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

Case No. CGC-12-526396
**[PROPOSED] CONSENT JUDGMENT
AS TO FRESH & EASY LLC F/K/A Y-
OPCO LLC**

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center For Environmental Health, a California non-profit corporation (“CEH”), and Fresh & Easy LLC f/k/a Y-Opco LLC (“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 ginger snack foods

1 (“Covered Products”) sold or offered for sale by Settling Defendant.

2 1.2 On August 22, 2014, CEH served Settling Defendant with a Notice of Violation
3 under Proposition 65, alleging that Settling Defendant violated Proposition 65 by exposing
4 persons to lead and lead compounds (“Lead”) contained in Covered Products without first
5 providing a clear and reasonable Proposition 65 warning.

6 1.3 Settling Defendant is a corporation that manufactures, distributes, sells or offers for
7 sale Covered Products that are offered for sale in the State of California or has done so in the past.

8 1.4 On November 27, 2012, CEH filed the original Complaint in this matter. On
9 December 20, 2012, CEH filed the operative First Amended Complaint in this matter. The First
10 Amended Complaint has since been amended to add additional named defendants.

11 1.5 For purposes of this Consent Judgment only, CEH and Settling Defendant (the
12 “Parties”) stipulate that this Court has jurisdiction over the allegations of violations contained in
13 the Complaint and personal jurisdiction over Settling Defendant as to the acts alleged in the
14 Complaint, that venue is proper in the County of San Francisco, and that this Court has
15 jurisdiction to enter this Consent Judgment as a full and final resolution of all claims which were
16 or could have been raised in the Complaint based on the facts alleged therein with respect to
17 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

18 1.6 Nothing in this Consent Judgment is or shall be construed as an admission by the
19 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
20 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
21 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
22 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
23 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
24 and compromise and is accepted by the Parties solely for purposes of settling, compromising, and
25 resolving issues disputed in this Action.

26 **2. INJUNCTIVE RELIEF**

27 2.1 **Specification Compliance Date.** To the extent it has not already done so, no more
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1 than fifteen (15) days after the date of entry of this Consent Judgment (“Effective Date”), Settling
2 Defendant shall provide the reformulation specification set forth in Section 2.2 to each of its
3 current Covered Products suppliers and shall instruct each such Covered Products supplier to
4 provide it with Covered Products that comply with the reformulation specification set forth in
5 Section 2.2. If in the future Settling Defendant purchases Covered Products from a new third
6 party that it has not previously provided with instructions regarding the reformulation
7 specification set forth in Section 2.2, Settling Defendant shall provide the reformulation
8 specification set forth in Section 2.2 prior to placing an initial order for Covered Products and
9 instruct the new Covered Products supplier to provide it with Covered Products that comply with
10 the reformulation specification set in Section 2.2. Settling Defendant shall retain records of
11 communications sent to and received from suppliers that are related to the requirement of this
12 Section 2.1 for a period of five years from the Effective Date.

13 **2.2 Reformulation of Covered Products.** After the Effective Date, Settling
14 Defendant shall not purchase, manufacture, ship, sell or offer for sale any Covered Product that
15 will be offered for sale in California that contains a concentration of more than forty (40) parts per
16 billion (“ppb”) Lead by weight, such concentration to be determined by use of a test performed by
17 an accredited laboratory using inductively coupled plasma mass spectrometry (ICP-MS)
18 equipment with a level of detection of at least ten (10) ppb that meets standard laboratory QA/QC
19 requirements (the “Reformulation Level”).

20 **2.3 Market Withdrawal of Covered Products.** On or before the Effective Date and
21 only to the extent not already done, Settling Defendant shall: (i) cease selling the Fresh & Easy
22 Dried Spicy & Sweetened Ginger product, SKU No. 5-051379-055721 (the “Recall Covered
23 Products”) in California; (ii) withdraw the Recall Covered Products from the market in California;
24 and (iii) send instructions to any stores and/or customers that continue to offer the Recall Covered
25 Products for sale in California to cease offering such Recall Covered Products for sale and to
26 either return all Recall Covered Products to Settling Defendant for destruction, or to directly
27 destroy the Recall Covered Products. Any destruction of the Recall Covered Products shall be in
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1 compliance with all applicable laws. Settling Defendant shall keep and make available to CEH for
2 inspection and copying records and correspondence regarding the market withdrawal and
3 destruction of the Recall Covered Products. If there is a dispute over the corrective action, the
4 Parties shall meet and confer before seeking any remedy in court.

