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Attorneys for Plaintiff
Kim Embry

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

KIM EMBRY, an individual,

Plaintiff,

v.

BIMBO BAKERIES USA, INC., and DOES
1 through 100, inclusive,

Defendants.

Case No. HG-17-885297

**[PROPOSED] CONSENT JUDGMENT
AS TO BIMBO BAKERIES USA, INC.**

1. **INTRODUCTION**

1.1 **Parties**

This Consent Judgment is entered into by and between plaintiff, Kim Embry, (“Embry” or “Plaintiff”) on the one hand, and Bimbo Bakeries USA, Inc. (“BBUSA” or “Defendant”) on the other hand, with Embry and Defendant individually referred to as a “Party” and collectively as the “Parties.”¹

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 chemicals and to improve human health by reducing exposures to chemicals in consumer products.

1.3 **Defendant**

Defendant employs ten or more persons 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**

Acrylamide is listed pursuant to Proposition 65 as a chemical that is known to the State of California to cause cancer and birth defects and other reproductive harm. Embry has alleged that Defendant manufactures, sells, or distributes for sale to consumers in the State of California various types of breads, buns, rolls, bagels, English muffins, and other similar baked goods and that the toasting or grilling of these products exposes the consumers in California who eat them in that toasted or grilled form to acrylamide without having first provided them a clear and reasonable warning for the exposure as she alleges is required by Proposition 65. Defendant has denied and continues to deny Embry’s allegations that its products require Proposition 65 warnings.

¹ A subsidiary of BBUSA acquired Bays Michigan Corporation in September 2017 prior to the initiation of this lawsuit but subsequent to the issuance of the 60-day notice letters discussed below. Bays Michigan Corporation has since become Bays Bakery, Inc. and is currently a subsidiary of BBUSA. The term “Defendant” is used herein to address both companies.

1 **1.5 Product Description**

2 The products covered by this Consent Judgment are all those breads and other baked
3 goods that are manufactured and/or distributed for authorized sale to consumers in California by
4 Defendant (“Covered Products”).² The Covered Products include Covered Products sold in
5 Defendant’s brand names and Covered Products Defendant manufactures and/or distributes for
6 authorized sale in California under private label arrangements entered into with retailers or
7 others.³

8 **1.6 Notices of Violation**

9 Beginning in February 2017, Embry served Defendant and all requisite public
10 enforcement agencies with “60-Day Notices of Violation” documents that informed the recipients
11 of Embry’s allegations that Defendant violated Proposition 65 by failing to warn its customers
12 and consumers in California that certain exemplars of the Covered Products expose users to
13 acrylamide. Embry subsequently withdrew the February 2017 60-day notices, but beginning in
14 July 2017, Embry served Defendant and requisite public enforcement agencies with 60-day
15 notices that informed the recipients of Embry’s allegations that the toasting or grilling of certain
16 exemplars of the Covered Products to a golden brown resulted in the violations Proposition 65 by
17 failing to warn its customers and consumers in California that the Covered Products expose users
18 to acrylamide. In November 2017, Embry’s counsel also served Defendant and requisite public
19 enforcement agencies with a 60-day notice that informed the recipients that the toasting or
20 grilling of an exemplar of the Covered Products manufactured by Defendant to a golden brown
21 resulted in further alleged violations Proposition 65 by failing to warn its customers and
22 consumers in California that such Covered Products expose users to furfuryl alcohol, another
23 chemical listed under Proposition 65 as known to the State of California to cause cancer.⁴

24 ² The Covered Products include, without limitation, various types (including and not limited to white, whole wheat,
25 multi-grain, rye, potato) of whole and sliced breads; buns, rolls and muffins; croissants and bagels; pitas, thins, and
pizza crusts.

26 ³ Such retailers include, without limitation: Target Corporation, The Kroger Co., Wal-Mart Stores, Inc., and Smart &
27 Final Stores, LLC (“Retailers”).

