



FILED
ALAMEDA COUNTY

JAN 10 2020

CLERK OF THE SUPERIOR COURT
By C. W. B. Deputy

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15 Attorneys for Plaintiff
16 Kim Embry

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

18 **IN AND FOR THE COUNTY OF ALAMEDA**

19 **KIM EMBRY, an individual,**
20
21 **Plaintiff,**
22
23 **v.**

24 **BIMBO BAKERIES USA, INC., and DOES**
25 **1 through 100, inclusive,**
26
27 **Defendants.**

Case No. HG-17-885297

**[PROPOSED] CONSENT JUDGMENT
AS TO FLOWERS FOODS, INC. AND
MAXIM'S NUTRICARE, INC.**

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Kim Embry, ("Embry" or
4 "Plaintiff") on the one hand, and Flowers Foods, Inc., individually and on behalf of its related
5 entities, Flowers Bakeries, LLC, Flowers Baking Co. of Modesto, LLC, Flowers Baking Co. of
6 Henderson, LLC, Holsum Bakery, Inc., and Holsum Bakery of Tolleson, LLC (collectively,
7 "FF"), and Maxim's Nutricare, Inc. and their respective distributors, retailers and other
8 downstream entities (all collectively, "Defendants"), on the other hand, with Embry and
9 Defendants individually referred to as a "Party" and collectively as the
10 "Parties."

11 **1.2 Plaintiff**

12 Embry is an individual residing in California and acting in the interest of the general
13 public. She seeks to promote awareness of exposures to chemicals and to improve human health
14 by reducing exposures to chemicals in consumer products.

15 **1.3 Defendant**

16 Defendants each employ ten or more persons and each is a person in the course of doing
17 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
18 and Safety Code Section 25249.6 *et seq.* ("Proposition 65").

19 **1.4 General Allegations**

20 Acrylamide is listed pursuant to Proposition 65 as a chemical that is known to the State of
21 California to cause cancer and birth defects and other reproductive harm. Embry alleges that
22 Defendants manufacture, sell, or distribute for sale to consumers in the State of California breads
23 and other similar baked goods and that the toasting or grilling of these products exposes the
24 consumers in California who eat them in that toasted or grilled form to acrylamide without having
25 first provided them a clear and reasonable warning for the exposure as she alleges is required by
26 Proposition 65. Defendants have denied and continue to deny Embry's allegations.

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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 Defendants ("Covered Products").¹ The Covered Products include Covered Products sold in
5 Defendants' brand names and Covered Products that Defendants manufacture and/or distribute
6 for authorized sale in California under private label arrangements entered into with retailers or
7 others.²

8 **1.6 Notices of Violation**

9 Beginning in February 2017, and at various times thereafter, Embry served Defendants
10 and all requisite public enforcement agencies with "60-Day Notices of Violation" documents that
11 informed the recipients of Embry's allegations that Defendants violated Proposition 65 by failing
12 to warn their customers and consumers in California that certain exemplars of the Covered
13 Products expose users to acrylamide. Embry subsequently withdrew the February 2017 60-Day
14 Notices, but, beginning in July 2017, and at various times thereafter, Embry served Defendants
15 and requisite public enforcement agencies with 60-Day Notices that informed the recipients of
16 Embry's allegations that the toasting or grilling of certain exemplars of the Covered Products to a
17 golden brown resulted in the violations of Proposition 65 by failing to warn their customers and
18 consumers in California that the Covered Products expose users to acrylamide ("Notices").

19 **1.7 Complaint, Answer, and Absence of Admissions**

20 After the 60-Day periods associated with all Notices were exhausted without an
21 authorized public prosecutor of Proposition 65 having asserted such claims, in December 2017,
22 Embry filed the instant action against Defendants, among others ("Complaint") for the alleged
23 violations of Health & Safety Code § 25249.6. Defendants ultimately answered Embry's
24 Complaint, denying all of the legal and material factual allegations asserted by Embry, pleading
25 numerous affirmative defenses and maintaining that all of the products they have manufactured or
26

27 ¹ The Covered Products include, without limitation, various types of whole and sliced breads; bagels, buns and rolls.

28 ² Such retailers include, without limitation, Target Corporation, The Kroger Co., and WalMart Stores, Inc. ("Retailers").

1 distributed for authorized sale in California, including the Covered Products, have been, and are,
2 in compliance with all laws, including Proposition 65. Nothing in this Consent Judgment shall be
3 construed as an admission by Defendants of any fact, finding, conclusion of law, issue of law, or
4 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as
5 an admission by Defendants of any fact, finding, conclusion of law, issue of law, or violation of
6 law, the same being specifically denied by Defendants. This section shall not, however, diminish
7 or otherwise affect Defendants' obligations, responsibilities, and duties under this Consent
8 Judgment.

