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FILED
ALAMEDA COUNTY

APR - 9 2019

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA**

KIM EMBRY, an individual,
Plaintiff,

v.

THE KROGER COMPANY, an Ohio corporation; PINNACLE FOODS GROUP, LLC, a Delaware corporation; BRUEGGER'S ENTERPRISES, INC., a Delaware corporation; and DOES 1 through 100, inclusive,
Defendants.

Case No.: RG18908172
Reservation No.: R-2040140

**[PROPOSED] JUDGMENT
PURSUANT TO TERMS OF
PROPOSITION 65 SETTLEMENT
AND CONSENT JUDGMENT**

Date: March 12, 2019
Time: 9:00 a.m.
Dept.: 16
Judge: Hon. M. Markman

Case Filed: June 8, 2018
Trial Date: Not set

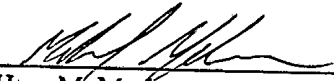
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Plaintiff Kim Embry and Defendant Bruegger's Enterprises, Inc., agreed through their respective counsel to enter judgment pursuant to the terms of their settlement in the form of a stipulated judgment ("Consent Judgment"). This Court issued an Order approving the Proposition 65 Settlement and Consent Judgment on ~~March 12~~, ^{April 9,} 2019.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health and Safety Code, section 25249.7(f)(4) and Code of Civil Procedure, section 664.6, judgment is hereby entered in accordance with the terms of the Consent Judgment attached hereto as **Exhibit A**. By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure, section 664.6.

IT IS SO ORDERED.

Dated: 4/9/19



Hon. M. Markman
JUDGE OF THE SUPERIOR COURT

Exhibit A

1 **GLICK LAW GROUP, PC**
Noam Glick (SBN 251582)
2 225 Broadway, Suite 2100
San Diego, California 92101
3 Tel: (619) 382-3400
Fax: (619) 615-2193
4 Email: noam@glicklawgroup.com

5 **NICHOLAS & TOMASEVIC, LLP**
Craig M. Nicholas (SBN 178444)
6 Shaun Markley (SBN 391785)
225 Broadway, 19th Floor
7 San Diego, California 92101
Tel: (619) 325-0492
8 Fax: (619) 325-0496
Email: craig@nicholaslaw.org

9 Attorneys for Plaintiff
10 Kim Embry

11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF ALAMEDA**

14 **KIM EMBRY, an individual**
15 **Plaintiff,**

16 **v.**

17 **THE KROGER COMPANY, an Ohio**
corporation; **PINNACLE FOODS GROUP,**
18 **LLC, a Delaware corporation; BRUEGGER'S**
ENTERPRISES, INC., a Delaware
19 **corporation; and DOES 1 through 100,**
inclusive,
20 **Defendants.**

Case No. RG18908172

[PROPOSED] CONSENT JUDGMENT as
to BRUEGGER'S ENTERPRISES, INC.

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

Department: 16
Judge: Hon. M. Markman

Complaint filed on June 8, 2018

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1. INTRODUCTION

1.1 Parties

This Consent Judgment is entered into by and between Kim Embry (“Embry”) and Bruegger’s Enterprises, Inc. (“Bruegger’s”) (collectively the “Parties”).

1.2 Plaintiff

Embry is an individual residing in California and acting in the interest of the general public. She seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products.

1.3 Defendant

Embry has alleged that Bruegger’s employs ten or more individuals and is a “person in the course of doing business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

1.4 General Allegations

Embry contends that Bruegger’s manufactures, imports, sells, and distributes for sale in California bagels that, when grilled or toasted, contains acrylamide. Embry further alleges that Bruegger’s does so without providing a sufficient warning as required by Proposition 65 and related regulations. Pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer and reproductive harm.

1.5 Product Description

For purposes of this Consent Judgment “Product” or “Products” are defined as bagels that contain acrylamide and which are authorized to be manufactured, distributed, sold, or offered for sale in California, including in their toasted or grilled form, by Bruegger’s and Releasees as defined *infra*.

