judgment, Settling Defendant may make such a submission subject to the terms of the
8 protective order previously entered in this action and the protective order's terms shall apply to the
9 report or information as if it were still in effect.

10 **14. RETENTION OF JURISDICTION**

11 14.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent
12 Judgment.

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

14 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
15 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute
16 the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

18 16.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
19 against an entity that is not a Settling Defendant on terms that are different than those contained in
20 this Consent Judgment.

21 **17. EXECUTION IN COUNTERPARTS**

22 17.1 The stipulations to this Consent Judgment may be executed in counterparts and by
23 means of facsimile or portable document format (pdf), which taken together shall be deemed to
24 constitute one document.

1
2 **IT IS SO ORDERED, ADJUDGED, AND**
3 **DECREED:**

4
5 Dated: 11-9-, 2021



Judge of the Superior Court of the State of California
EVELIO GRACE

1 **IT IS SO STIPULATED:**

2
3 Dated: August 19, 2021

CENTER FOR ENVIRONMENTAL HEALTH

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6 

7
8 Michael Green
Chief Executive Officer

9
10
11 Dated: 8/19, 2021

HUMM KOMBUCHA LLC

12 DocuSigned by:
13 

14 Signature

15 Matt Witherell

16 Printed Name

17 President & CEO

18 Title

19 Dated: August 19, 2021

BRAUNHAGEY & BORDEN LLP

20
21 

22 David H. Kwasniewski

23 Attorney for Defendant
24 Humm Kombucha, LLC