9 **1.8 Consent to Jurisdiction**

10 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
11 jurisdiction over Defendants as to the allegations in the Complaint, that venue is proper in the
12 County of Alameda, California, and that this Court has jurisdiction to enter and enforce the
13 provisions of this Consent Judgment.

14 **1.9 Effective Date**

15 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date on
16 which Embry serves notice on Defendants that the Court has approved and entered this Consent
17 Judgment.

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1 **2. STIPULATED INJUNCTION**

2 2.1 Commencing six (6) months from the Effective Date, and continuing thereafter,
3 Defendants shall only manufacture and package for distribution, or cause to manufacture and
4 package for distribution, in California, Covered Products that, as packaged, contain acrylamide
5 concentrations of 0.200 parts per million ("ppm") or less as a single sample maximum and 0.100
6 ppm or less as an average of at least three (3) samples.³

7 2.2 For any Covered Products manufactured by or on behalf of Defendants offered
8 for sale in California in brand names owned by or licensed to Defendants, whose product
9 packaging includes references recommending toasting or grilling, to the extent such references
10 are retained, Defendants shall add the following U.S. Food and Drug Administration
11 recommendation or its substantial equivalent to the product packaging in question whenever,
12 following the Effective Date, it next updates the artwork for the product packaging for the
13 Covered Product in question in the normal course of business:

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

15 2.3 In the event Plaintiff enters into an agreement or consent judgment with any other
16 person manufacturing Covered Products addressing alleged violations of Proposition 65 with
17 respect to exposures to acrylamide that provides for less stringent standards than that set forth in
18 Section 2.1 or a different commitment than that set forth in Paragraph 2.2 above (including no
19 such commitment); or if a judgment is entered in any Proposition 65 case with respect to
20 exposures to acrylamide from Covered Products that provides for less stringent requirements than
21 those set forth in this Section 2; or if the California Office of Environmental Health Hazard
22 Assessment adopts a regulation or safe use determination, or issues an interpretative guideline
23 that exempts or, has the effect of increasing the levels set forth in Section 2.1 or otherwise has
24 the effect of allowing Covered Products from meeting Proposition 65's requirements as to

25 ³ In the event an issue arises in the future with respect to compliance with the requirements set forth in Section 2.1,
26 such compliance may be demonstrated by Defendants using a sample, or in the case of the average, at least three (3)
27 samples, of the same Covered Product (however branded) as raises the issue. Samples shall consist of portions of the
28 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.

1 acrylamide at a level less stringent than that provided in Paragraph 2.1; or if Proposition 65 is
2 determined to be preempted by federal law with respect to acrylamide in Covered Products, then
3 this Consent Judgment shall be subject to modification at the option of Defendants, and without
4 the objection of Embry, to conform or eliminate the terms of this Section 2 accordingly.

5 **3. STATUTORY PENALTY PAYMENTS**

6 **3.1 Civil Penalty** Defendants shall pay the total sum of \$12,000.00 in civil penalties
7 pursuant to California Health & Safety Code § 25249.7(b) in accordance with this Section. This
8 penalty payment shall be allocated in accordance with California Health & Safety Code
9 § 25249.12(c)(l) and (d), with 75% of the funds remitted to the California Office of
10 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
11 remitted to Embry. More specifically, within twenty (20) business days following the Effective
12 Date, Defendants shall issue two separate company checks for the civil penalty payment to (a)
13 "OEHHA" in the amount of \$9000.00 and with the memo line on the check indicating "Prop 65
14 Penalties—Embry v. Flowers Foods, Inc." (Defendants may reference OEHHA's Tax
15 Identification Number of 68-0284486 for this check); and (b) "Kim Embry" in the amount of
16 \$3000.00 (for which Embry shall provide Defendants a completed IRS Form W-9 with a tax
17 identification number within two days following the Effective Date, if not beforehand). These
18 checks shall be delivered to the addresses listed in Section 3.3 below.

19 **3.2 Payment Delivery**

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

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

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

25 For United States Postal Service Delivery:

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

1 or

2 For Non-United States Postal Service Delivery:

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

7 **4. REIMBURSEMENT OF FEES AND COSTS**

8 Provided that Plaintiff and her counsel have provided Defendants with complete and
9 executed 2019 versions of IRS Form W-9 on or before the Effective Date, Defendants shall pay
10 Embry and her attorneys the total sum of \$113,000.00 for fees and costs incurred as a result of
11 investigating, bringing this matter to Defendants' attention, and negotiating a settlement in the
12 public interest. Defendants shall either wire transfer, within 10 days of receiving appropriate wire
13 instructions, or make two company checks of \$56,500.00 each payable to "Nicholas &
14 Tomasevic, LLP" (EIN 46-3474065) and the "Glick Law Group" (EIN 47-1838518) respectively,
15 and shall deliver payment to the address listed in Section 9 below within twenty (20) business
16 days following the Effective Date.

