SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

CENTER FOR ENVIRONMENTAL HEALTH, Plaintiff, v. WHOLESOME SWEETENERS, INC., et al., Defendants.	Case No. CGC-19-575773 **[PROPOSED] CONSENT JUDGMENT AS TO WHOLESOME SWEETENERS, INC.**

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1. INTRODUCTION

1.1 The Parties to this Proposition 65 consent judgment ("Consent Judgment") are the Center For Environmental Health ("CEH"), a California non-profit corporation, and Wholesome Sweeteners, Inc. ("Settling Defendant").[1] CEH and 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.

1.2 This Consent Judgment covers the lead and acrylamide content of molasses that is packaged by Settling Defendant for consumer use and then offered for retail sale by Settling Defendant or any other direct or indirect downstream entity to residents of the State of California, whether in Settling Defendant's own brand name or as privately labeled ("Covered Products"). Covered Products do not include molasses packaged by Settling Defendant for commercial use or the resulting products that utilize such commercial molasses as an ingredient. A list of all privately labeled Covered Products that are currently sold by Settling Defendant and covered by this Consent Judgment is attached hereto as Exhibit A.

1.3 On February 8, 2017, CEH provided a 60-day 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 Settling Defendant, alleging that Settling Defendant violated Proposition 65 by exposing persons to acrylamide contained in Covered Products without first providing a clear and reasonable Proposition 65 warning.

1.4 On September 7, 2018, CEH provided a 60-day 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 Settling Defendant, alleging that Settling Defendant violated Proposition 65 by exposing persons to lead and lead compounds ("Lead") contained in Covered Products without first providing a clear and reasonable Proposition 65 warning.

[1] Proposition 65 is codified in California Health & Safety Code §§ 25249.5 *et seq*.

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1.5 Settling Defendant is a corporation or other business entity that manufactures, distributes, sells or offers for sale Covered Products that are sold in the State of California or has done so in the past.

1.6 On May 7, 2019, CEH filed the Complaint in the above-captioned matter naming Settling Defendant as a defendant in the action.

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

1.8 Nothing in this Consent Judgment is or 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 Consent Judgment 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 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. This Consent Judgment is the product of negotiation and compromise and is accepted by the Parties solely for purposes of settling, compromising and resolving issues disputed in this Action.

2. DEFINITIONS

2.1 The " Effective Date" shall mean the date Notice of Entry of this Consent Judgment is served.

2.2 The "Acrylamide Level" shall mean a concentration level of no more than 325 parts per billion (" ppb") acrylamide by weight.

2.3 The "Lead Level" shall mean a concentration level of no more than 35 ppb Lead by weight.

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3. INJUNCTIVE RELIEF

3.1 **Clear and Reasonable Warnings for Covered Products**. As of the Effective Date, no Covered Product that:

- contains acrylamide in a concentration exceeding the Acrylamide Level; or
- contains lead in a concentration exceeding the Lead Level,

shall be sold or offered for sale by Settling Defendant unless Settling Defendant provides a clear and reasonable warning as further specified in this Section 3.

3.2 **Warning Language**. The warning required by Section 3.1 for Covered Products shall state the following:

3.2.1 For Covered Products that contain acrylamide in a concentration exceeding the Acrylamide Level:

WARNING:

Consuming this product can expose you to chemicals including acrylamide, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov/food.

3.2.2 For Covered Products that contain Lead in a concentration exceeding the Lead Level:

WARNING:

Consuming this product can expose you to chemicals including lead, which is known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/food.

3.2.3 For Covered Products that contain both acrylamide in a concentration exceeding the Acrylamide Level and Lead in a concentration exceeding the Lead Level:

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WARNING:

Consuming this product can expose you to chemicals including lead and acrylamide, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/food.

The word "**WARNING**" must be in all capital letters and bold print.

3.3 **Placement of Warning Language**. The warning language set forth in Section 3.2 must be displayed with such conspicuousness as compared with other words, statements, designs or devices as to render the warning likely to be read and understood by an ordinary consumer under customary conditions of purchase and use. The warning language shall appear on the container's label, set off from other surrounding information or enclosed in a box. If the product's label contains other warnings or nutritional information in a language other than English, the warning language set forth in Section 3.2 must also be displayed on the label in that language in addition to English.

