

1
2
3
4
5
6
7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ALAMEDA

10
11 CENTER FOR ENVIRONMENTAL
12 HEALTH,

13 Plaintiff,

14 v.

15 ACH FOOD COMPANIES, INC., *et al*,

16 Defendants.
17
18
19

Case No. RG 16-829822

**[PROPOSED] CONSENT JUDGMENT
AS TO LIBERTY RICHTER, LLC**

20 **1. INTRODUCTION**

21 1.1 The Parties to this Consent Judgment are the Center For Environmental Health
22 (“CEH”), a California non-profit corporation, and Liberty Richter, LLC, a Delaware limited
23 liability company (“Settling Defendant”).

24 1.2 Settling Defendant represents and warrants that it is the exclusive importer and
25 distributor of the Kitchens of India brand food products in the United States. Settling Defendant
26 agrees to assume any and all liability related to alleged violations of Proposition 65 (Health &
27 Safety Code Section 25249.5 *et seq.*) regarding the failure to warn about exposures to lead and
28 lead compounds (“Lead”) in the Kitchens of India brand food products, regardless of its capacity

1 as an importer and distributor of the Kitchens of India food products, as if it were the
2 manufacturer of the Kitchens of India food products and as such it stands in the shoes of the
3 manufacturer of Covered Products (defined below) for purposes of this Consent Judgment.

4 1.3 CEH and Settling Defendant (the “Parties”) enter into this Consent Judgment to
5 settle certain claims asserted by CEH against Settling Defendant as set forth in the operative
6 complaint (“Complaint”) in the above-captioned matter. This Consent Judgment covers the lead
7 content of “Covered Products,” a term defined to mean “Indian pastes and sauces containing
8 ginger that are distributed, sold, or offered for sale by Settling Defendant in the State of
9 California.”

10 1.4 On June 14, 2016, CEH provided a 60-day Notice of Violation of Proposition 65
11 to the California Attorney General, the District Attorneys of every county in California, the City
12 Attorneys of every California city with a population greater than 750,000 and to Settling
13 Defendant, alleging that Settling Defendant violated Proposition 65 by exposing persons to Lead
14 contained in Covered Products without first providing a clear and reasonable Proposition 65
15 warning.

16 1.5 Settling Defendant is a corporation or other business entity that distributes, sells,
17 or offers for sale Covered Products that are sold in the State of California.

18 1.6 On September 2, 2016, CEH filed the Complaint in the above-captioned matter
19 (the “Action”). On June 9, 2017, the pleading was amended to name Settling Defendant as a
20 defendant in the Action.

21 1.7 For purposes of this Consent Judgment only, the Parties stipulate that this Court
22 has jurisdiction over the allegations of violations contained in the Complaint and personal
23 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper
24 in the County of Alameda and that this Court has jurisdiction to enter and enforce this Consent
25 Judgment as a full and final resolution of all claims which were or could have been raised in the
26 Complaint based on the facts alleged therein with respect to Covered Products manufactured,
27 distributed or sold by Settling Defendant.

1.8 The Parties have entered into and accept this Consent Judgment for the sole purposes of settling, compromising and amicably resolving issues disputed in this Action, and avoiding the burdens, expenses, delay, and uncertainties of litigation.

1.9 Nothing in this Consent Judgment constitutes, and nothing in this Consent Judgment shall be construed to constitute an admission by the Parties of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, liability, or responsibility. Nor shall compliance with the Consent Judgment constitute or be construed to constitute an admission by the Parties of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, liability, or responsibility. Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any other pending or future legal proceedings.

2. INJUNCTIVE RELIEF

2.1 **Purchase of Covered Products.** As of the date of entry of this Consent Judgment by the Court (the “Effective Date”), Settling Defendant shall not purchase any Covered Products that will be sold or offered for sale to California consumers that do not meet the standards set forth in Section 2.3.

2.2 **Sale of Covered Products.** Within sixty (60) days of the Effective Date, Settling Defendant shall not distribute, sell, or offer for sale, any Covered Products that will be sold or offered for sale to California consumers that do not meet the standards set forth in Section 2.3.