1.6 Releasees

Bruegger’s contends that it is a franchisor and that the acts alleged by Embry are attributable to other persons in the course of doing business in California. This Consent Judgment expressly encompasses all bagel products sold under Bruegger’s brand name or in retail locations operated by its franchisees in California. The term “Products” used throughout this Consent Judgment refers to

1
2 all such products. The term "Releasee" means Bruegger's franchisees that sell Products in California
3 as well as all other entities or persons addressed in the definition of Releasee in Section 4 below.

4 **1.7 Notices of Violation**

5 On May 2, 2017, Embry served Bruegger's, among others, the California Attorney General,
6 and all other required public enforcement agencies with a 60-Day Notice of Violation of California
7 Health and Safety Code section 25249.6 *et seq.* The notice alleged that Bruegger's violated
8 Proposition 65 by failing to sufficiently warn consumers in California of exposures to acrylamide
9 contained in the Products. Embry sent an amended notice to Bruegger's, the California Attorney
10 General, and all other required public enforcement agencies on July 21, 2017 ("Notice"), specifying
11 that the alleged exposures violating Proposition 65 resulted from grilling or toasting the Products.

12 On July 25, 2017, Embry sent Bruegger's an updated, but substantive duplicate of the July 21,
13 2017 Notice. On September 15, 2017, Embry notified the California Attorney General's office that it
14 was withdrawing its May 2, 2017 notice to Bruegger's. Subsequently, Embry's counsel confirmed to
15 Bruegger's Franchise Corporation that it had withdrawn its May 2, 2017 notice and would not be
16 proceeding on those claims or those in its July 25, 2017 notice.

17 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
18 violations alleged in the Notice.

19 **1.8 Complaint**

20 On June 8, 2018, Embry filed a Complaint against Bruegger's, among others, for the alleged
21 violations of Health and Safety Code section 25249.6 that are the subject of the Notice
22 ("Complaint").

23 **1.9 No Admission**

24 Bruegger's denies the material, factual, and legal allegations in the Notice and Complaint, and
25 maintains that all of the products it has authorized for sale in California, including the Products as
26 sold by its franchisees, have been, and are, in compliance with Proposition 65 and all other applicable
27 laws. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
28 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment

be construed as an admission of any fact, finding, ³ conclusion of law, issue of law, or violation of law.

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This Section shall not, however, diminish or otherwise affect Bruegger's's obligations, responsibilities, and duties under this Consent Judgment.

1.10 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Bruegger's as to the allegations in the Complaint, that venue is proper in the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1.11 Effective Date

For purposes of this Consent Judgment, the term "Effective Date" means the date on which Embry serves notice that the Court has granted a motion for approval and entry of this Consent Judgment, as discussed in Section 5.

2. INJUNCTIVE RELIEF

2.1 Commencing within three (3) months following the Effective Date and continuing thereafter, Bruegger's shall, for all Products it authorizes for sale in California, require its franchisees to post signs in their California retail outlets containing one of the following clear and reasonable warnings:

WARNING: Chemicals known to the State of California to cause cancer and reproductive toxicity, including acrylamide, are present in coffee, baked goods, and other food or beverages sold here. Acrylamide is not added to our products, but results from cooking, such as when coffee beans are roasted or baked goods are baked.

or, pursuant to 27 Cal. Code Regs. § 25607.6:

WARNING: Certain foods and beverages sold or served here can expose you to chemicals including acrylamide in many fried or baked foods, and mercury in fish, 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/restaurant

The following information may, in whole or in part, accompany the warning statement selected from the above at Bruegger's discretion:

Your personal cancer risk is affected by a wide variety of factors. The FDA has not advised people to stop drinking coffee or eating baked goods that contain acrylamide. For more

1
2 information regarding FDA's views, see www.fda.gov. For more information about
3 acrylamide and Proposition 65, visit www.oehha.ca.gov/prop65/acrylamide.html.

