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

CENTER FOR ENVIRONMENTAL HEALTH,)
Plaintiff,)
v.)
FOOD MARKET MANAGEMENT, INC., *et al.*,)
Defendants.)

Case No. CGC-12-526395
**[PROPOSED] CONSENT JUDGMENT
AS TO GELSON’S MARKETS**

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center For Environmental Health, a California non-profit corporation (“CEH”), and Gelson’s Markets (collectively, “Settling Defendant”). The Parties enter into this Consent Judgment to settle certain claims asserted by CEH against Settling Defendant as set forth in the operative complaint (“Complaint”) in the above-captioned matter. This Consent Judgment covers the lead content of baking ingredient and

1 snack food products made with ginger that is processed with sugar or a sugar substitute (“Covered
2 Products”) that are sold or offered for sale by Settling Defendant.

3 1.2 On August 22, 2014, CEH served Settling Defendant with a Notice of Violation
4 under Proposition 65, alleging that Settling Defendant violated Proposition 65 by exposing
5 persons to lead and lead compounds (“Lead”) contained in Covered Products without first
6 providing a clear and reasonable Proposition 65 warning.

7 1.3 Settling Defendant is a corporation that sells or offers for sale Covered Products
8 that are offered for sale in the State of California or has done so in the past.

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, including
12 Settling Defendant.

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

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

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1 **2. INJUNCTIVE RELIEF**

2 **2.1 Specification Compliance Date.** To the extent it has not already done so, no more
3 than fifteen (15) days after the date of entry of this Consent Judgment (“Effective Date”), Settling
4 Defendant shall provide the reformulation specification set forth in Section 2.2 to each of its
5 Covered Products suppliers and shall instruct each such Covered Products supplier to provide it
6 with Covered Products that comply with the reformulation specification set forth in Section 2.2. If
7 in the future Settling Defendant purchases Covered Products from a new third party that it has not
8 previously provided with instructions regarding the reformulation specification set forth in Section
9 2.2, Settling Defendant shall provide the reformulation specification set forth in Section 2.2 prior
10 to placing an initial order for Covered Products and instruct the new Covered Products supplier to
11 provide it with Covered Products that comply with the reformulation specification set forth in
12 Section 2.2. Settling Defendant shall retain records of communications sent to and received from
13 suppliers that are related to the requirement of this Section 2.1 for a period of five years from the
14 Effective Date.

15 **2.2 Reformulation of Covered Products.** After the Effective Date, Settling
16 Defendant shall not purchase, manufacture, ship, sell or offer for sale any Covered Product that
17 will be sold or offered for sale in California that contains a concentration of more than seventeen
18 (17) parts per billion (“ppb”) Lead by weight, such concentration to be determined by use of a test
19 performed by an accredited laboratory using inductively coupled plasma mass spectrometry (ICP-
20 MS) equipment with a level of detection of at least ten (10) ppb that meets standard laboratory
21 QA/QC requirements (the “Reformulation Level”).

22 **3. ENFORCEMENT**

23 **3.1 Enforcement Procedures.** Prior to bringing any motion or order to show cause to
24 enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the violating
25 party thirty (30) days advanced written notice of the alleged violation. The Parties shall meet and
26 confer during such thirty (30) day period, exchanging any relevant information, in an effort to try
27 to reach agreement on an appropriate cure for the alleged violation absent Court intervention.

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1 After such thirty (30) day period, the Party seeking to enforce may, by new action, motion or order
2 to show cause before the Superior Court of San Francisco, seek to enforce the terms and
3 conditions contained in this Consent Judgment.

4 **4. PAYMENTS**

5 4.1 **Payments by Settling Defendant.** Within five (5) days of the Effective Date,
6 Settling Defendant shall pay a total of \$25,000 as further set forth in this Section.

7 4.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
8 be paid in four separate checks in the amounts set forth below and delivered as set forth below.

