

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (the “Agreement”) is between the Center for Environmental Health (“CEH”) and Sincerely Nuts, Inc. (“Sincerely Nuts”) (together, the “Parties”).

### **1. INTRODUCTION**

**1.1.** On August 22, 2014, CEH, a non-profit corporation acting in the public interest, provided a “Notice of Violation of Proposition 65” to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and to Sincerely Nuts regarding the presence of lead and lead compounds (collectively, “Lead”) in crystallized ginger snack food sold in California by Sincerely Nuts (the “Notice”).

**1.2.** The Notice alleges that crystallized ginger snack food sold by Sincerely Nuts contains Lead. The Notice alleges that such Covered Products expose people who consume them to Lead, a chemical known to the State of California to cause cancer, birth defects or other reproductive harm, without first providing clear and reasonable warning to such persons regarding the carcinogenic or reproductive hazards associated with Lead. The Notice alleges that such conduct violates Health & Safety Code § 25249.6, the warning provision of Proposition 65.

**1.3.** The Parties enter into this Agreement for the purpose of avoiding prolonged and costly litigation regarding Covered Products manufactured, distributed and/or sold in California by Sincerely Nuts. By executing this Agreement, the Parties do not admit any facts or conclusions of law. Nothing in this Agreement shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the Agreement constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this Agreement shall prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or any other or future legal proceedings.

## 2. DEFINITIONS

2.1. “Covered Products” means crystallized ginger snack food.

2.2. The “Effective Date” means five (5) days after execution of this Agreement.

2.3. “Lead Limits” means the maximum concentrations of Lead by weight specified in Section 3.2.

2.4. “Supplier” means a person or entity that manufactures, imports, distributes or supplies a Covered Product to Sincerely Nuts.

## 3. INJUNCTIVE RELIEF

3.1. **Specification Compliance Date.** To the extent it has not already done so, no more than thirty (30) days after execution of this Agreement, Sincerely Nuts shall provide the Lead Limits to its Suppliers of Covered Products and shall instruct each Supplier to only provide Covered Products to Sincerely Nuts that comply with the Lead Limits.

3.2. **Lead Limits.** Upon execution of this Agreement, Sincerely Nuts shall not purchase, manufacture, ship, sell or offer for sale in California any Covered Products that contain a concentration of more than forty (40) parts per billion (“ppb”) Lead by weight, such concentration to be determined by use of a test performed by an accredited laboratory using inductively coupled plasma mass spectrometry (ICP-MS) equipment with a level of detection of at least ten (10) ppb that meets standard laboratory QA/QC requirements.

### 3.3. Action Regarding Specific Products.

3.3.1. Upon execution of this Agreement, and to the extent not previously completed, Sincerely Nuts shall cease selling the Sincerely Nuts Sliced Ginger Crystal, SKU No. X000G7R3RL (the “Recall Covered Products”) to customers who sell or offer for sale the Recall Covered Products to California consumers. Upon execution of this Agreement, Sincerely Nuts shall also: (i) cease shipping the Recall Covered Products to any of its customers that resell the Recall Covered Products in California; and (ii) send instructions to its customers that resell the Recall Covered Products in California instructing them to either (a) return all the Recall Covered

Products to Sincerely Nuts for destruction; or (b) directly destroy the Recall Covered Products.

3.3.2. Any destruction of the Recall Covered Products shall be in compliance with all applicable laws.

3.3.3. Within sixty (60) days of execution of this Agreement, Sincerely Nuts shall provide CEH with written certification from Sincerely Nuts confirming compliance with the requirements of this Section 3.3.

#### **4. SETTLEMENT PAYMENTS**

**4.1.** In consideration of the mutual covenants and releases provided in this Agreement, Sincerely Nuts shall pay a total of \$12,000 as a settlement payment. Any failure by Sincerely Nuts to comply with the payment terms herein shall be subject to a stipulated late payment fee of \$100 per day, which amount shall be recoverable by CEH, together with its reasonable attorneys' fees and costs, in an enforcement proceeding brought pursuant to Section 6. This total payment shall be made in two installments according to the following schedule: (a) within five (5) days of the Effective Date, Sincerely Nuts shall pay \$6,000 as a settlement payment; (b) within sixty (60) days of the Effective Date, Sincerely Nuts shall pay \$6,000 as a settlement payment. Each of these payments shall be made payable and allocated as follows, as set forth below in Sections 4.2-4.4:

**4.2. Civil Penalty.** Sincerely Nuts shall pay a total of \$1,530 as a penalty pursuant to Health & Safety Code § 25249.7(b). The civil penalty payment shall be apportioned in accordance with Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA")). Accordingly, the total OEHHA portion of the civil penalty payment shall be \$1,147.50. \$573.75 of this amount shall be included with the first payment due within five (5) days of the Effective Date, and \$573.75 of this amount shall be included with the second payment due within sixty (60) days of the Effective Date. These payments shall be made payable to OEHHA and associated with taxpayer identification number 68-0284486, and shall be delivered as follows:

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

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

The total CEH portion of the civil penalty payment shall be \$382.50. \$191.25 of this amount shall be included with the first payment due within five (5) days of the Effective Date, and \$191.25 of this amount shall be included with the second payment due within sixty (60) days of the Effective Date. These payments shall be made payable to the Center For Environmental Health and associated with taxpayer identification number 94-3251981, and shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

**4.3. Monetary Payment in Lieu of Civil Penalty.** Sincerely Nuts shall pay \$2,300 as payment to CEH in lieu of a civil penalty pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). \$1,150 of this amount shall be included with the first payment due within five (5) days of the Effective Date, and \$1,150 of this amount shall be included with the second payment due within sixty (60) days of the Effective Date. These payments shall be made payable to the Center For Environmental Health and associated with taxpayer identification number 94-3251981, and shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117. CEH will 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 to toxic chemicals. The method of selection of such groups can be found at the CEH web site at [www.ceh.org/justicefund](http://www.ceh.org/justicefund).

