

FILED  
ALAMEDA COUNTY

NOV 09 2021

CLERK OF THE SUPERIOR COURT

By  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 GT'S LIVING FOODS, LLC AND  
MILLENNIUM PRODUCTS, INC.

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"), GT's Living Foods, LLC and Millennium Products,  
4     Inc., which was a predecessor of GT's Living Foods, LLC (together "Settling Defendants"). The  
5     Parties enter into this Consent Judgment to settle certain claims asserted by CEH against Settling  
6     Defendants as set forth in the operative complaint ("Complaint") in the above-captioned matter as  
7     amended by this Consent Judgment. This Consent Judgment covers Kombucha and Kefir drinks  
8     sold by Settling Defendants other than those sold as alcoholic beverages that have been or will be  
9     sold or offered for sale to California consumers ("Covered Products").

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

17            1.3     On November 10, 2020, CEH provided a 60-day Notice of Violation under  
18     Proposition 65 to the California Attorney General, the District Attorneys of every county in  
19     California, the City Attorneys of every California city with a population greater than 750,000 and  
20     Settling Defendants, alleging that, by selling the Covered Kefir Products, Settling Defendants  
21     violated Proposition 65 by exposing persons to Alcohol without first providing a clear and  
22     reasonable Proposition 65 warning.

23            1.4     Settling Defendants are each a corporation or other business entity that  
24     manufactures, distributes, sells or offers for sale Covered Products that are sold or offered for sale  
25     or has done so in the past.

26            1.5     On December 20, 2019, CEH filed the Complaint in the above-captioned matter  
27     naming Settling Defendants as defendants.  
28

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

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

## 18     **2.     DEFINITIONS**

19           2.1     The "Complaint" means the operative complaint in the above-captioned matter.

20           2.2     "Covered Kombucha Products" means kombucha drinks manufactured, distributed  
21     or sold by Settling Defendants other than kombucha drinks that are sold as alcoholic beverages.

22           2.3     "Covered Kefir Products" means kefir drinks manufactured, distributed or sold by  
23     Settling Defendants other than kefir drinks that are sold as alcoholic beverages.

24           2.4     "Covered Products" means Covered Kombucha Products and Covered Kefir  
25     Products.

26           2.5     "Effective Date" means the date on which notice of entry of this Consent Judgment  
27     by the Court is served upon Settling Defendants.

28           2.6     "Expiration Date" means the best-by or sell-by date of a Covered Product.

1           2.7     “Compliance Level” means less than 0.5% Alcohol by volume.

2           2.8     “Type” means flavor. To the extent different flavors of Covered Products contain  
3 identical ingredients, such products will be treated as the same Type for purposes of this Consent  
4 Judgment.

5     **3.     INJUNCTIVE RELIEF**

6           3.1     **Alcohol Content of Covered Products.** As of the Effective Date, Settling  
7 Defendants shall not sell or offer for sale a Covered Product manufactured on or after the Effective  
8 Date to California consumers if that Covered Product contains more than 0.5% Alcohol by volume  
9 as measured at any time between the production date and the expiration date of the Covered Product  
10 according to the results of the testing described in Section 3.2 below.

11          3.2     **Testing.** In order to ensure that the Covered Products meet the Compliance Level,  
12 Settling Defendants shall conduct random testing of Covered Products from its production facility  
13 and take the follow-up actions described in this section (“Validation Testing”).

14               3.2.1     Covered Products To Be Tested. Validation Testing shall be performed  
15 on a quarterly basis for each Type of Covered Product Settling Defendants manufacture or arrange  
16 to be manufactured on or after the Effective Date; such Validation Testing shall be performed on  
17 samples drawn randomly from single production lots of each Type of Covered Product  
18 manufactured during that quarter. Three (3) samples of each Type of Covered Product shall be  
19 tested at the beginning and end of the Covered Product’s shelf-life, extending from a Covered  
20 Product’s manufacturing date to its expiration or “best-by” date (the “Testing Period”).

21               3.2.2     Methods of Testing. Settling Defendants shall conduct Alcohol by  
22 Volume Validation Testing pursuant to one of the following methods: (1) Ethanol Analysis by  
23 Headspace Gas Chromatography with Mass Spectroscopy Detection; or (2) Ethanol Analysis by  
24 Headspace Gas Chromatography with Flame Ionization Detector (AOAC 2016.12). Additionally,  
25 Settling Defendants may use any other methodology for alcohol testing of kombucha and/or kefir  
26 products that is accepted for First Action by the AOAC in the future.