2.3 **Standards.** Covered Products that contain a concentration of no more than the amount of Lead by weight set forth in parts per billion (“ppb”) below are deemed compliant with the standards of this Section (the “Section 2.3 Standards”):

For Covered Products that are Indian pastes:	50 ppb
For Covered Products that are Indian sauces:	20 ppb

Examples of Covered Products sold by Settling Defendant in the past that are Indian pastes and Indian sauces are identified on Exhibit A attached hereto. Compliance with the Section 2.3 Standards shall 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

no greater than 50% of the Section 2.3 Standards that meets standard laboratory QA/QC requirements.

3. ENFORCEMENT

3.1.1 General Enforcement Provisions. CEH may, by motion or application for an order to show cause before this Court, enforce the terms and conditions contained in this Consent Judgment. Any action to enforce alleged violations of Section 2 by Settling Defendant shall be brought exclusively pursuant to this Section 3, and be subject to the meet and confer requirement of Section 3.2.4 if applicable.

3.2 Enforcement of Commitment to Comply with Section 2.3 Standards.

3.2.1 Notice of Violation. In the event that CEH identifies a Covered Product for which CEH has laboratory test results showing that the Covered Product has a Lead level exceeding the Section 2.3 Standards, CEH may issue a Notice of Violation pursuant to this Section.

3.2.2 Service of Notice of Violation and Supporting Documentation.

3.2.2.1 A Notice of Violation issued pursuant to Section 3.2.1 shall be sent to the person(s) identified in Section 7.2 to receive notices for Settling Defendant, and must be served within sixty (60) days of the date the Covered Products at issue were purchased or otherwise acquired by CEH, provided, however, that CEH may have up to an additional sixty (60) days to send the Notice of Violation if, notwithstanding CEH's good faith efforts, the test data required by Section 3.2.2.2 below cannot be obtained by CEH from its laboratory before expiration of the initial sixty (60) day period.

3.2.2.2 The Notice of Violation shall, at a minimum, set forth: (a) the date the alleged violation was observed; (b) the location at which the Covered Products were offered for sale; (c) a description of the Covered Products giving rise to the alleged violation, including the name and address of the retail entity from which the sample was obtained and, if available, information that identifies the product lot; and (d) all test data obtained by CEH regarding the Covered Products and supporting documentation sufficient for validation of the test results,

1 including any laboratory reports, quality assurance reports and quality control reports associated
2 with testing of the Covered Products.

3 3.2.3 Notice of Election of Response. No more than thirty (30) days after
4 effectuation of service of a Notice of Violation, Settling Defendant shall provide written notice
5 to CEH whether it elects to contest the allegations contained in a Notice of Violation (“Notice of
6 Election”). Failure to provide a Notice of Election within thirty (30) days of effectuation of
7 service of a Notice of Violation shall be deemed an election to contest the Notice of Violation.

8 3.2.3.1 If a Notice of Violation is contested, the Notice of Election shall
9 include all then-available documentary evidence regarding the alleged violation, including all
10 test data, if any is available. If Settling Defendant or CEH later acquires additional test or other
11 data regarding the alleged violation, it shall notify the other party and promptly provide all such
12 data or information to the party.

13 3.2.4 Meet and Confer. If a Notice of Violation is contested, CEH and Settling
14 Defendant shall meet and confer to attempt to resolve their dispute. Within thirty (30) days of
15 serving a Notice of Election contesting a Notice of Violation, Settling Defendant may withdraw
16 the original Notice of Election contesting the violation and serve a new Notice of Election to not
17 contest the violation, provided, however, that, in this circumstance, Settling Defendant shall pay
18 \$2,500 in addition to any payment required under this Consent Judgment. At any time, CEH
19 may withdraw a Notice of Violation, in which case for purposes of this Section 3.2 the result
20 shall be as if CEH never issued any such Notice of Violation. If no informal resolution of a
21 Notice of Violation results within thirty (30) days of a Notice of Election to contest, CEH may
22 file an enforcement motion or application pursuant to Section 3.1. In any such proceeding, CEH
23 may seek whatever fines, costs, penalties, attorneys’ fees or other remedies are provided by law
24 for failure to comply with the Consent Judgment.