9 Any failure by Settling Defendant to comply with the payment terms herein shall be subject to a
10 stipulated late fee in the amount of \$100 for each day after the delivery date the payment is
11 received. The late fees required under this Section shall be recoverable, together with reasonable
12 attorneys' fees, in an enforcement proceeding brought pursuant to Section 3 of this Consent
13 Judgment. The funds paid by Settling Defendant shall be allocated as set forth below between the
14 following categories and made payable as follows:

15 4.2.1 A civil penalty pursuant to Health & Safety Code § 25249.7(b) in the
16 amount of \$3,250. The civil penalty payment shall be apportioned in accordance with Health &
17 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
18 Environmental Health Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the
19 civil penalty payment in the amount of \$2,438 shall be made payable to OEHHA and associated
20 with taxpayer identification number 68-0284486. This payment shall be delivered as follows:

21 For United States Postal Service Delivery:

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

27 For Non-United States Postal Service Delivery:

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

1 The CEH portion of the civil penalty payment in the amount of \$812 shall be made
2 payable to the Center For Environmental Health and associated with taxpayer identification
3 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
4 Street, San Francisco, CA 94117.

5 4.2.2 A payment in lieu of civil penalty to CEH pursuant to Health & Safety
6 Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b) in the amount of
7 \$4,900. CEH shall use such funds to continue its work educating and protecting people from
8 exposures to toxic chemicals, including heavy metals. In addition, as part of its Community
9 Environmental Action and Justice Fund, CEH will use four percent of such funds to award grants
10 to grassroots environmental justice groups working to educate and protect people from exposures
11 to toxic chemicals. The method of selection of such groups can be found at the CEH web site at
12 www.ceh.org/justicefund. The payment pursuant to this Section shall be made payable to the
13 Center For Environmental Health and associated with taxpayer identification number 94-3251981.
14 This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco,
15 CA 94117.

16 4.2.3 A reimbursement of a portion of CEH's reasonable attorneys' fees and
17 costs in the amount of \$16,850. The attorneys' fees and cost reimbursement check shall be made
18 payable to the Lexington Law Group and associated with taxpayer identification number 94-
19 3317175. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San
20 Francisco, CA 94117.

21 **5. MODIFICATION AND DISPUTE RESOLUTION**

22 5.1 **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
24 Court upon motion and in accordance with law.

25 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
26 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
27 modify the Consent Judgment.

1 **6. CLAIMS COVERED AND RELEASE**

2 6.1 This Consent Judgment is a full, final and binding resolution between CEH on
3 behalf of itself and the public interest and Settling Defendant, and Settling Defendant’s parents,
4 subsidiaries, and affiliated entities that are under common ownership, predecessors, successors and
5 assigns, directors, officers, employees, and attorneys (“Defendant Releasees”), and all entities,
6 other than those listed on Exhibit A, to which Settling Defendant distributes or sells Covered
7 Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees,
8 licensors and licensees (“Downstream Defendant Releasees”), of any violation of Proposition 65
9 based on failure to warn about alleged exposure to Lead contained in Covered Products that were
10 sold by Settling Defendant prior to the Effective Date.

11 6.2 CEH, for itself releases, waives, and forever discharges any and all claims against
12 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
13 violation of Proposition 65 or any other statutory or common law claims that have been or could
14 have been asserted in the public interest regarding the failure to warn about exposure to Lead
15 arising in connection with Covered Products sold by Settling Defendant prior to the Effective
16 Date.

17 6.3 Compliance with the terms of this Consent Judgment by Settling Defendant and
18 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
19 Settling Defendant’s Defendant Releasees and Settling Defendant’s Downstream Defendant
20 Releasees with respect to any alleged failure to warn about Lead in Covered Products sold by
21 Settling Defendant after the Effective Date.

22 **7. PROVISION OF NOTICE**

23 7.1 When CEH is entitled to receive any notice under this Consent Judgment, the
24 notice shall be sent by first class and electronic mail to:
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Eric S. Somers
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117
esomers@lexlawgroup.com

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

James Neudecker
Reed Smith
101 Second Street, Suite 1800
San Francisco, California 94105
jneudecker@reedsmith.com

7.3 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.

8. COURT APPROVAL

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

8.2 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.

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. ATTORNEYS' FEES

10.1 A Party who unsuccessfully brings or contests an action arising out of this Consent Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs unless the unsuccessful Party has acted with substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, *et seq.*

10.2 Notwithstanding Section 10.1, a Party who prevails in a contested enforcement action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of Civil Procedure §1021.5 against a Party that acted with substantial justification. The Party

1 seeking such an award shall bear the burden of meeting all of the elements of §1021.5, and this
2 provision shall not be construed as altering any procedural or substantive requirements for
3 obtaining such an award.

4 10.3 Nothing in this Section 10 shall preclude a party from seeking an award of
5 sanctions pursuant to law.