27               3.2.3     Laboratories Conducting Validation Testing. Any Validation Testing  
28 shall be performed by an independent, accredited third party laboratory.

1                    3.2.4        Covered Products That Exceed Compliance Level. If the Validation  
2 Testing result indicates that any of the tests for a type of a Covered Product exceeds the Compliance  
3 Level, Settling Defendants shall, within ten days, select another production lot of the same Type  
4 and sample three additional bottles for testing ("Secondary Testing"). Should this Secondary  
5 Testing show an exceedance of a Compliance Level, Settling Defendants shall, within 10 days of  
6 the exceedance: (a) notify CEH as set forth in Section 8; and (b) undertake a root cause analysis of  
7 the formulation, production and storage of that Type of Covered Product to determine the cause of  
8 the exceedance, and shall institute appropriate corrective measures to avoid future exceedances as  
9 measured by the quarterly Validation Testing. Settling Defendants must provide CEH with notice  
10 regarding the corrective measures taken.

11                    3.2.5        Records. The testing reports and results of the Validation Testing and  
12 Secondary Testing performed pursuant to this Consent Judgment shall be retained by Settling  
13 Defendants for four (4) years and made available to CEH upon reasonable request, but no more than  
14 twice per year.

#### 15        **4.        ENFORCEMENT**

16                    4.1        CEH may, by motion or application for an order to show cause before the Superior  
17 Court of the County of Alameda, enforce the terms and conditions contained in this Consent  
18 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3  
19 above, CEH shall provide Settling Defendants with a Notice of Violation setting forth the basis for  
20 the alleged violation. The Parties shall then meet and confer regarding the basis for CEH's  
21 anticipated motion or application in an attempt to resolve it informally. Should such attempts at  
22 meeting and conferring fail, CEH may file its enforcement motion or application. In ruling on any  
23 motion to enforce the terms of this section, the Court may, in addition to ordering compliance with  
24 the terms of this Judgment, employ such remedies as necessary to ensure compliance with  
25 Proposition 65 including requiring Settling Defendants to provide alcohol-related warning signage  
26 or notifications to retailers or distributors. Should CEH prevail on any motion or application to  
27 enforce a material violation of this Consent Judgment under this Section, CEH shall be entitled to  
28 its reasonable attorneys' fees and costs incurred as a result of such motion or application. Should

1 Settling Defendants prevail on any motion or application under this Section, Settling Defendants  
2 may be awarded their reasonable attorneys' fees and costs as a result of such motion or application  
3 upon a finding by the court that CEH's prosecution of the motion or application was not in good  
4 faith.

5 **5. PAYMENTS**

6 **5.1 Payments by Settling Defendants.** Within fifteen (15) calendar days of the  
7 Effective Date, Settling Defendants shall jointly pay the total sum of \$90,000 as a settlement  
8 payment as further set forth in this Section.

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

18 **5.2.1** \$12,180 as a civil penalty pursuant to Health & Safety Code §  
19 25249.7(b). The civil penalty payment shall be apportioned in accordance with Health & Safety  
20 Code § 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health  
21 Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty payment  
22 for \$9,135 shall be made payable to OEHHA and associated with taxpayer identification number  
23 68-0284486. This payment shall be delivered as follows:

24 For United States Postal Service Delivery:

25 Attn: Mike Gyurics

26 Fiscal Operations Branch Chief  
27 Office of Environmental Health Hazard Assessment  
28 P.O. Box 4010, MS #19B  
Sacramento, CA 95812-4010

1 For Non-United States Postal Service Delivery:

2 Attn: Mike Gyurics  
3 Fiscal Operations Branch Chief  
4 Office of Environmental Health Hazard Assessment  
5 1001 I Street, MS #19B  
6 Sacramento, CA 95814

7 The CEH portion of the civil penalty payment for \$3,045 shall be made  
8 payable to the Center for Environmental Health and associated with taxpayer identification number  
9 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San  
10 Francisco, CA 94117.

