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

CENTER FOR ENVIRONMENTAL HEALTH,) Case No. CGC-12-526396
Plaintiff,)
v.) **[PROPOSED] CONSENT JUDGMENT**
FAYEON DISTRIBUTORS, INC., *et al.*,) **AS TO AMERICAN ROLAND FOOD**
Defendants.) **CORPORATION**

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center for Environmental Health, a California non-profit corporation (“CEH”), and American Roland Food Corporation (“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 crystallized, uncrystallized, or candied ginger snack foods (“Covered Products”) sold or offered for sale by Settling Defendant.

1 1.2 On August 22, 2014, CEH served Settling Defendant with a Notice of Violation
2 under Proposition 65, alleging that Settling Defendant violated Proposition 65 by exposing
3 persons to lead and lead compounds (“Lead”) contained in Covered Products without first
4 providing a clear and reasonable Proposition 65 warning.

5 1.3 Settling Defendant is a corporation that manufactures, distributes, sells or offers for
6 sale Covered Products that are offered for sale in the State of California or has done so in the past.

7 1.4 On November 27, 2012, CEH filed the original Complaint in this matter. On
8 December 20, 2012, CEH filed the operative First Amended Complaint in this matter. The First
9 Amended Complaint has since been amended to add additional named defendants, including
10 Settling Defendant.

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.

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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”), for
4 Covered Products that Settling Defendant purchases, manufactures, ships, or sells, for sale to
5 California consumers after the Effective Date, Settling Defendant shall provide the reformulation
6 specification set forth in Section 2.2 to each of its Covered Products suppliers and shall instruct
7 each such Covered Products supplier to provide it with Covered Products that comply with the
8 reformulation specification set forth in Section 2.2. If in the future Settling Defendant purchases
9 Covered Products from a new third party that it has not previously provided with instructions
10 regarding the reformulation specification set forth in Section 2.2, Settling Defendant shall provide
11 the reformulation specification set forth in Section 2.2 prior to placing an initial order for Covered
12 Products and instruct the new Covered Products supplier to provide it with Covered Products that
13 comply with the reformulation specification set in Section 2.2. Settling Defendant shall retain
14 records of communications sent to and received from suppliers that are related to the requirement
15 of this Section 2.1 for a period of five years from the Effective Date.

16 **2.2 Reformulation of Covered Products.** After 90 days following the Effective Date
17 (the “Compliance Date”), Settling Defendant shall not purchase, manufacture, ship, sell or offer
18 for sale any Covered Product that will be offered for sale to California consumers that contains a
19 concentration of more than forty (40) parts per billion (“ppb”) Lead by weight, such concentration
20 to be determined by use of a test performed by an accredited laboratory using inductively coupled
21 plasma mass spectrometry (ICP-MS) equipment with a level of detection of at least ten (10) ppb
22 that meets standard laboratory QA/QC requirements (the “Reformulation Level”).

23 **2.3 Supplier and Product Information.** CEH acknowledges that prior to executing
24 this Consent Judgment, Settling Defendant provided full and complete information and supporting
25 documentation as to each Covered Product as further specified on Exhibit A. Settling Defendant
26 shall cooperate and work in good faith to promptly answer any reasonable follow-up questions or
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1 requests for supporting documentation from CEH about the information and documents to be
2 provided pursuant to this Section.

3 **3. ENFORCEMENT**

4 3.1 **Enforcement Procedures.** Prior to bringing any motion or order to show cause to
5 enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the violating
6 Party thirty (30) days advanced written notice of the alleged violation. The Parties shall meet and
7 confer during such thirty (30) day period in an effort to try to reach agreement on an appropriate
8 cure for the alleged violation absent Court intervention. After such thirty (30) day period, the
9 Party seeking to enforce may, by new action, motion or order to show cause before the Superior
10 Court of San Francisco, seek to enforce the terms and conditions contained in this Consent
11 Judgment.

12 3.2 Notwithstanding the provisions of Section 3.1, CEH may not issue any Notice of
13 Violation if the packaging of the Covered Product is marked or labeled with the statement “Not for
14 Sale in California” or substantially similar language as long as such statement is prominently
15 placed upon such Covered Product’s label or other labeling as compared with other words or
16 statements on the label or labeling as to render it likely to be read and understood by an ordinary
17 individual under customary conditions of purchase or use. If Settling Defendant marks or labels a
18 Covered Product with such a statement, Settling Defendant shall include a letter to its customer
19 notifying the customer that the Covered Product may not be sold in California.