**4.4. Attorneys' Fees and Costs.** Sincerely Nuts shall pay a total of \$8,170 to reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result of investigating the alleged violations, bringing this matter to Sincerely Nuts' attention, and negotiating a settlement in the public interest. \$4,085 of this amount shall be included with the first payment due within five (5) days of the Effective Date and \$4,085 of this amount shall be included with the second payment due within sixty (60) days of the Effective Date. Each check pursuant to this section shall be made payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175, and shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

**5. MODIFICATION OF SETTLEMENT AGREEMENT**

**5.1.** This Agreement may be modified only by written agreement of the Parties.

**6. ENFORCEMENT OF SETTLEMENT AGREEMENT**

**6.1. Enforcement Venue and Jurisdiction.** The Parties agree that any action based on violation of this Agreement shall be brought in the Superior Court of California in San Francisco County. For purposes of this Agreement, notwithstanding Section 1.3 above, the Parties agree that the Superior Court of California in San Francisco County has subject matter jurisdiction over any disputes arising from this Agreement and personal jurisdiction over each of the Parties, and that venue is proper in the County of San Francisco. Should a party to this Agreement prevail on any action to enforce the terms of this Agreement, it shall be entitled to reasonable attorneys' fees and costs associated with such enforcement.

**6.2. Enforcement Procedures.** Prior to bringing any action to enforce the terms of this Agreement, a Party seeking to enforce shall provide the violating Party thirty (30) days advanced written notice of the alleged violation. The Parties shall meet and confer during such thirty (30) day period in an effort to try to reach agreement on an appropriate cure for the alleged violation. After such thirty (30) day period, the Party seeking to enforce may, by new action before the Superior Court of California in San Francisco County, seek to enforce the terms and

conditions contained in this Agreement or to otherwise enforce Proposition 65.

## **7. APPLICATION OF SETTLEMENT AGREEMENT**

**7.1.** This Agreement shall apply to and be binding upon the Parties hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

## **8. CLAIMS COVERED AND RELEASED**

**8.1.** Upon Sincerely Nuts' full compliance with Section 4 hereto, CEH hereby releases and discharges Sincerely Nuts and its parents, subsidiaries, directors, officers, employees, and agents ("Defendant Releasees"), and all entities to whom they distribute or sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Downstream Defendant Releasees"), with respect to any violation of Proposition 65, or any other statutory or common law claim, that was or could have been asserted against Sincerely Nuts regarding the failure to warn about exposures to Lead arising in connection with Covered Products manufactured, distributed, or sold by Sincerely Nuts on or before the execution of this Agreement.

**8.2.** Compliance with the terms of this Agreement by Sincerely Nuts constitutes compliance with Proposition 65 by Sincerely Nuts, Defendant Releasees, and Downstream Defendant Releasees for purposes of exposures to Lead from the Covered Products sold by Sincerely Nuts.

## **9. SPECIFIC PERFORMANCE**

**9.1.** The Parties expressly recognize that Sincerely Nuts' obligations under this Agreement are unique. In the event that Sincerely Nuts is found to be in breach of this Agreement for failure to comply with the provisions of Section 3 hereto, the Parties agree that it would be extremely impracticable to measure any resulting damages and that such breach would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or remedies, may sue in equity for specific performance, and Sincerely Nuts expressly waives the defense that a remedy in damages will be adequate.

**10. GOVERNING LAW**

**10.1.** The terms of this Agreement shall be governed by the laws of the State of California.

**11. PROVISION OF NOTICE**

**11.1.** All notices required pursuant to this Agreement and correspondence shall be sent by first class and electronic mail to the following:

For CEH:

Eric S. Somers  
Lexington Law Group  
503 Divisadero Street  
San Francisco, CA 94117  
esomers@lexlawgroup.com

For Sincerely Nuts, Inc.:

Stacy Don  
Law Office of Stacy E. Don  
3007 Douglas Blvd., Suite 100  
Roseville, CA 95661  
sdon@sdonlaw.com

**11.2.** 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.

**11. ENTIRE AGREEMENT**

**11.1.** This Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. There are no warranties, representations, or other agreements between the Parties except as expressly set forth herein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Agreement have been made by any Party hereto. No other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically contained or

referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto only to the extent that they are expressly incorporated herein. No supplementation, modification, waiver, or termination of this Agreement shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

**12. NO EFFECT ON OTHER SETTLEMENTS**

12.1. Nothing in this Agreement shall preclude CEH from resolving any claim against any entity besides Sincerely Nuts on terms that are different than those contained in this Agreement.

**13. EXECUTION IN COUNTERPARTS**

13.1. The stipulations to this Agreement may be executed in counterparts by electronic mail, which taken together shall be deemed to constitute one document.

**14. AUTHORIZATION**

14.1. Each signatory to this Agreement certifies that he or she is fully authorized by the party he or she represents to stipulate to this Agreement and to enter into and execute the Agreement on behalf of the Party represented and legally bind that Party. The undersigned have read, understand and agree to all of the terms and conditions of this Agreement. Except as explicitly provided herein, each Party is to bear its own fees and costs.

**AGREED TO:**

**CENTER FOR ENVIRONMENTAL HEALTH**



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Charlie Pizarro  
Associate Director



SINCERELY NUTS, INC.



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ALBERT ESSEL

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[Name]

PRESIDENT

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[Title]