11 5.2.2 \$9,130 as an Additional Settlement Payment ("ASP") to CEH pursuant  
12 to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH  
13 intends to place these funds in CEH's Toxics in Food Fund, which is used to support CEH programs  
14 and activities that seek to educate the public about alcohol and other toxic chemicals in food, to  
15 work with the food industry and agriculture interests to reduce exposure to alcohol and other toxic  
16 chemicals in food, and to thereby reduce the public health impacts and risks of exposure to  
17 acrylamide and other toxic chemicals in food sold in California. CEH shall obtain and maintain  
18 adequate records to document that ASPs are spent on these activities and CEH agrees to provide  
19 such documentation to the Attorney General within thirty (30) days of any request from the  
20 Attorney General. The payment pursuant to this Section shall be made payable to the Center for  
21 Environmental Health and associated with taxpayer identification number 94-3251981. This  
22 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA  
23 94117.

24 5.2.3 \$68,690 as a reimbursement of a portion of CEH's reasonable attorneys'  
25 fees and costs. The attorneys' fees and cost reimbursement shall be made in two separate checks as  
26 follows: (a) \$57,850 payable to the Lexington Law Group and associated with taxpayer  
27 identification number 94-3317175; and (b) \$10,840 payable to the Center for Environmental Health  
28 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.



1                    5.2.4    To summarize, Settling Defendants shall deliver checks made out to the  
2 payees and in the amounts set forth below:

3

4

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$9,135	OEHHA per Section 5.2.1
Center For Environmental Health	Penalty	\$3,045	LLG
Center For Environmental Health	ASP	\$9,130	LLG
Lexington Law Group	Fee and Cost	\$57,850	LLG
Center For Environmental Health	Fee and Cost	\$10,840	LLG

12

13                    5.2.5    Notwithstanding the provisions of the Enforcement of Judgments Law  
14 and Code of Civil Procedure § 780.160, in the event that Settling Defendants do not comply fully  
15 with its payment obligations under this Section 5, in addition to any other enforcement mechanism  
16 available to CEH, CEH may seek an order requiring Settling Defendants to submit a debtor's  
17 examination in the Alameda County Superior Court. In the event that Settling Defendants fail to  
18 submit to any such debtor's examination ordered by the Court, CEH may seek an order holding  
19 Settling Defendants in contempt of Court.

20

21    **6.        MODIFICATION AND DISPUTE RESOLUTION**

22                    6.1    **Modification.** This Consent Judgment may be modified from time to time by  
23 express written agreement of the Parties, with the approval of the Court, or by an order of this Court  
24 upon motion and in accordance with law. The Parties agree that if Proposition 65 or its  
25 implementing regulations (including but not limited to any "safe harbor" set forth in the regulations,  
26 or any "alternative risk level" adopted by regulation or court decision) are implemented or amended  
27 from their terms as they exist on the date of entry of this Consent Judgment in a manner that  
28 impacts the 0.5% ABV set forth herein, or if OEHHA or a state or federal department or agency,



1 including but not limited to California's Alcohol Beverage Control ("ABC") or the U.S. Department  
2 of the Treasury's Alcohol, and Tobacco Tax Trade Bureau ("TTB") takes some other regulatory  
3 action pertaining to the Covered Products in a manner that impacts the 0.5% ABV level, or that  
4 determines that warnings are not required on kombucha, kefir or similar products then Settling  
5 Defendants may seek to modify or terminate this Consent Judgment. Similarly, if a court of  
6 competent jurisdiction or an agency of the federal government, including, but not limited to, the  
7 U.S. Food and Drug Administration, states through any final decision, guidance, regulation or  
8 legally binding act that federal law has preemptive effect on any of the requirements of this Consent  
9 Judgment, then Settling Defendants may seek to modify or terminate this Consent Judgment. The  
10 Parties recognize that the injunctive relief provisions set forth herein are based on a compromise of  
11 a number of issues, and that potential changes to warning requirements related to Alcohol as  
12 described above would not necessarily entitle a Party to a modification of the terms of this Consent  
13 Judgment.

14       **6.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment  
15 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to  
16 modify the Consent Judgment.

## 17       **7. CLAIMS COVERED AND RELEASE**

18       **7.1** This Consent Judgment is a full, final and binding resolution between CEH on behalf  
19 of itself and the public interest and Settling Defendants and Settling Defendants' parents,  
20 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,  
21 agents, shareholders, successors, assigns, and attorneys ("Defendant Releasees"), and all entities to  
22 which Settling Defendants directly or indirectly distribute or sell Covered Products, including but  
23 not limited to distributors, wholesalers, customers, retailers, franchisees, licensors and licensees  
24 ("Downstream Defendant Releasees"), of any violation of Proposition 65 based on failure to warn  
25 about alleged exposure to Alcohol contained in Covered Products that were sold, distributed or  
26 offered for sale by Settling Defendants prior to the Effective Date.