4 **2.2** Bruegger's shall direct that the signs containing one of the above warning statements
5 shall be prominently placed in its California franchisees' retail outlets with such
6 conspicuousness as compared with other words, statements, designs, or devices as to render it
7 likely to be read and understood by an ordinary individual under customary conditions before
8 purchase or use. The posting of a sign no smaller than 5 by 5 inches, printed in no smaller
9 than 20-point type, placed at the primary point of sale in a Bruegger's franchisee's retail
10 outlet in California where orders are placed shall be deemed to meet this requirement.
11 Pursuant to 27 Cal. Code Regs § 25607.5, the following alternatives shall also be deemed to
12 meet the requirement:

13 (a) An 8½ by 11 inch sign, printed in no smaller than 28-point type placed so that it is
14 readable and conspicuous to customers as they enter each public entrance to the
15 restaurant or facility where food or beverages may be consumed, or

16 (b) A warning on any menu or list describing food or non-alcoholic beverage
17 offerings, in a type size no smaller than the largest type size used for the names of
18 general menu items.

19 **2.3 Effect of Future Determinations and Judgments**

20 In the event that the California Office of Environmental Health Hazard Assessment
21 ("OEHHA") promulgates one or more regulations requiring or permitting warning text and/or
22 methods of transmission different than those set forth above, Bruegger's shall be entitled to use, at its
23 discretion, such other warning text and/or method of transmission without being deemed in breach of
24 this Consent Judgment. In the event Embry enters into an agreement or consent judgment with any
25 other person addressing alleged violations of Proposition 65 with respect to exposures to acrylamide
26 from bagels that provides for meeting an acrylamide concentration limit ("Reformulation Standard")
27 rather than providing clear and reasonable Proposition 65 warnings or provides for a different
28 warning commitment than that set forth in Sections 2.2 and 2.3 above; or if a final judgment is

entered in any Proposition 65 case with respect to⁵ exposures to acrylamide from bagels that provides

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2 for a Reformulations Standard applicable to bagels or an alternative Proposition 65 warning; or if
3 OEHHA adopts a regulation or safe use determination, or issues an interpretative guideline, that
4 provides for or has the effect of providing for a Reformulation Standard or different treatment of
5 bagels and acrylamide under Proposition 65; or if Proposition 65 is determined in a final judgment to
6 be preempted by federal law with respect to acrylamide in bagels or other bread products, then this
7 Consent Judgment shall be subject to modification at the option of Bruegger's, and without the
8 objection of Embry, to conform or eliminate the terms of this Section 2 accordingly.

9 **3. MONETARY SETTLEMENT TERMS**

10 **3.1 Settlement Amount**

11 Bruegger's shall pay forty-eight thousand dollars (\$48,000) in settlement and total satisfaction
12 of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes
13 civil penalties in the amount of four thousand dollars (\$4,000) pursuant to Health and Safety Code
14 section 25249.7(b) and reimbursement of Embry's attorney's fees and costs in the amount of forty
15 four thousand dollars (\$44,000).

16 **3.2 Civil Penalty**

17 The portion of the settlement attributable to civil penalties shall be allocated according to
18 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the
19 penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and
20 the remaining twenty-five percent (25%) of the penalty paid to Embry.

21 All payments owed to Embry, shall be delivered to the following payment address:

22 Noam Glick
23 Glick Law Group
24 225 Broadway, Suite 2100
San Diego, CA 92101

25 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA
26 (Memo Line "Prop 65 Penalties") at the following addresses:

27 For United States Postal Service Delivery:

28 Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
CONSENT JUDGMENT

1
2 Sacramento, CA 95812-4010

3 For Non-United States Postal Service Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 1001 I Street
8 Sacramento, CA 95814

9 Bruegger's agrees to provide Embry's counsel with a copy of the check payable to OEHHA,
10 simultaneous with its penalty payments to Embry.

11 The Parties, including Embry, will exchange completed IRS 1099, W-9, or other forms as
12 required. Relevant information for Glick Law Group, Nicholas & Tomasevic, LLP, and Embry are
13 set out below:

- 14 • "Kim Embry" whose address and tax identification number shall be provided within five
15 (5) days after this Settlement Agreement is fully executed by the Parties;
- 16 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.3;
- 17 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.3; and
- 18 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA
19 95814.

20 **3.3 Attorney's Fees and Costs**

21 The portion of the settlement attributable to attorney's fees and costs shall be paid to Embry's
22 counsel, which contend that they should be entitled to attorney's fees and costs incurred by her in this
23 action, including but not limited to investigating potential violations, bringing this matter to
24 Bruegger's's attention, as well as litigating and negotiating a settlement in the public interest.