5 **3. ENFORCEMENT**

6 3.1 **Enforcement Procedures.** Prior to bringing any motion or order to show cause to
7 enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the violating
8 party thirty (30) days advanced written notice of the alleged violation. The Parties shall meet and
9 confer during such thirty (30) day period in an effort to try to reach agreement on an appropriate
10 cure for the alleged violation absent Court intervention. After such thirty (30) day period, the
11 Party seeking to enforce may, by new action, motion or order to show cause before the Superior
12 Court of San Francisco, seek to enforce the terms and conditions contained in this Consent
13 Judgment.

14 **4. PAYMENTS**

15 4.1 **Payments by Settling Defendant.** Within five (5) days of the entry of this
16 Consent Judgment, Settling Defendant shall pay a total \$30,000 as further set forth in this Section.

17 4.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
18 be paid in four separate checks in the amounts set forth below and delivered as set forth below.

19 Any failure by Settling Defendant to comply with the payment terms herein shall be subject to a
20 stipulated late fee in the amount of \$100 for each day after the payment is due under Section 4.1.

21 The late fees required under this Section shall be recoverable, together with reasonable attorneys'
22 fees, in an enforcement proceeding brought pursuant to Section 3 of this Consent Judgment. The
23 funds paid by Settling Defendant shall be allocated as set forth below between the following
24 categories and made payable as follows:

25 4.2.1 A civil penalty pursuant to Health & Safety Code § 25249.7(b) in the
26 amount of \$3,900. The civil penalty payment shall be apportioned in accordance with Health &
27 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of

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1 Environmental Health Hazard Assessment (“OEHHA”). Accordingly, the OEHHA portion of the
2 civil penalty payment in the amount of \$2,925 shall be made payable to OEHHA and associated
3 with taxpayer identification number 68-0284486. This payment shall be delivered as follows:
4

5 For United States Postal Service Delivery:

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

11 For Non-United States Postal Service Delivery:

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

17 The CEH portion of the civil penalty payment in the amount of \$975 shall be made
18 payable to the Center For Environmental Health and associated with taxpayer identification
19 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
20 Street, San Francisco, CA 94117.

21 4.2.2 A payment in lieu of civil penalty to CEH pursuant to Health & Safety
22 Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b) in the amount of
23 \$5,900 . CEH shall use such funds to continue its work educating and protecting people from
24 exposures to toxic chemicals, including heavy metals. In addition, as part of its Community
25 Environmental Action and Justice Fund, CEH will use four percent of such funds to award grants
26 to grassroots environmental justice groups working to educate and protect people from exposures
27 to toxic chemicals. The method of selection of such groups can be found at the CEH web site at
28 www.ceh.org/justicefund. 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.

1 4.2.3 A reimbursement of a portion of CEH’s reasonable attorneys’ fees and
2 costs in the amount of \$20,200. The attorneys’ fees and cost reimbursement check shall be made
3 payable to the Lexington Law Group and associated with taxpayer identification number 94-
4 3317175. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San
5 Francisco, CA 94117.

6 **5. MODIFICATION AND DISPUTE RESOLUTION**

7 5.1 **Modification.** This Consent Judgment may be modified from time to time by
8 express written agreement of the Parties, with the approval of the Court, or by an order of this
9 Court upon motion and in accordance with law.

10 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
11 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
12 modify the Consent Judgment.

13 **6. CLAIMS COVERED AND RELEASE**

14 6.1 This Consent Judgment is a full, final and binding resolution between CEH on
15 behalf of itself and the public interest and Settling Defendant, and Settling Defendant’s parents,
16 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,
17 and attorneys (“Defendant Releasees”), and all entities, other than those listed on Exhibit A, to
18 which Settling Defendant distributes or sells Covered Products, including but not limited to
19 distributors, wholesalers, customers, retailers, franchisees, licensors and licensees (“Downstream
20 Defendant Releasees”), of any violation of Proposition 65 based on failure to warn about alleged
21 exposure to Lead contained in Covered Products that were sold by a Settling Defendant prior to
22 the Effective Date.

23 6.2 CEH, for itself releases, waives, and forever discharges any and all claims against
24 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
25 violation of Proposition 65 or any other statutory or common law claims that have been or could
26 have been asserted in the public interest regarding the failure to warn about exposure to Lead
27 arising in connection with Covered Products manufactured, distributed or sold by Settling

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1 Defendant prior to the Effective Date.

2 6.3 Compliance with the terms of this Consent Judgment by Settling Defendant and
3 Settling Defendant's Defendant Releasees shall constitute compliance with Proposition 65 by
4 Settling Defendant, Settling Defendant's Defendant Releasees and Settling Defendant's
5 Downstream Defendant Releasees with respect to any alleged failure to warn about Lead in
6 Covered Products manufactured, distributed or sold by Settling Defendant after the Effective Date.