25 3.2.5 Non-Contested Notices. If Settling Defendant elects to not contest the
26 allegations in a Notice of Violation, it shall undertake corrective action(s) and make payments, if
27 any, as set forth below.

1 3.2.5.1 Settling Defendant shall include in its Notice of Election a detailed
2 description with supporting documentation of the corrective action(s) that it has undertaken or
3 proposes to undertake to address the alleged violation. Any such correction shall, at a minimum,
4 provide reasonable assurance that all Covered Products having the same lot number as that of the
5 Covered Product identified in CEH's Notice of Violation (the "Noticed Covered Products") will
6 not be thereafter sold or offered for sale to California consumers, that the Noticed Covered
7 Products are removed from the California market and that Settling Defendant has sent
8 instructions to any of its stores and/or customers that offer the Noticed Covered Products for sale
9 to cease offering the Noticed Covered Products for sale to California consumers and to either
10 return all such Noticed Covered Products to Settling Defendant for destruction, or to directly
11 destroy such Noticed Covered Products. Settling Defendant shall keep for a period of two years
12 and make available to CEH, upon reasonable notice, for inspection and copying records any
13 correspondence regarding the market withdrawal and destruction of the Noticed Covered
14 Products. If there is a dispute over the corrective action, Settling Defendant and CEH shall meet
15 and confer before seeking any remedy in court. In no case shall CEH issue more than one Notice
16 of Violation per manufacturing lot of a type of Covered Product.

17 3.2.5.2 If the Notice of Violation is the first, second, third or fourth Notice of
18 Violation received by Settling Defendant under Section 3.2.1 that was not successfully contested
19 or withdrawn, then Settling Defendant shall pay \$10,000 for each Notice of Violation, provided
20 however that Settling Defendant shall be responsible for no more than two such payments for
21 Notices of Violation served in the first year after the Effective Date. If Settling Defendant has
22 received more than four (4) Notices of Violation under Section 3.2.1 that were not successfully
23 contested or withdrawn, then Settling Defendant shall pay \$20,000 for each Notice of Violation.
24 If Settling Defendant produces with its Notice of Election test data for the Covered Product that:
25 (i) was conducted in the year prior to the date CEH purchased the Covered Product that is the
26 subject of the Notice of Violation; (ii) was conducted on the Covered Product that was the
27 subject of the Notice of Violation; and (iii) demonstrates Lead levels below the Section 2.3
28 Standards, then any payment under this Section shall be reduced by fifty percent (50%).

1 3.2.6 Payments. Any payments under Section 3.2 shall be made by check
2 payable to the “Lexington Law Group” and shall be paid within thirty (30) days of service of a
3 Notice of Election triggering a payment and which shall be used as reimbursement for costs for
4 investigating, preparing, sending and prosecuting Notices of Violation, and to reimburse
5 attorneys’ fees and costs incurred in connection with these activities.

6 3.3 **Repeat Violations.** If Settling Defendant has received five (5) or more Notices of
7 Violation concerning the same Covered Product that were not successfully contested or
8 withdrawn in any twelve (12) month period then, at CEH’s option, CEH may seek whatever
9 fines, costs, penalties, attorneys’ fees or other remedies that are provided by law for failure to
10 comply with the Consent Judgment. Prior to seeking such relief, CEH shall meet and confer
11 with Settling Defendant for at least thirty (30) days to determine if Settling Defendant and CEH
12 can agree on measures that Settling Defendant can undertake to prevent future violations.

13 **4. PAYMENTS**

14 4.1 **Payments by Settling Defendant.** On or before five (5) days after the entry of
15 this Consent Judgment, Settling Defendant shall pay the total sum of \$97,500 as a settlement
16 payment as further set forth in this Section.