20 **4. PAYMENTS**

21 4.1 **Payments by Settling Defendant.** Within five (5) days of the entry of this
22 Consent Judgment, Settling Defendant shall pay a total of \$42,000 as further set forth in this
23 Section.

24 4.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
25 be paid in four (4) separate checks in the amounts set forth 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 stipulated late fee in the amount of \$100 for each day after the delivery date the payment is
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1 received. The late fees required under this Section shall be recoverable, together with reasonable
2 attorneys' fees, in an enforcement proceeding brought pursuant to Section 3 of this Consent
3 Judgment. The funds paid by Settling Defendant shall be allocated as set forth below between the
4 following categories and made payable as follows:

5 4.2.1 A civil penalty pursuant to Health & Safety Code § 25249.7(b) in the
6 amount of \$5,500. The civil penalty payment shall be apportioned in accordance with Health &
7 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
8 Environmental Health Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the
9 civil penalty payment in the amount of \$4,125 shall be made payable to OEHHA and associated
10 with taxpayer identification number 68-0284486. This payment shall be delivered as follows:

11 For United States Postal Service Delivery:

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

17 For Non-United States Postal Service Delivery:

18 Attn: Mike Gyurics
19 Fiscal Operations Branch Chief
20 Office of Environmental Health Hazard Assessment
21 1001 I Street, MS #19B
22 Sacramento, CA 95814

23 The CEH portion of the civil penalty payment in the amount of \$1,375 shall be made
24 payable to the Center For Environmental Health and associated with taxpayer identification
25 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
26 Street, San Francisco, CA 94117.

27 4.2.2 A payment in lieu of civil penalty to CEH pursuant to Health & Safety
28 Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b) in the amount of
\$8,250. CEH shall use such funds to continue its work educating and protecting people from
exposures to toxic chemicals, including 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

1 to toxic chemicals. The method of selection of such groups can be found at the CEH web site at
2 www.ceh.org/justicefund. The payment pursuant to this Section shall be made payable to the
3 Center For Environmental Health and associated with taxpayer identification number 94-3251981.

4 4.2.3 A reimbursement of a portion of CEH's reasonable attorneys' fees and
5 costs in the amount of \$28,250. The attorneys' fees and cost reimbursement check shall be made
6 payable to the Lexington Law Group and associated with taxpayer identification number 94-
7 3317175. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San
8 Francisco, CA 94117.

9 **5. MODIFICATION AND DISPUTE RESOLUTION**

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

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

16 **6. CLAIMS COVERED AND RELEASE**

17 6.1 This Consent Judgment is a full, final and binding resolution between CEH on
18 behalf of itself and the public interest and Settling Defendant, and Settling Defendant's parents,
19 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,
20 and attorneys ("Defendant Releasees"), and all entities to which Settling Defendant directly or
21 indirectly distributes or sells Covered Products, including but not limited to distributors (including
22 but not limited to KeHE Distributors, LLC, KeHE Enterprises, LLC, and KeHE Distributors, Inc.),
23 wholesalers, customers, retailers (including but not limited to Wal-Mart Stores, Inc. and
24 Walmart.com USA LLC), franchisees, licensors and licensees ("Downstream Defendant
25 Releasees"), of any violation of Proposition 65 based on failure to warn about alleged exposure to
26 Lead contained in Covered Products that were manufactured, distributed, or sold by a Settling
27 Defendant prior to the Compliance Date.

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1 6.2 CEH, for itself releases, waives, and forever discharges any and all claims against
2 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
3 violation of Proposition 65 or any other statutory or common law claims that have been or could
4 have been asserted in the public interest regarding the failure to warn about exposure to Lead
5 arising in connection with Covered Products manufactured, distributed or sold by Settling
6 Defendant prior to the Compliance Date.

