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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

CENTER FOR ENVIRONMENTAL HEALTH,

Plaintiff,

vs.

FAYEON DISTRIBUTORS, INC., *et al.*,

Defendants.

Case No. CGC-12-526396

**[PROPOSED] CONSENT JUDGMENT
AS TO AMERICAN IMPORTING
COMPANY, INC.**

1. **INTRODUCTION**

1.1 The Parties to this Consent Judgment are the Center For Environmental Health, a California non-profit corporation (“CEH”), and American Importing Company, Inc. dba Amport (“Settling Defendant”). CEH and Settling Defendant are referred to herein as the Parties. The Parties enter into this Consent Judgment to settle claims regarding the lead content of crystalized

1 ginger snack food (“Covered Products”) asserted by CEH against Settling Defendant as set forth in
2 the operative complaint (“Complaint”) in the above-captioned matter.

3 1.2 On October 8, 2012, CEH served a 60-day Notices of Violation under Proposition
4 65, alleging that Settling Defendant violated Proposition 65 by exposing persons to lead and lead
5 compounds (“Lead”) contained in Covered Products without first providing a clear and reasonable
6 Proposition 65 warning.

7 1.3 Settling Defendant is a corporation that manufactures, distributes, sells or offers for
8 sale Covered Products that are offered for sale in the State of California.

9 1.4 On November 27, 2012, CEH filed the original Complaint in this matter. On
10 December 20, 2012, CEH filed the operative First Amended Complaint in this matter. The First
11 Amended Complaint has since been amended to add additional named defendants.

12 1.5 For purposes of this Consent Judgment only, CEH and Settling Defendant stipulate
13 that this Court has jurisdiction over the allegations of violations contained in the Complaint and
14 personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is
15 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
16 Judgment as a full and final resolution of all claims which were or could have been raised in the
17 Complaint based on the facts alleged therein with respect to the failure to warn about Lead
18 contained in Covered Products manufactured, distributed, and/or sold by Settling Defendant.

19 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by the
20 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
21 Consent Judgment constitute or be construed as an admission by the Parties of any fact, conclusion
22 of law, issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive or
23 impair any right, remedy, argument or defense the Parties may have in any other pending or future
24 legal proceedings. This Consent Judgment is the product of negotiation and compromise and is
25 accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed
26 in this Action.

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Specification Compliance Date.** To the extent it has not already done so, no more
3 than fifteen days after the date of entry of this Consent Judgment (“Effective Date”), Settling
4 Defendant shall provide the reformulation specification set in Section 2.2 to each supplier of
5 Covered Products and shall instruct each such Covered Products supplier to provide it with Covered
6 Products that comply with the reformulation specification set in Section 2.2. If in the future a
7 Settling Defendant purchases Covered Products from a new third party that it has not previously
8 provided with instructions regarding the reformulation specification set in Section 2.2, the Settling
9 Defendant shall provide the reformulation specification set in Section 2.2 prior to placing an initial
10 order for Covered Products and instruct the new Covered Products supplier to provide it with
11 Covered Products that comply with the reformulation specification set in Section 2.2. Settling
12 Defendant shall retain records of communications sent to and received from suppliers that are
13 related to the requirement of this Section 2.1 for a period of five years from the Effective Date.

14 **2.2 Reformulation of Covered Products.** After the Effective Date, Settling Defendant
15 shall not purchase, manufacture, ship, sell or offer for sale in California any Covered Product that
16 contains a concentration of more than seventeen (17) parts per billion (“ppb”) Lead by weight, such
17 concentration to be determined by use of a test performed by an accredited laboratory using
18 inductively coupled plasma mass spectrometry (ICP-MS) equipment with a level of detection of at
19 least ten (10) ppb that meets standard laboratory QA/QC requirements (the “Reformulation Level”).
20 Subject to Section 7 below, no allocation is made for naturally occurring Lead in food pursuant to
21 22 Cal. Code of Regs. §25501.

22 **2.3 Market Withdrawal of Covered Products.** Settling Defendant represents and
23 warrants that it is no longer selling the Covered Products identified on Exhibit A (the “Withdrawn
24 Covered Products”) to stores and/or customers in California. Settling Defendant further represents
25 and warrants that it has received confirmation from the retail entity to whom Settling Defendant
26 sold the Withdrawn Covered Products that said products are no longer available for retail sale in
27 California.