17 **5. CLAIMS COVERED AND RELEASED**

18 **5.1 Embry's Public Release of Proposition 65 Claims**

19 Embry, acting on her own behalf and in the public interest, releases Defendants and their
20 affiliated entities (including, without limitation, parent companies, subsidiaries, divisions,
21 corporate affiliates, licensors, licensees, and similarly related companies), and all of its and their
22 directors, officers, shareholders, employees, and attorneys (collectively, all of the foregoing shall
23 be referred to as "Defendant Releasees"), and each entity to which they directly or indirectly
24 distribute or sell Covered Products, including, but not limited to, distributors, wholesalers,
25 dealers, retailers (including, without limitation, Target, Kroger, and Wal Mart), restaurants and
26 their franchisees, and cooperative members (collectively, "Downstream Defendant Releasees"),
27 from all claims for violations of Proposition 65 based on exposures to acrylamide from Covered
28 Products manufactured and packaged by Defendants prior to the Effective Date. Following the

1 Effective Date, compliance with the terms of this Consent Judgment shall be deemed compliance
2 with Proposition 65 with respect to exposures to acrylamide in or from the Covered Products.

3 **5.2 Waiver of Civil Code Sec. 1542**

4 Embry, in her individual capacity and in the public interest, and on behalf of herself and
5 her successors, heirs, assigns, agents, and attorneys, also provides a release herein to Defendant
6 Releasees and Downstream Defendant Releasees which shall be effective as a full and final
7 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
8 attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character, or kind,
9 whether known or unknown, suspected or unsuspected, with respect to any other issue concerning
10 Defendants' Covered Products. In this regard, Embry hereby acknowledges that she is familiar
11 with Section 1542 of the California Civil Code, which provides as follows:

12 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
13 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE
14 TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST
15 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

16 **5.3 Defendants' Release of Embry**

17 Defendants, on their own behalf and on behalf of their past and current agents,
18 representatives, attorneys, successors, and assignees, hereby waive any and all claims that they
19 may have against Embry and her attorneys for any and all actions taken or statements made (or
20 those that could have been taken or made) by Embry and her attorneys, whether in the course of
21 investigating claims, otherwise seeking to enforce Proposition 65 against Defendants in this
22 matter prior to the Effective Date.

23 **6. COURT APPROVAL**

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

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1 **7. SEVERABILITY**

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

5 **8. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of
7 California and apply within the State of California. In the event that Proposition 65 is repealed or
8 is otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then
9 Defendants may provide written notice to Embry of any asserted change in the law and have no
10 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
11 Covered Products are so affected.

12 **9. NOTICES**

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

17 For Defendants:

18
19 Sina Ellis Griffith, Esq.
20 Flowers Foods, Inc.
21 1919 Flowers Circle
22 Thomasville, Georgia 31757

23 *With a copy to:*

24 Kevin C. Mayer, Esq.
25 Kmayer@crowell.com
26 Crowell & Morning LLP
27 515 South Flower Street, 40th Floor
28 Los Angeles, CA 90071

For Embry:

Noam Glick
Noam@glicklawgroup.com
Glick Law Group

1 225 Broadway, Suite 2100
2 San Diego, CA 92101

3 AND:

4 Craig Nicholas
5 Craig@nicholaslaw.org
6 Nicholas & Tomasevic, LLP
7 225 Broadway, 19th Floor
8 San Diego, CA 92101

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

11 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

15 **11. POST EXECUTION ACTIVITIES**

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

1 **12. ENFORCEMENT**

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

6 **13. MODIFICATION**

7 This Consent Judgment may be modified only by: (i) a written agreement of the Parties
8 and upon entry, following at least twenty-one (21) days' notice to the Office of the California
9 Attorney General, of a modified consent judgment by the Court thereon; and (ii) upon a
10 successful motion or application of any Party, which shall also be served on the Office of the
11 California Attorney General with at least twenty-one (21) days' notice, and the entry of a
12 modified consent judgment by the Court. Any Party seeking to modify this Consent Judgment
13 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to
14 modify the Consent Judgment.

15 **14. AUTHORIZATION**

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

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**APPROVED AS TO FORM AND
CONTENT:**Date: September 17, 2019By: Noam Glick
Noam Glick
On behalf of counsel to Kim Embry**AGREED TO:**Date: September 17, 2019By: Kim Embry
Kim Embry**APPROVED AS TO FORM AND
CONTENT:**Date: September 16, 2019By: Kevin C. Mayer
Kevin C. Mayer
Counsel for
Flowers Foods, Inc. and Maxim's
Nutricare, Inc.**AGREED TO:**Date: September 16, 2019By: Stephen R. Avera
Stephen R. Avera
Chief Legal Officer
Flowers Foods, Inc.**AGREED TO:**Date: 9/24/2019By: F. Mohebbi
Farzad Mohebbi
President
Maxim's Nutricare Inc.**IT IS SO ORDERED:**Dated: January 10, 2020Christine J. Smith
Judge of the Superior Court