17 4.2 **Allocation of Payments.** The total settlement amount for Settling Defendant
18 shall be paid in five (5) separate checks in the amounts specified below and delivered as set forth
19 below. Any failure by Settling Defendant to comply with the payment terms herein shall be
20 subject to a stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each
21 day the full payment is not received after the applicable payment due date set forth in Section
22 4.1. The late fees required under this Section shall be recoverable, together with reasonable
23 attorneys’ fees, in an enforcement proceeding brought pursuant to Section 3 of this Consent
24 Judgment. The funds paid by Settling Defendant shall be allocated as set forth below between
25 the following categories and made payable as follows:

26 4.2.1 Settling Defendant shall pay \$13,115 as a civil penalty pursuant to Health
27 & Safety Code §25249.7(b). The civil penalty payment shall be apportioned in accordance with
28 Health & Safety Code §25249.12 (25% to CEH and 75% to the State of California’s Office of

1 Environmental Health Hazard Assessment (“OEHHA”). Accordingly, the OEHHA portion of
2 the civil penalty payment for \$9,837 shall be made payable to OEHHA and associated with
3 taxpayer identification number 68-0284486. This payment shall be delivered as follows:

4 For United States Postal Service Delivery:

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

10 For Non-United States Postal Service Delivery:

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

16 The CEH portion of the civil penalty payment for \$3,279 shall be made payable to
17 the Center for Environmental Health and associated with taxpayer identification number 94-
18 3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San
19 Francisco, CA 94117.

20 4.2.2 Settling Defendant shall pay \$9,836 as an Additional Settlement Payment
21 (“ASP”) to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of
22 Regulations, Title 11, § 3204. CEH intends to place these funds in CEH’s Toxics in Food Fund
23 and use them to support CEH programs and activities that seek to educate the public about lead
24 and other toxic chemicals in food, to work with the food industry and agriculture interests to
25 reduce exposure to lead and other toxic chemicals in food, and to thereby reduce the public
26 health impacts and risks of exposure to lead and other toxic chemicals in food sold in California.
27 CEH shall obtain and maintain adequate records to document that ASPs are spent on these
28 activities and CEH agrees to provide such documentation to the Attorney General within thirty
days of any request from the Attorney General. The payments pursuant to this Section shall be
made payable to the Center for Environmental Health and associated with taxpayer identification
number 94-3251981. These payments shall be delivered to Lexington Law Group, 503
Divisadero Street, San Francisco, CA 94117.

4.2.3 Settling Defendant shall pay \$74,548 as a reimbursement of a portion of CEH's reasonable attorneys' fees and costs. This amount shall be divided into two checks: (1) a check in the amount of \$65,648 shall be made payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175; and (2) a check in the amount of \$8,900 shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. These payments shall be delivered to the Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

4.2.4 To summarize, Settling Defendant shall deliver checks made out to the payees and in the amounts set forth below:

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$9,837	OEHHA per Section 4.2.1
Center For Environmental Health	Penalty	\$3,279	LLG
Center For Environmental Health	ASP	\$9,836	LLG
Lexington Law Group	Fee and Cost	\$65,648	LLG
Center For Environmental Health	Fee and Cost	\$8,900	LLG

5. MODIFICATION AND DISPUTE RESOLUTION

5.1 **Modification.** This Consent Judgment, including without limitation the Section 2.3 Standards, may be modified from time to time by express written agreement of the Parties, with the approval of the Court, or by an order of this Court upon motion and in accordance with law.

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

1 **6. CLAIMS COVERED AND RELEASE**

2 6.1 Provided that Settling Defendant complies in full with its obligations under
3 Section 4 hereof, this Consent Judgment is a full, final and binding resolution between CEH on
4 behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries,
5 affiliated entities that are under common ownership, directors, officers, employees, agents,
6 shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities to
7 which Settling Defendant distributes or sells Covered Products, such as distributors, wholesalers,
8 customers, retailers, franchisees, licensors and licensees (“Downstream Defendant Releasees”),
9 of any violation of Proposition 65 based on failure to warn about alleged exposure to Lead
10 contained in the Covered Products identified on Exhibit A that were sold, distributed or offered
11 for sale by Settling Defendant within 60 days of the Effective Date (the “Released Products”).