1 2.4 **Supplier and Product Information.** On or before December 15, 2013, Settling
2 Defendant shall provide full and complete information and supporting documentation as to the
3 Covered Products as further specified on Exhibit B. Such information shall be provided and attested
4 to under oath by an authorized officer of Settling Defendant. Settling Defendant shall cooperate and
5 work in good faith to promptly answer any follow-up questions or requests for supporting
6 documentation from CEH about the information and documents to be provided pursuant to this
7 section.

8 **3. ENFORCEMENT**

9 3.1 **Enforcement Procedures.** Prior to bringing any motion or order to show cause to
10 enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the violating
11 party thirty (30) days advanced written notice of the alleged violation. The Parties shall meet and
12 confer during such thirty (30) day period in an effort to try to reach agreement on an appropriate
13 cure for the alleged violation. After such thirty (30) day period, the Party seeking to enforce may,
14 by new action, motion or order to show cause before the Superior Court of San Francisco, seek to
15 enforce the terms and conditions contained in this Consent Judgment.

16 **4. PAYMENTS**

17 4.1 **Payments by Settling Defendant.** Within 15 days of the entry of this Consent
18 Judgment, Settling Defendant shall pay the sum set forth on Exhibit A as further set forth in this
19 Section and on Exhibit A.

20 4.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
21 be paid in four separate checks in the amounts specified on Exhibit A and delivered as set forth
22 below. Any failure by Settling Defendant to comply with the payment terms herein shall be subject
23 to a stipulated late fee in the amount of \$100 for each day after the delivery date the payment is
24 received. The late fees required under this Section shall be recoverable, together with reasonable
25 attorneys' fees, in an enforcement proceeding brought pursuant to Section 3 of this Consent
26 Judgment. The funds paid by Settling Defendant shall be allocated as set forth on Exhibit A
27 between the following categories and made payable as follows:
28

1 4.2.1 A civil penalty pursuant to Health & Safety Code § 25249.7(b). The civil
2 penalty payment shall be apportioned in accordance with Health & Safety Code § 25249.12 (25% to
3 CEH and 75% to the State of California's Office of Environmental Health Hazard Assessment
4 (“OEHHA”). Accordingly, the OEHHA portion of the civil penalty payment for the amount
5 designated on Exhibit A as “Civil Penalty OEHHA Portion” shall be made payable to OEHHA and
6 associated with taxpayer identification number 68-0284486. This payment shall be delivered as
7 follows:

8 For United States Postal Service Delivery:

9 Attn: Mike Gyurics
10 Fiscal Operations Branch Chief
11 Office of Environmental Health Hazard Assessment
12 P.O. Box 4010, MS #19B
13 Sacramento, CA 95812-4010

14 For Non-United States Postal Service Delivery:

15 Attn: Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 1001 I Street, MS #19B
19 Sacramento, CA 95814

20 A copy of the correspondence and payment materials shall be sent to Plaintiff’s counsel.

21 The CEH portion of the civil penalty payment for the amount designated on Exhibit A as
22 “Civil Penalty CEH Portion” shall be made payable to the Center For Environmental Health and
23 associated with taxpayer identification number 94-3251981. This payment shall be delivered to
24 Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

25 4.2.2 A payment in lieu of civil penalty to CEH pursuant to Health & Safety Code
26 § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH shall use such funds to
27 continue its work educating and protecting people from exposures to toxic chemicals, including
28 heavy metals. In addition, as part of its Community Environmental Action and Justice Fund, CEH
will use four percent of such funds to award grants to grassroots environmental justice groups
working to educate and protect people from exposures to toxic chemicals. The method of selection
of such groups can be found at the CEH web site at www.ceh.org/justicefund. The payment
pursuant to this Section shall be made payable to the Center For Environmental Health and

1 associated with taxpayer identification number 94-3251981. This payment shall be delivered to
2 Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

3 4.2.3 A reimbursement of a portion of CEH’s reasonable attorneys’ fees and costs.
4 The attorneys’ fees and cost reimbursement check shall be made payable to the Lexington Law
5 Group and associated with taxpayer identification number 94-3317175. This payment shall be
6 delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

7 **5. MODIFICATION AND DISPUTE RESOLUTION**

8 5.1 **Modification.** This Consent Judgment may be modified from time to time by
9 express written agreement of the Parties, with the approval of the Court, or by an order of this Court
10 upon motion and in accordance with law.