7 **7. PROVISION OF NOTICE**

8 7.1 When CEH is entitled to receive any notice under this Consent Judgment, the
9 notice shall be sent by first class and electronic mail to:

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

15 7.2 When Settling Defendant is entitled to receive any notice under this Consent
16 Judgment, the notice shall be sent by first class and electronic mail to:

17 Eric Lindstrom
18 Keller & Heckman LLP
19 Three Embarcadero Center, Suite 1420
20 San Francisco, California 94111
21 lindstrom@khlaw.com

22 7.3 Any Party may modify the person and address to whom the notice is to be sent by
23 sending the other Party notice by first class and electronic mail.

24 **8. COURT APPROVAL**

25 8.1 This Consent Judgment shall become effective on the Effective Date, provided
26 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
27 Settling Defendant shall support approval of such Motion.

28 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

1 California.

2 **10. ATTORNEYS' FEES**

3 10.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
4 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
5 unless the unsuccessful Party has acted with substantial justification. For purposes of this Consent
6 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
7 Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, *et seq.*

8 10.2 Notwithstanding Section 10.1, a Party who prevails in a contested enforcement
9 action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of
10 Civil Procedure §1021.5 against a Party that acted with substantial justification. The Party
11 seeking such an award shall bear the burden of meeting all of the elements of §1021.5, and this
12 provision shall not be construed as altering any procedural or substantive requirements for
13 obtaining such an award.

14 10.3 Nothing in this Section 10 shall preclude a party from seeking an award of
15 sanctions pursuant to law.

16 **11. ENTIRE AGREEMENT**

17 11.1 This Consent Judgment contains the sole and entire agreement and understanding
18 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
19 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
20 and therein. There are no warranties, representations, or other agreements between the Parties
21 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
22 other than those specifically referred to in this Consent Judgment have been made by any Party
23 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
24 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
25 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
26 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
27 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in

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

4 **12. RETENTION OF JURISDICTION**

5 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
6 Consent Judgment.

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

8 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
9 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
10 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

12 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
13 against an entity that is not Settling Defendant on terms that are different than those contained in
14 this Consent Judgment.

15 **15. EXECUTION IN COUNTERPARTS**

16 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by
17 means of facsimile or portable document format (pdf), which taken together shall be deemed to
18 constitute one document.

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

Dated:


Judge of the Superior Court of the State of California

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IT IS SO STIPULATED:

Dated: <u>SEP 4</u> , 2015	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <p></p> <hr/> <p>CHARLIE PIZARRO</p> <hr/> <p>Printed Name</p> <p>ASSOCIATE DIRECTOR</p> <hr/> <p>Title</p>
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Dated: _____, 2015	FRESH & EASY LLC F/K/A Y-OPCO LLC
	 By _____
	<i>JAMES W. KILPATRICK</i> Printed Name
	<i>CEO</i> 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.
- Amazon.com, Inc.
- American Roland Food Corporation
- B&V Enterprises, Inc.
- Blue Marble Brands, LLC
- Buderim Ginger Limited
- Cost Plus, Inc.
- Dakota Brothers, Inc.
- Draeger's Super Markets
- Euromarket Designs, Inc.
- Frieda's, Inc.
- Frontier Distribution LLC
- Frontier Natural Products Co-op
- Foodnet Supermarkets, Inc.
- Garden Grove Superstore Inc.
- Goldstar Supermarket
- Hosoda Bros. Inc.
- Island Pacific Supermarkets, Inc.
- Kam Lee Yuen Trading Co., Inc.
- KeHe Distributors, LLC
- KeHe Enterprises, LLC
- KeHe Distributors, Inc.

1 Longchamp Corporation dba Lion Supermarket
2 Marra Bros. Dist., Inc.
3 Mrs. Gooch's Natural Food Markets, Inc.
4 Nature's World LLC
5 PANOS Brands, LLC
6 Reed's, Inc.
7 San Pablo Supermarket, Inc.
8 Safeway Inc.
9 Save Mart Supermarkets
10 Seawind International, LLC
11 Shun Fat Supermarket, Inc.
12 Sincerely Nuts, Inc.
13 Sunflower Farmers Markets, LLC
14 Tawa Supermarket, Inc.
15 Torn & Glasser, Inc.
16 Trader Joe's Company
17 Unbeatable Sale. Com Inc.
18 United Natural Foods, Inc.
19 United Natural Trading, LLC
20 Wal-Mart Stores, Inc.
21 Walmart.com USA LLC
22 Whole Foods Market California, Inc.