28 ⁴ The various 60-day notices that Embry served on Defendant and/or on Retailers concerning Defendant’s Covered
Products are hereinafter collectively referred to as “Notices” in this Consent Judgment. Copies of the Notices that
were served on Defendant and all authorized public prosecutors of Proposition 65 are available on the California

1 **1.7 Status of the Pleadings and Absence of Admissions**

2 On or about December 2017, Embry filed the instant action against Defendant, among
3 others, (“Complaint”) for the alleged violations of Health & Safety Code § 25249.6. Defendant
4 subsequently answered Embry’s Complaint, denying all of the legal and material factual
5 allegations asserted by Embry, pleading numerous affirmative defenses and maintaining that all
6 of the products it has manufactured or distributed for authorized sale in California, including the
7 Covered Products, have been, and are, in compliance with all laws, including Proposition 65.
8 Concurrently with the approval of this Consent Judgment, the Complaint shall be deemed to have
9 been amended to include claims by Embry concerning the alleged need for Proposition 65
10 warnings as to all of Defendant’s Covered Products as to which Notices were issued and Embry
11 shall upon the entry of this Consent Judgment be deemed to have dismissed with prejudice all
12 such claims while preserving the continuing jurisdiction of this Court over the terms and effect of
13 this Consent Judgment. Nothing in this Consent Judgment shall be construed as an admission by
14 Defendant of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall
15 compliance with this Consent Judgment constitute or be construed as an admission by Defendant
16 of any fact, finding, conclusion of law, issue of law, or violation of law, the same being
17 specifically denied by Defendant. This section shall not, however, diminish or otherwise affect
18 Defendant’s obligations, responsibilities, and duties under this Consent Judgment.

19 **1.8 Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in the
22 County of Alameda, California, and that this Court has jurisdiction to enter and oversee and
23 enforce the provisions of this Consent Judgment.

24
25
26 Attorney General’s public database of Proposition 65 60-day notices ([https://oag.ca.gov/prop65/60-day-notice-
27 search-
28 results?combine=&combine_1=embry&field_prop65_defendant_value=bimbo&date_filter%5Bmin%5D%5Bdate%5D=03%2F03%2F2016&date_filter%5Bmax%5D%5Bdate%5D=03%2F28%2F2019&field_prop65_product_value=&sort_by=field_prop65_id_value&items_per_page=20&=Search](https://oag.ca.gov/prop65/60-day-notice-search-results?combine=&combine_1=embry&field_prop65_defendant_value=bimbo&date_filter%5Bmin%5D%5Bdate%5D=03%2F03%2F2016&date_filter%5Bmax%5D%5Bdate%5D=03%2F28%2F2019&field_prop65_product_value=&sort_by=field_prop65_id_value&items_per_page=20&=Search)) .

1.9 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on which Embry serves notice on the Defendant that the Court has approved and entered this Consent Judgment.

2. CONTINUING INJUNCTION

2.1 Commencing six (6) months from the Effective Date, and continuing thereafter, Defendant shall only manufacture and package for distribution, or cause to manufacture and package for distribution, in California, Covered Products, regardless of type, form, or branding, that, as packaged, contain acrylamide concentrations of 0.200 parts per million (“ppm”) or less as a single sample maximum and 0.100 ppm or less as an average of at least three (3) samples.⁵

2.2 For any Covered Products manufactured by or on behalf of Defendant offered for sale in California in brand names owned by or licensed to Defendant, whose product packaging includes references recommending toasting or grilling (including but not limited to Covered Products which are English muffins or bagels, should they contain such references), to the extent such references are retained, Defendant shall add the following U.S. Food and Drug Administration (“FDA”) recommendation or its substantial equivalent to the product packaging in question whenever, following the Effective Date, it next updates the artwork for the product packaging for the Covered Product in question in the normal course of business:⁶

Toast to a light brown, not a dark brown color.

2.3 In the event Plaintiff enters into an agreement or consent judgment with any other person manufacturing Covered Products addressing alleged violations of Proposition 65 with

⁵ In the event an issue arises in the future with respect to compliance with the requirements set forth in Section 2.1, such compliance may be demonstrated by Defendant using a sample, or in the case of the average, at least three (3) samples, of the same Covered Product (however branded) as raises the issue. Samples shall consist of portions of the Covered Products, other than heels (end pieces of loaves) or other unrepresentative pieces, obtained at the point of packaging from then-current production and shall be measured by means of a test performed by an accredited laboratory using either GC/MS (Gas Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), or any other testing method agreed upon by the Parties.