11 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
12 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
13 modify the Consent Judgment.

14 **6. CLAIMS COVERED AND RELEASE**

15 6.1 This Consent Judgment is a full, final and binding resolution between CEH on behalf
16 of itself and the public interest and Settling Defendant, and its parents, subsidiaries, affiliated
17 entities that are under common ownership, directors, officers, employees, and attorneys (“Defendant
18 Releasees”), and all downstream entities to which Settling Defendant distributes or sells Covered
19 Products, including but not limited to Albertson’s LLC and distributors, wholesalers, customers,
20 retailers, franchisees, licensors and licensees (“Downstream Defendant Releasees”), of any violation
21 of Proposition 65 based on failure to warn about alleged exposure to Lead contained in Covered
22 Products that were sold by a Settling Defendant prior to the Effective Date. This Consent Judgment
23 only addresses Covered Products and nothing in this Consent Judgment covers, releases, waives,
24 discharges or otherwise affects CEH or any other entities ability to pursue claims under Proposition
25 65 or otherwise related to lead in ginger or plum snack food other than Covered Products.

26 6.2 CEH, for itself releases, waives, and forever discharges any and all claims against
27 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
28 violation of Proposition 65 or any other statutory or common law claims that has been or could have

1 been asserted in the public interest regarding the failure to warn about exposure to Lead arising in
2 connection with Covered Products manufactured, distributed or sold by Settling Defendant prior to
3 the Effective Date.

4 6.3 Compliance with the terms of this Consent Judgment by Settling Defendant and
5 Settling Defendant's Defendant Releasees shall constitute compliance with Proposition 65 by
6 Settling Defendant, Settling Defendant's Defendant Releasees and Settling Defendant's
7 Downstream Defendant Releasees with respect to any alleged failure to warn about Lead in
8 Covered Products manufactured, distributed or sold by Settling Defendant after the Effective Date.

9 **7. EFFECT OF SUBSEQUENT SETTLEMENTS**

10 7.1 The parties contemplate that future Consent Judgments entered with other defendants
11 including farmers, processors and manufacturers may involve a higher Reformulation Level due to
12 an allocation of Lead that is naturally occurring under 22 Cal. Code Regs. §22501. This higher
13 Reformulation Level may also include additional injunctive requirements that will ensure that the
14 Lead in the Covered Products is not avoidable by good agricultural or good manufacturing practices
15 and that the producer, manufacturer, distributor, or holder of the food is at all times utilizing quality
16 control measures that reduce natural occurring Lead to the lowest level currently feasible, as such
17 term is defined in 22 Cal. Code Regs. §22501.

18 7.2 Accordingly, if on or before January 1, 2019, the Court enters a Judgment or a
19 Consent Judgment to which CEH is a party that resolves Proposition 65 claims asserted by CEH
20 regarding failure to warn about Lead in Covered Products that: (i) sets forth a Reformulation Level
21 containing an allocation of Lead that is naturally occurring under 22 Cal. Code Regs. §22501; or (ii)
22 includes injunctive relief designed to ensure that the Lead in the Covered Products is not avoidable
23 by good agricultural or good manufacturing practices and that the producer, manufacturer,
24 distributor, or holder of the food is at all times utilizing quality control measures that reduce natural
25 occurring Lead to the "lowest level currently feasible" as such term is defined in 22 Cal. Code Regs.
26 §22501; or (iii) a combination of both, then Settling Defendant may move the Court to modify the
27 Reformulation Level in this Consent Judgment so that it is consistent with the reformulation
28 requirement of such future Judgment or Consent Judgment. Prior to filing any such Motion the

1 parties shall meet and confer in an attempt to agree on specific language regarding the modification
2 pursuant to this Section. If the parties are unable to agree on specific language Settling Defendant
3 shall inform the Court of both parties' position in the papers filed in support of the Motion to
4 Modify this Consent Judgment.

5 **8. PROVISION OF NOTICE**

6 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the notice
7 shall be sent by first class and electronic mail to:

8 Eric S. Somers
9 Lexington Law Group
10 503 Divisadero Street
11 San Francisco, CA 94117
12 esomers@lexlawgroup.com

13 8.2 When Settling Defendant is entitled to receive any notice under this Consent
14 Judgment, the notice shall be sent by first class and electronic mail to the person(s) identified in
15 Exhibit A for each such Settling Defendant.