12 6.2 Provided that Settling Defendant complies in full with its obligations under
13 Section 4 hereof, CEH, for itself, its agents, successors and assigns, releases, waives and forever
14 discharges any and all claims against Settling Defendant, Defendant Releasees and Downstream
15 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or
16 common law claims that have been or could have been asserted by CEH individually or in the
17 public interest regarding the failure to warn about exposure to Lead arising in connection with
18 the Released Products.

19 6.3 Provided that Settling Defendant complies in full with its obligations under
20 Section 4 hereof, compliance with the terms of this Consent Judgment by Settling Defendant and
21 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
22 Defendant Releasees and Downstream Defendant Releasees with respect to any alleged failure to
23 warn about Lead in Covered Products manufactured, distributed or sold by Settling Defendant
24 after the Effective Date.

25 **7. PROVISION OF NOTICE**

26 7.1 When CEH is entitled to receive any notice under this Consent Judgment, the
27 notice shall be sent by first class and electronic mail to:
28

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:

Garrett L. Jansma
Latham & Watkins LLP
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626-1925
garrett.jansma@lw.com

Any Party may modify the person and/or 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 upon the date it is entered by the Court, provided however that the provisions of Section 8.2 below shall become enforceable upon the date this Consent Judgment is signed by CEH and Settling Defendant, whichever is later.

8.2 CEH shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant shall support CEH's Motion for Approval.

8.3 Other than as set forth in this Section, 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

1 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
2 Civil Discovery Act of 1986, Code of Civil Procedure §§2016.010, *et seq.*

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

9 10.3 Nothing in this Section 10 shall preclude a party from seeking an award of
10 sanctions pursuant to law.

11 **11. ENTIRE AGREEMENT**

12 11.1 This Consent Judgment contains the sole and entire agreement and understanding
13 of 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
15 and therein. There are no warranties, representations or other agreements between the Parties
16 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
17 other than those specifically referred to in this Consent Judgment have been made by any Party
18 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
19 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
20 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
21 Parties hereto only to the extent that they are expressly incorporated herein. No
22 supplementation, modification, waiver or termination of this Consent Judgment shall be binding
23 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions
24 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
25 provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

26 **12. RETENTION OF JURISDICTION**

27 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
28 Consent Judgment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

13.1 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.

14. NO EFFECT ON OTHER SETTLEMENTS

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

15. EXECUTION IN COUNTERPARTS

15.1 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

IT IS SO STIPULATED:

Dated: 30 June, 2017

CENTER FOR ENVIRONMENTAL HEALTH


Signature

Carmitz Pizano
Printed Name

Associate Director
Title

Dated: _____, 2017

LIBERTY RICHTER, LLC

Signature

Printed Name

Title

1 **IT IS SO STIPULATED:**

2
3 Dated: _____, 2017

CENTER FOR ENVIRONMENTAL HEALTH

Signature

Printed Name

Title

12 Dated: June 30, 2017

LIBERTY RICHTER, LLC

Signature

Printed Name

Title

EXHIBIT A

Released Products

Kitchens of India Bombay Kadai
Kitchens of India Delhi Dum Aloo
Kitchens of India Delhi Murgh Makhani
Kitchens of India Hyderabad Korma
Kitchens of India Kashmiri Rogan Josh
Kitchens of India Malai Tikka
Kitchens of India Paste for Butter Chicken Curry
Kitchens of India Paste for Chicken Curry
Kitchens of India Paste for Fish Curry
Kitchens of India Paste for Hyderabad Biryani
Kitchens of India Paste for Lamb Curry
Kitchens of India Paste for Malabari Chicken Stew
Kitchens of India Paste for Tikka Masala
Kitchens of India Paste for Vegetable Curry
Kitchens of India Punjabi Tikka Masala
Kitchens of India Tandoori Tikka
Kitchens of India Paste for Vegetable Biryani