⁶ The FDA’s recommended language is otherwise non-binding. It is contained in *Guidance for Industry Acrylamide in Foods* (March 2016) and available at <https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ChemicalContaminantsMetalsNaturalToxinsPesticides/UCM374534.pdf>

respect to exposures to acrylamide that provides for less stringent standards than that set forth in Paragraph 2.1 above or a different commitment than that set forth in Paragraph 2.2 above (including no such commitment); or if a judgment is entered in any Proposition 65 case with respect to exposures to acrylamide from Covered Products that provides for less stringent requirements than those set forth in this Section 2; or if the California Office of Environmental Health Hazard Assessment adopts a regulation or safe use determination, or issues an interpretative guideline that exempts or, has the effect of increasing the levels set forth in Section 2.1 or otherwise has the effect of allowing Covered Products from meeting Proposition 65's requirements as to acrylamide at a level less stringent than that provided in Paragraph 2.1; or if Proposition 65 is determined to be preempted by federal law with respect to acrylamide in Covered Products, then this Consent Judgment shall be subject to modification at the option of the Defendant, and without the objection of the Plaintiff, to conform or eliminate the terms of this Section 2 accordingly. Otherwise, modification of the injunctive relief provisions set forth in this Section 2 due to changed circumstances shall be subject to Section 13 below.

3. STATUTORY PENALTY PAYMENTS

3.1 **Civil Penalty** Defendant shall pay \$12,000 in civil penalties pursuant to California Health & Safety Code § 25249.7(b) in accordance with this Section. This penalty payment shall be allocated in accordance with California Health & Safety Code § 25249.12(c)(l) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Embry. More specifically, within twenty (20) business days following the Effective Date, Defendant shall issue two separate company checks for the civil penalty payment to (a) "OEHHA" in the amount of \$9,000 and with the memo line on the check indicating "Prop 65 Penalties—Embry v. BBUSA" (Defendant may reference OEHHA's Tax Identification Number of 68-0284486 for this check); and (b) "Kim Embry" in the amount of \$3,000 (for which Embry shall provide Defendant a completed IRS Form W-9 with a tax identification number within two days following the Effective Date, if not beforehand). These checks shall be delivered to the addresses listed in Section 3.3 below.

3.2 **Payment Delivery**

- (a) Payment to Embry shall be delivered to the following address:

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

- (b) Payment to OEHHA shall be delivered to one of the following addresses:

For United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

or

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

4. **REIMBURSEMENT OF FEES AND COSTS**

Provided that Plaintiff and her counsel have provided Defendant with complete and executed 2018 versions of IRS Form W-9 on or before the Effective Date, Defendant shall pay Embry \$113,000 for fees and costs incurred as a result of investigating, bringing this matter to Defendant's attention, and negotiating a settlement in the public interest. Defendant shall make two company checks of \$56,500 each payable to "Nicholas & Tomasevic, LLP" (EIN 46-3474065) and the "Glick Law Group" (EIN 47-1838518) respectively and shall deliver payment to the address listed in Section 9 below within twenty (20) business days following the Effective Date.

5. **LIABILITY RELEASES**

5.1 **Embry's Public Release of Proposition 65 Claims**

Embry, acting on her own behalf and in the public interest, releases Defendant and its affiliated entities (including, without limitation, parent companies, subsidiaries, corporate

1 affiliates and similarly related companies), and all of its and their directors, officers, shareholders,
2 employees, and attorneys, as well as its licensors (collectively, all of the foregoing shall be
3 referred to as “Defendant Releasees”), and each entity to whom they directly or indirectly
4 distribute or sell Covered Products, including, but not limited to, distributors, wholesalers,
5 dealers, retailers (including, without limitation, Target, Kroger, Wal-Mart, and Smart & Final),
6 restaurants and their franchisees, cooperative members (collectively, “Downstream Defendant
7 Releasees”), from all claims for violations of Proposition 65 based on exposures to acrylamide
8 from Covered Products that are or have been marketed by Defendant, Defendant Releasees, or
9 Downstream Defendant Releasees as potato breads/buns/rolls (collectively, “Potato Bread”) and
10 were manufactured and packaged by Defendant prior to the Effective Date. Following the
11 Effective Date, compliance with the terms of this Consent Judgment shall be deemed compliance
12 with Proposition 65 with respect to exposures to acrylamide from Covered Products which are
13 Potato Bread.