6 **11. ENTIRE AGREEMENT**

7 11.1 This Consent Judgment contains the sole and entire agreement and understanding
8 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
9 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
10 and therein. There are no warranties, representations, or other agreements between the Parties
11 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
12 other than those specifically referred to in this Consent Judgment have been made by any Party
13 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
14 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
15 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
16 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
17 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
18 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
19 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
20 whether or not similar, nor shall such waiver constitute a continuing waiver.

21 **12. RETENTION OF JURISDICTION**

22 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
23 Consent Judgment.

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

2 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
3 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
4 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

5 **14. NO EFFECT ON OTHER SETTLEMENTS**

6 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
7 against an entity that is not Settling Defendant on terms that are different than those contained in
8 this Consent Judgment.

9 **15. EXECUTION IN COUNTERPARTS**

10 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by
11 means of facsimile or portable document format (pdf), which taken together shall be deemed to
12 constitute one document.

13 **IT IS SO ORDERED, ADJUDGED,
14 AND DECREED**

15 Dated:

Judge of the Superior Court of the State of California

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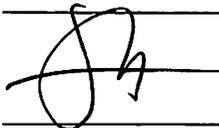
Dated: <u>18 May</u> 2016	CENTER FOR ENVIRONMENTAL HEALTH  _____ Charles Pizzano _____ Printed Name Associates Director _____ Title
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Dated: _____, 2016	GELSON'S MARKETS _____ By _____ _____ Printed Name _____ Title
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IT IS SO STIPULATED:

Dated: _____, 2016	CENTER FOR ENVIRONMENTAL HEALTH _____ _____ Printed Name _____ Title
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Dated: <u>MARCH 15</u> , 2016	GELSON'S MARKETS _____  _____ By <u>MARK MÖTZENBOCKER</u> Printed Name <u>Senior Director of H.R./R.M.</u> Title
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EXHIBIT A
(LIST OF ENTITIES NOT SUBJECT
TO DOWNSTREAM DEFENDANT RELEASE)

List of non-settling defendants that have received
60-Day Notices re lead in Covered Products from CEH

- ACH Food Companies, Inc.
- Albertson's LLC
- Amazon.com, Inc.
- American Roland Food Corporation
- B&V Enterprises, Inc.
- Blue Marble Brands, LLC
- Brinkhoff & Monoson, Inc.
- Buderim Ginger Limited
- The C.F. Sauer Company
- Cost Plus, Inc.
- Dakota Brothers, Inc.
- Draeger's Super Markets
- Euromarket Designs, Inc.
- Food Castle, Inc.
- Food Market Management, Inc.
- Foodnet Supermarket, Inc.
- Fresh & Easy LLC fka Y-Opco LLC
- Frieda's, Inc.
- Frontier Distribution LLC
- Frontier Natural Products Co-op
- Garden Grove Superstore Inc.
- Goldstar Supermarket
- Hosoda Bros. Inc.

1 Island Pacific Supermarkets, Inc.
2 JFC International Inc.
3 Kam Lee Yuen Trading Co., Inc.
4 KeHE Distributors, LLC
5 KeHE Enterprises, LLC
6 KeHE Distributors, Inc.
7 The Kroger Co.
8 Longchamp Corporation dba Lion Supermarket
9 Marra Bros. Dist., Inc.
10 McCormick & Company, Incorporated
11 Mrs. Gooch's Natural Food Markets, Inc.
12 Nature's World LLC
13 PANOS Brands, LLC
14 Ralphs Grocery Company
15 Reed's, Inc.
16 San Pablo Supermarket, Inc.
17 Safeway Inc.
18 Save Mart Supermarkets
19 Seawind International, LLC
20 Shun Fat Supermarket, Inc.
21 Sincerely Nuts, Inc.
22 The Spice Hunter, Inc.
23 Sunflower Farmers Markets, LLC
24 Target Corporation
25 Tawa Supermarket, Inc.
26 Torn & Glasser, Inc.
27 Trader Joe's Company
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Unbeatable Sale. Com Inc.
United Natural Foods, Inc.
United Natural Trading, LLC
Vanns Spices Ltd.
The Von's Companies, Inc.
Wal-Mart Stores, Inc.
Walmart.com USA LLC
Whole Foods Market California, Inc.
Zion Market Irvine, Inc.