3.4 **Internet Sales**. With respect to internet sales of Covered Products, the warning language set forth in Section 3.2 must be prominently displayed in such a manner that it is likely to be read and understood as being applicable to the Covered Product being sold prior to the authorization of or actual payment by the purchaser. For purposes of this Section 3.4, the warning language is not prominently displayed if the customer must search for the warning language in the general content of Settling Defendant's website or if a reasonable consumer cannot determine the specific Covered Product to which the warning applies. If the product display page contains other warnings or nutritional information in a language other than English, the warning language set forth in Section 3.2 must also be displayed on the label in that language in addition to English.

3.5 **Commercial Products**. The requirements set forth in this Section 3 do not apply to molasses that is packaged by the Settling Defendant in containers of more than one quart which are intended for commercial use.

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3.6 **Additional Time.** Notwithstanding the foregoing, to avoid waste, Settling Defendant may have until the Effective Date to bottle Covered Product in consumer packaging that was printed prior to the execution of this Consent Judgment, and until December 31, 2019 to sell or distribute from its inventory Covered Products bottled in such consumer product packaging, without the warning required by Sections 3.1 and 3.2.

4. ENFORCEMENT

4.1 **Enforcement Procedures.** This Court shall have exclusive jurisdiction over all matters regarding enforcement of the Consent Judgment. Prior to bringing any motion or order to show cause to enforce the terms of this Consent Judgment, 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, motion or order to show cause before the Superior Court of San Francisco, seek to enforce Proposition 65 or the terms and conditions contained in this Consent Judgment.

4.2 **Failure to Comply With Payment Obligations.** Notwithstanding the provisions of the Enforcement of Judgments Law and CCP § 780.160, in the event that Settling Defendant does not comply fully with its payment obligations under Section 5, in addition to any other enforcement mechanism available to CEH, CEH may obtain an order requiring Settling Defendants to submit to a debtors exam. In the event that Settling Defendants fail to submit to any such debtors exam ordered by the Court, CEH may seek an order holding Settling Defendant in contempt of court.

5. PAYMENTS

5.1 **Payments by Settling Defendant.** On or before ten (10) days following the Effective Date, Settling Defendant shall pay the total sum of $197,500 as a settlement payment as further set forth in this Section.

5.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall

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be paid in five (5) separate checks in the amounts specified below and delivered as set forth below. Any failure by Settling Defendant to comply with the payment terms herein shall be subject to a stipulated late fee to be paid by Settling Defendant in the amount of $100 for each day the full payment is not received after the applicable payment due date set forth in Section 5.1. The late fees required under this Section shall be recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 4 of this Consent Judgment. The funds paid by Settling Defendant shall be allocated as set forth below between the following categories and made payable as follows:

5.2.1 A civil penalty in the amount of $36,343 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 OEHHA portion of the civil penalty payment for $27,257 shall be made payable to OEHHA and associated with taxpayer identification number 68-0284486. This payment 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 CEH portion of the civil penalty payment for $9,086 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.

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5.2.2 An Additional Settlement Payment ("ASP") in the amount of $27,257 to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204. CEH intends to place these funds in CEH's Toxics in Food Fund and used to support CEH programs and activities that seek to educate the public about toxic chemicals in food, to work with the food industry and agriculture interests to reduce exposure to toxic chemicals in food and to thereby reduce the public health impacts and risks of exposure to acrylamide, Lead and other toxic chemicals in food sold in California. CEH shall obtain and maintain adequate records to document that ASPs are spent on these activities and CEH agrees to provide such documentation to the Attorney General within thirty days of any request from the Attorney General. 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.

5.2.1 Settling Defendant shall pay $133,900 as a reimbursement of a portion of CEH's reasonable attorneys' fees and costs. The attorneys' fees and cost reimbursement shall be made in two separate checks as follows: (a) $117,500 payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175; and (b) $16,400 payable to the Center For Environmental Health and associated with taxpayer identification number 94-3251981. Both of these payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

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

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Payee	Type	Amount	Deliver To
OEHHA	Penalty	$27,257	OEHHA per Section 5.2.1
Center For Environmental Health	Penalty	$9,086	LLG
Center For Environmental Health	ASP	$27,257	LLG
Lexington Law Group	Fee and Cost	$117,500	LLG
Center For Environmental Health	Fee and Cost	$16,400	LLG

6. MODIFICATION AND DISPUTE RESOLUTION

6.1 **Modification.** This Consent Judgment 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.

6.2 **Notice; Meet and Confer.** Any party seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with the other party prior to filing a motion to modify the Consent Judgment.