14 **5.2 Embry’s Private Releases of Claims**

15 Embry, in her individual capacity only, and on behalf of herself and her successors, heirs,
16 assigns, agents, and attorneys, also provides a release herein to Defendant Releasees and
17 Downstream Defendant Releasees as to all chemicals currently listed under Proposition 65,
18 including but not limited to acrylamide and furfuryl alcohol in all of Defendant’s Covered
19 Products (including those that are not potato-related) and in its Additional Baked Goods.⁷ In
20 addition, Embry, in her individual capacity only, and on behalf of herself and her successors,
21 heirs, assigns, agents, and attorneys, also provides a release herein to Defendant Releasees⁸ and
22 Downstream Defendant Releasees which shall be effective as a full and final accord and
23 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,
24 damages, losses, claims, liabilities and demands of any nature, character, or kind, whether known
25 or unknown, suspected or unsuspected, with respect to any other issue concerning Defendant’s
26

27 ⁷ “Additional Baked Goods” refers to sweet baked goods such as cookies, wafers, donuts, and cakes.

28 ⁸ The Defendant Releasees addressed above include, without limitation, Focus Brands, Inc. and The Hillshire Brands Company.

Covered Products or Additional Baked Goods. In this regard, Embry hereby acknowledges that she is familiar with Section 1542 of the California Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

5.3 **Defendant's Release of Embry**

Defendant, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims that it may have against Embry and her attorneys for any and all actions taken or statements made (or those that could have been taken or made) by Embry and her attorneys, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against Defendant in this matter prior to the Effective Date.

6. **COURT APPROVAL**

This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within one year after it has been fully executed by all Parties unless the Parties mutually agree to extend that time period due to what they mutually agree are reasonably unforeseeable circumstances.

7. **SEVERABILITY**

If, subsequent to the execution of this Consent Judgment, any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

8. **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 by reason of law generally, or as to the Products, then

Defendant may provide written notice to Embry of any asserted change in the law and have no further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the Products are so affected.

9. **NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any Party by the other Party to the following addresses:

For Defendant:

General Counsel
Bimbo Bakeries USA, Inc.
255 Business Center Drive
Horsham, PA 19044

With a copy to:

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

For Embry:

Noam Glick
Noam@glicklawgroup.com
Glick Law Group
225 Broadway, Suite 2100
San Diego, CA 92101

And:

Craig Nicholas
Craig@nicholaslaw.org
Nicholas & Tomasevic, LLP
225 Broadway, 19th Floor
San Diego, CA 92101

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

10. **COUNTERPARTS; FACSIMILE SIGNATURES**

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

11. **POST EXECUTION ACTIVITIES**

Embry agrees to comply with the reporting form requirements referenced in Health & Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement manifested in this Consent Judgment. In furtherance of obtaining such approval, Embry shall file and serve a noticed motion for approval of this Consent Judgment within sixty (60) days of its execution by all Parties and assure that the Office of the California Attorney General is served with said motion and all supporting papers at least forty-five (45) days prior to the scheduled hearing thereon. Defendant agrees to support the entry of this Consent Judgment once such motion has been filed. Unless otherwise separately agreed to in a mutual writing, Embry agrees that neither she, nor anyone acting on her behalf (including but not limited to her attorneys), will issue a press release or otherwise make statements to the media or in social media, concerning the matters covered by this Consent Judgment or with respect to the health or safety aspects of the Covered Products.

12. **ENFORCEMENT**

Any Party may, after providing sixty (60) days written notice and meeting and conferring within a reasonable time thereafter to attempt to resolve any issues, by motion or application for an order to show cause before this Court, enforce the terms and conditions contained in this Consent Judgment.

13. **MODIFICATION**

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and upon entry, following at least twenty-one (21) days' notice to the Office of the Attorney General, of a modified consent judgment by the Court thereon; and (ii) upon a successful motion

or application of any Party, which shall also be served on the Office of the California Attorney General with at least twenty-one (21) days' notice, and the entry of a modified consent judgment by the Court. 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.

14. **AUTHORIZATION**

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agreed to all of the terms and conditions of this Consent Judgment.

APPROVED AS TO FORM AND CONTENT: Date: <u>April 25, 2019</u> By: <u>Noam Glick</u> Noam Glick On behalf of counsel to Kim Embry	APPROVED AS TO FORM AND CONTENT: Date: <u>April 24, 2019</u> By: <u>Robert L. Falk</u> Robert Falk Counsel for Bimbo Bakeries USA, Inc.
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AGREED TO:

Date: April 25, 2019
By: Kim Embry
Kim Embry

AGREED TO:

Date: 4/25/19
By: Shelly Seligman
Shelly Seligman
General Counsel for
Bimbo Bakeries USA, Inc.

IT IS SO ORDERED:

Dated: _____

Judge of the Superior Court