25 Bruegger's shall provide its payment to Embry's counsel in two checks, divided equally,
26 payable to Glick Law Group, PC (\$22,000) and Nicholas & Tomasevic, LLP (\$22,000) respectively.

27 The addresses for these two entities are:

28 Noam Glick
Glick Law Group
225 Broadway, Suite 2100
San Diego, CA 92101

Craig Nicholas
Nicholas & Tomasevic, LLP
225 Broadway, 19th Floor
San Diego, CA 92101

3.4 Timing

The above mentioned checks will be issued within fourteen (14) business days of the Effective Date.

4. CLAIMS COVERED AND RELEASED

4.1 Embry's Public Release of Proposition 65 Claims

For any claim or violation arising under Proposition 65 alleging a failure to warn about exposures to acrylamide from Products prior to the Effective Date, Embry, acting on her own behalf and in the public interest, releases Bruegger's of any and all liability. This release extends to Bruegger's' parents, subsidiaries, affiliated entities under common ownership, it and their directors, officers, agents, employees, attorneys, and each entity to whom Bruegger's authorizes to sell the Products, including but not limited to, its franchisees and licensees (collectively, the "Releasees"). Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide from the Products after the Effective Date.

4.2 Embry's Individual Release of Claims

Given the nature of the injunctive relief to be provided herein, Embry, in her individual capacity, also provides a release to Bruegger's and/or Releasees, which shall be a full and final accord and satisfaction of as well as a bar to all actions, causes of action, obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands by Embry of any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to chemicals in addition to acrylamide that have been listed under Proposition 65 before the Effective Date to the extent that such exposures have arisen as the result of products sold in Bruegger's-branded stores in California. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about such exposures after the Effective Date.

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4.3 Bruegger's Release of Embry

Bruegger's, on its own behalf, and on behalf of Releasees as well as its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Embry and her attorneys and other representatives, for any and all actions taken or statements made by Embry and her attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with respect to the Products.

5. COURT APPROVAL

This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void if it is not approved and entered by the Court within one year after it has been fully executed by the Parties, or by such additional time as the Parties may agree to in writing.

6. SEVERABILITY

Subsequent to the Court's approval and entry of this Consent Judgment, if any provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

7. GOVERNING LAW

The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed, or is otherwise rendered inapplicable for reasons, including but not limited to changes in the law, then Bruegger's may provide written notice to Embry of any asserted change, and shall have no further injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

8. NOTICE

Unless specified herein, all correspondence and notice required by this Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail, return receipt requested; or (iii) a recognized overnight courier to the following addresses:

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For Bruegger's:

For Embry:

General Counsel
Coffee & Bagel Brands
555 Zang Street, Suite 300
Lakewood, CO 80228

Noam Glick
Glick Law Group, PC
225 Broadway, 21st Floor
San Diego, CA 92101

With a copy to:

Robert Falk
Morrison & Foerster LLP
425 Market Street, 32nd Floor
San Francisco, CA 94105

Any Party may, from time to time, specify in writing to the other, a change of address to which all notices and other communications shall be sent.

9. COUNTERPARTS; FACSIMILE SIGNATURES

This Consent Judgment may be executed in counterparts and by facsimile or .pdf transmitted signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

10. POST EXECUTION ACTIVITIES

Embry agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, including those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for approval, responding to any objection that any third-party may make, and appearing at the hearing before the Court if so requested.

11. MODIFICATION

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or application

of any Party, and the entry of a modified consent judgment thereon by the Court.

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12. AUTHORIZATION


The undersigned are authorized to execute this Consent Judgment and acknowledge that they have read, understand, and agree to all of the terms and conditions contained herein.

AGREED TO:

AGREED TO:

Date: 11/26/2018

Date: _____

By: 
_____ **KIM EMBRY**

By: _____
_____ [print name]
BRUGGER'S ENTERPRISES, INC.

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12. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment and acknowledge that they have read, understand, and agree to all of the terms and conditions contained herein.

AGREED TO:

AGREED TO:

Date:

Date: November 28, 2018

By: _____

KIM EMBRY

By:  _____

Michael W. Davis - SVP, General Counsel [print name]
BRUGGER'S ENTERPRISES, INC.