27       **7.2** CEH, for itself, its agents, successors and assigns, releases, waives, and forever  
28 discharges any and all claims against Settling Defendants, Defendant Releasees, and Downstream

1 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or common  
2 law claims that have been or could have been asserted by CEH individually or in the public interest  
3 regarding the failure to warn about exposure to Alcohol arising in connection with Covered  
4 Products manufactured by or for Settling Defendants prior to the Effective Date .

5 7.3 Compliance with the terms of this Consent Judgment by Settling Defendants shall  
6 constitute compliance with Proposition 65 by Settling Defendants, their Defendant Releasees and  
7 their Downstream Defendant Releasees with respect to any alleged failure to warn about Alcohol in  
8 Covered Products manufactured, distributed or sold by Settling Defendants after the Effective Date  
9 for as long as Settling Defendants continue testing in accordance with Section 3.2.

## 10 **8. PROVISION OF NOTICE**

11 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the notice  
12 shall be sent by first class and electronic mail to:

13 Mark N. Todzo  
14 Lexington Law Group  
15 503 Divisadero Street  
16 San Francisco, CA 94117  
17 mtodzo@lexlawgroup.com

18 8.2 When Settling Defendants are entitled to receive any notice under this Consent  
19 Judgment, the notice shall be sent by first class and electronic mail to:

20 Scott M. Voelz  
21 O'Melveny & Myers LLP  
22 400 South Hope Street, 18<sup>th</sup> Floor  
23 Los Angeles, CA 90071  
24 svoelz@omm.com

25 8.3 Any Party may modify the person and address to whom the notice is to be sent by  
26 sending the other Party notice by first class and electronic mail.

## 27 **9. COURT APPROVAL**

28 9.1 This Consent Judgment shall become effective as a contract upon the date signed by  
CEH and Settling Defendants, whichever is later, provided however, that CEH shall also prepare  
and file a Motion for Approval of this Consent Judgment and Settling Defendants shall support  
approval of such Motion.

1           9.2    If this Consent Judgment is not entered by the Court, it shall be of no force or effect  
2 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

3   **10.   GOVERNING LAW AND CONSTRUCTION**

4           10.1   The terms of this Consent Judgment shall be governed by the laws of the State of  
5 California.

6   **11.   ATTORNEYS' FEES**

7           11.1   A Party who unsuccessfully brings or contests an action arising out of this Consent  
8 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs.

9           11.2   Nothing in this Section 11 shall preclude a party from seeking an award of sanctions  
10 pursuant to law.

11   **12.   ENTIRE AGREEMENT**

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

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

27           13.1   For any report or information that Settling Defendants submit to CEH pursuant to  
28 this Consent Judgment, Settling Defendants may make such a submission subject to the terms of the

1 protective order previously entered in this action and the protective order's terms shall apply to the  
2 report or information as if it were still in effect.

3 **14. RETENTION OF JURISDICTION**

4 14.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent  
5 Judgment.

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

7 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized  
8 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute  
9 the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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


11 16.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim  
12 against an entity that is not a Settling Defendants on terms that are different than those contained in  
13 this Consent Judgment.

14 **17. EXECUTION IN COUNTERPARTS**

15 17.1 The stipulations to this Consent Judgment may be executed in counterparts and by  
16 means of facsimile or portable document format (pdf), which taken together shall be deemed to  
17 constitute one document.

18  
19  
20 **IT IS SO ORDERED, ADJUDGED, AND  
DECREED:**

21  
22  
23  
24 Dated: 11-9-, 2021

25   
26 \_\_\_\_\_  
27 Judge of the Superior Court of the State of California  
28 EVELIO BRILLO

1 **IT IS SO STIPULATED:**

2  
3 Dated: August 19, 2021

**CENTER FOR ENVIRONMENTAL HEALTH**



5 Michael Green  
6 Chief Executive Officer

7  
8 Dated: August 12, ~~2020~~ 2021

**GT'S LIVING FOODS, LLC**



10 Signature

11 George Thomas Dave  
12 Printed Name

13 Chief Executive Officer  
14 Title

15  
16 Dated: August 12, ~~2020~~ 2021

**MILLENNIUM PRODUCTS, INC.**



19 Signature

20 George Thomas Dave  
21 Printed Name

22 Chief Executive Officer  
23 Title