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

13 **7. PROVISION OF NOTICE**

14 7.1 When CEH is entitled to receive any notice under this Consent Judgment, the
15 notice shall be sent by first class and electronic mail to:

16 Eric S. Somers
17 Lexington Law Group
18 503 Divisadero Street
19 San Francisco, CA 94117
20 esomers@lexlawgroup.com

21 7.2 When Settling Defendant is entitled to receive any notice under this Consent
22 Judgment, the notice shall be sent by first class and electronic mail to:

23 Trent Norris
24 Sarah Esmaili
25 Arnold & Porter LLP
26 Three Embarcadero Center, 10th Floor
27 San Francisco, CA 94111
28 sarah.esmaili@aporter.com
 trent.norris@aporter.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.

1 **8. COURT APPROVAL**

2 8.1 This Consent Judgment shall become effective on the Effective Date, provided
3 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
4 Settling Defendant shall support approval of such Motion.

5 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect
6 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

7 **9. GOVERNING LAW AND CONSTRUCTION**

8 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
9 California.

10 **10. ATTORNEYS' FEES**

11 10.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
12 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
13 unless the unsuccessful Party has acted with substantial justification. For purposes of this Consent
14 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
15 Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, *et seq.*

16 10.2 Notwithstanding Section 10.1, a Party who prevails in a contested enforcement
17 action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of
18 Civil Procedure §1021.5 against a Party that acted with substantial justification. The Party
19 seeking such an award shall bear the burden of meeting all of the elements of §1021.5, and this
20 provision shall not be construed as altering any procedural or substantive requirements for
21 obtaining such an award.

22 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
23 sanctions pursuant to law.

24 **11. ENTIRE AGREEMENT**

25 11.1 This Consent Judgment contains the sole and entire agreement and understanding
26 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
27 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein

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1 and therein. There are no warranties, representations, or other agreements between the Parties
2 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
3 other than those specifically referred to in this Consent Judgment have been made by any Party
4 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
5 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
6 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
7 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
8 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
9 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
10 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
11 whether or not similar, nor shall such waiver constitute a continuing waiver.

12 **12. RETENTION OF JURISDICTION**

13 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
14 Consent Judgment.

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

16 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
17 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
18 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

20 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
21 against an entity that is not Settling Defendant on terms that are different than those contained in
22 this Consent Judgment. Provided however, nothing in this Section 14.1 is intended to limit or
23 otherwise affect the scope of the release provided in Section 6.

24 **15. BINDING EFFECT**

25 15.1 This Consent Judgment shall apply to and inure to the benefit of Settling
26 Defendant's successors or assigns.

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1 **16. EXECUTION IN COUNTERPARTS**



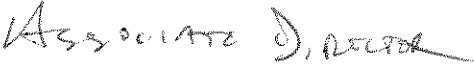
2 16.1 The stipulations to this Consent Judgment may be executed in counterparts and by
3 means of facsimile or portable document format (pdf), which taken together shall be deemed to
4 constitute one document.
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6 **IT IS SO ORDERED, ADJUDGED,
7 AND DECREED:**

8
9 Dated: _____

10 JUDGE OF THE SUPERIOR COURT
11 OF THE STATE OF CALIFORNIA

12 **IT IS SO STIPULATED:**
13

<p>14 Dated: <u>Oct 16</u>, 2015</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p>	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <p> _____ Signature</p> <p> _____ Printed Name</p> <p> _____ Title</p>
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Dated: October 21, 2015

AMERICAN ROLAND FOOD CORPORATION



Signature

James D. Wagner
Printed Name

Chief Executive Officer
Title

EXHIBIT A

Product and Supplier Information

For each Covered Product sold by your company in the two years prior to the Effective Date, please provide the following information and documents:

1. Covered Product name.
2. Covered Product description.
3. SKU or UPC number.
4. Name, address, contact person, phone, e-mail and web site of the company from which each Covered Product was purchased.
5. Name, address, contact person, phone, e-mail and web site of importer or distributor.
6. Name, address, contact person, phone, e-mail and web site of product manufacturer.
7. Name, address, contact person, phone, e-mail and web site of any other know entity in the upstream chain of distribution.
8. Units and dollar sales of each Covered Product sold in California by Defendant for a one year period since May 1, 2014.
9. Indicate if any Proposition 65 warnings were provided with each of the Covered Products and if so, provide a copy of such warning.
10. Identify the country of origin of each Covered Product.
11. Identify and attach any non-privileged test results in your possession for any of the Covered Products.

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