16 8.3 Any Party may modify the person and address to whom the notice is to be sent by
17 sending the other Party notice by first class and electronic mail.

18 **9. COURT APPROVAL**

19 9.1 This Consent Judgment shall become effective on the Effective Date, provided
20 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
21 Settling Defendant shall support approval of such Motion.

22 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect
23 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

24 **10. GOVERNING LAW AND CONSTRUCTION**

25 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
26 California.

27 **11. ATTORNEYS' FEES**

28 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

1 the unsuccessful Party has acted with substantial justification. For purposes of this Consent
2 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
3 Discovery Act of 1986, Code of Civil Procedure §§2016.010, *et seq.*

4 11.2 Notwithstanding Section 11.1, a Party who prevails in a contested enforcement
5 action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of Civil
6 Procedure §1021.5 against a Party that acted with substantial justification. The Party seeking such
7 an award shall bear the burden of meeting all of the elements of §1021.5, and this provision shall
8 not be construed as altering any procedural or substantive requirements for obtaining such an award.

9 11.3 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 those
17 specifically referred to in this Consent Judgment have been made by any Party hereto. No other
18 agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to
19 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. RETENTION OF JURISDICTION**

27 13.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent
28 Judgment.

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14. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

14.1 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 legally to bind that Party.

15. NO EFFECT ON OTHER SETTLEMENTS

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


16. EXECUTION IN COUNTERPARTS

16.1 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: _____
Judge of the Superior Court of the State of California

IT IS SO STIPULATED:

<p>Dated: <u>11/15</u>, 2013</p>	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <p></p> <hr/> <p><u>Carliz Pizarro</u></p> <p>Printed Name</p> <hr/> <p><u>ASSOCIATE DIRECTOR</u></p> <p>Title</p>
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Dated: <u>November 18</u> , 2013	AMERICAN IMPORTING COMPANY, INC. DBA AMPORT FOODS <u>Kevin McMenimen</u> Printed Name <u>CFO</u> Title
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2 **EXHIBIT A**

3 **Settling Defendant:** American Importing Company, Inc. dba Amport Foods
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5 **Covered Product(s) To Be Withdrawn From Market:**

6 Albertson's Bulk Crystallized Ginger; Amport Foods SKU 0-71725-71218-9
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8 **Defendant's Settlement Payment and Allocation:**

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10 Total Settlement Payment	\$65,000
11 Civil Penalty OEHHA Portion	\$6,450
12 Civil Penalty CEH Portion	\$2,150
Payment in Lieu of Civil Penalty	\$12,900
Attorneys' Fees and Costs	\$43,500

13 **Person(s) to Receive Notices Pursuant to Section 8:**

14 Kristin Eads
15 Faegre Baker Daniels LLP
16 2200 Wells Fargo Center
17 90 South Seventh Street
18 Minneapolis, MN 55402

19 Flagstone Foods
20 380 St. Peter Street
21 Suite 1000
22 St. Paul, MN 55102
23 Attn: CFO
24
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2 **EXHIBIT B**

3 **Product and Supplier Information**

4 For each Covered Product supplied by your company for sale in California in the two years prior to
5 the Effective Date, please provide the following information and documents:

- 6 1. Covered Product name.
- 7 2. Covered Product Description.
- 8 3. SKU or UPC number.
- 9 4. Name, address, contact person, phone, e-mail and web site of the company from which
10 each Covered Product was purchased.
- 11 5. Name, address, contact person, phone, e-mail and web site of importer or distributor.
- 12 6. Name, address, contact person, phone, e-mail and web site of product manufacturer.
- 13 7. Name, address, contact person, phone, e-mail and web site of any other know entity in the
14 upstream chain of distribution.
- 15 8. Date and number of units ordered for each order of a Covered Product purchased from the
16 date two years prior to the Effective Date to the Effective Date. Please attach copies of
17 each Purchase Order or other documentation from each sale.
- 18 9. Units of each Covered Product sold from the date two years prior to the Effective Date to
19 the Effective Date.
- 20 10. Indicate if any Proposition 65 warnings were provided with each of the Covered Products
21 and if so, provide a copy of such warning.
- 22 11. Identify the country of origin of each Covered Product.
- 23 12. Identify and attach any test results in your possession for any of the Covered Products.
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