7. CLAIMS COVERED AND RELEASE

7.1 Provided that Settling Defendant complies in full with its obligations under Section 5, this Consent Judgment is a full, final and binding resolution between CEH on behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, agents, shareholders, successors, assigns, and attorneys ("Defendant Releasees"), and all entities to which Settling Defendant distributes or sells Covered Products, such as distributors, wholesalers, customers, retailers (including, but not limited to Save Mart Supermarkets and Target Corporation), franchisees, licensors and licensees ("Downstream Defendant Releasees"), of any violation of Proposition 65 based on failure to warn about alleged exposure to acrylamide or Lead contained in Covered Products that were sold or distributed by Settling Defendant prior to the Effective Date.

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7.2 Provided that Settling Defendant complies in full with its obligations under Section 5, CEH, for itself, its agents, successors and assigns, releases, waives and forever discharges any and all claims against Settling Defendant, Defendant Releasees and Downstream Defendant Releasees arising from any violation of Proposition 65 or any other statutory or common law claims that have been or could have been asserted by CEH individually or in the public interest regarding the failure to warn about exposure to acrylamide or Lead contained in Covered Products sold or distributed by Settling Defendant prior to the Effective Date.

7.3 Provided that Settling Defendant complies in full with its obligations under Section 3 hereof, compliance with the terms of this Consent Judgment by Settling Defendant shall constitute compliance with Proposition 65 by Settling Defendant, Defendant Releasees and Downstream Defendant Releasees with respect to any alleged failure to warn about acrylamide or Lead in Covered Products sold by Settling Defendant after the Effective Date. Notwithstanding the foregoing, to the extent that a Downstream Defendant Releaseee offers Covered Products for sale to California consumers via the internet following the Effective Date that have been labeled with warnings as required under Sections 3.1 and 3.2, such Downstream Defendant Releasee shall not be deemed in compliance with Proposition 65 under this Section unless it provides internet warnings for the Covered Products in question in a manner compliant with Section 3.4 hereof.

8. PROVISION OF NOTICE

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

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

8.2 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:

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Nigel Willerton
Chief Executive Officer
Wholesome Sweeteners, Inc.
1 Sugar Creek Center Blvd. Suite 500
Sugar Land, TX 77478
Nigel@wholesomesweet.com

Robert L. Falk
Morrison & Foerster LLP
425 Market Street, 32nd Floor
San Francisco, CA 94105
rfalk@mofo.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.

9. COURT APPROVAL

9.1 This Consent Judgment shall become effective upon the date signed by CEH and Settling Defendant, whichever is later, 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.

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

10. GOVERNING LAW AND CONSTRUCTION

10.1 The terms of this Consent Judgment shall be governed by the laws of the State of California.

11. ATTORNEYS' FEES

11.1 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.*

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11.3 Notwithstanding Section 11.1, a Party who prevails in a contested enforcement action brought pursuant to Section 4 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 seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and this provision shall not be construed as altering any procedural or substantive requirements for obtaining such an award.

11.4 Nothing in this Section 11 shall preclude a party from seeking an award of sanctions pursuant to law.

12. ENTIRE AGREEMENT

12.1 This Consent Judgment 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 Consent Judgment 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 Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent Judgment 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.

13. RETENTION OF JURISDICTION

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

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14. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

14.1 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.

15. SUCCESSORS AND ASSIGNS

15.1 This Consent Judgment shall apply to and be binding upon CEH and Settling Defendant, and their respective divisions, subdivisions, and subsidiaries, and the successors or assigns of any of them.

16. NO EFFECT ON OTHER SETTLEMENTS

15.1 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.

17. EXECUTION IN COUNTERPARTS

17.1 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.

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IT IS SO STIPULATED:

Dated: 7/12, 2019

CENTER FOR ENVIRONMENTAL HEALTH

Signature

MICHAEL GREEN

Printed Name

CEO

Title

Dated: _____, 2019

WHOLESOME SWEETENERS, INC.

Signature

Printed Name

Title

IT IS SO ORDERED, ADJUDGED, AND DECREED

Dated: _____

Judge of the Superior Court

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IT IS SO STIPULATED:

Dated: _____, 2019

CENTER FOR ENVIRONMENTAL HEALTH

_____
Signature

_____
Printed Name

_____
Title

Dated: 7-16-, 2019

WHOLESOME SWEETENERS, INC.

_____
Signature

NIGEL WILLERTON
Printed Name

C.E.O.
Title

IT IS SO ORDERED, ADJUDGED, AND DECREED

Dated: _____

_____
Judge of the Superior Court

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