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FILED
ALAMEDA COUNTY

MAR 15 2018

CLERK OF THE SUPERIOR COURT

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

KIM EMBRY, an individual,

Plaintiff,

v.

WESTERN BAGEL BAKING
CORPORATION, and DOES 1 through 100,
inclusive,

Defendants.

Case No.: RG17884528
Reservation No.: 1923875

~~PROPOSED~~ JUDGMENT
PURSUANT TO TERMS OF
PROPOSITION 65 SETTLEMENT
AND CONSENT JUDGMENT

Date: March 15, 2018
Time: 9:00 a.m.
Dept.: 25
Judge: Hon. Ronni MacLaren

Case Filed: December 4, 2017
Trial Date: None Set

~~PROPOSED~~ JUDGMENT PURSUANT TO TERMS OF
PROPOSITION 65 SETTLEMENT AND CONSENT JUDGMENT

1 Plaintiff Kim Embry and Defendant Western Bagel Baking Corporation agreed through
 2 their respective counsel to enter judgment pursuant to the terms of their settlement in the form of a
 3 stipulated judgment ("Consent Judgment"). This Court's issued an Order approving the
 4 Proposition 65 Settlement and Consent Judgment on March 15, 2018.

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

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11 **IT IS SO ORDERED.**

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14 Dated: March 15, 2018


 Hon. Ronni MacLaren
 JUDGE OF THE SUPERIOR COURT

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EXHIBIT A

1 **GLICK LAW GROUP, PC**
 2 Noam Glick (SBN 251582)
 3 Kelsey McCarthy (SBN 305372)
 4 225 Broadway, Suite 2100
 5 San Diego, California 92101
 6 Tel: (619) 382-3400
 7 Fax: (619) 615-2193

8 Attorneys for Plaintiff
 9 Kim Embry

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

12 KIM EMBRY, an individual

13 Plaintiff,

14 v.

15 WESTERN BAGEL BAKING CORP., an
 16 California corporation, and DOES 1 through
 17 100, inclusive

18 Defendants.

19 Case No. RG17884528

20 **[PROPOSED] CONSENT JUDGMENT**

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

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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Kim Embry (“Embry”) and Western
4 Bagel Baking Corp. (“Western”) (collectively the “Parties”).

5 **1.2 Plaintiff**

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

9 **1.3 Defendant**

10 Western employs ten or more individuals and is a “person in the course of doing business” for
11 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
12 section 25249.6 *et seq.* (“Proposition 65”).

13 **1.4 General Allegations**

14 Embry alleges that Western manufactures, imports, sells, and distributes for sale in California
15 Bagels that, when grilled or toasted, contains acrylamide. Embry further alleges that Western does so
16 without providing a sufficient health hazard warning as required by Proposition 65 and related
17 Regulations. Pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer and
18 reproductive harm.

19 **1.5 Product Description**

20 For purposes of this Consent Judgment “Product” or “Products” are defined as bagels that, when
21 grilled or toasted, contain acrylamide that are manufactured, imported, sold, or distributed for sale in
22 California by Western and Releasees, defined *infra*.

23 **1.6 Other Releasees**

24 Western also sells its bagel products under CVS’s generic bagel product brand “Cottage
25 Hearth.” Western sells its bagel products, under the Western brand name, at other grocery and retail
26 outlets such as Ralphs, through a distribution chain that includes DSD and Unified Grocers (now
27 SuperValu, Inc.). This Consent Judgment expressly encompasses all Western bagel products, whether
28 sold under its own brand name, under the Cottage Hearth brand, or some other private label, at all

1 grocery and retail locations. The term “Western” used throughout this Consent Judgment refers to all
2 such products, including the private label products.

3 1.7 Notices of Violation

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

11 On June 26, 2017, Embry served certain Releasees – CVS and Unified Grocers (now
12 SuperValu, Inc.) – as well as the California Attorney General, and all other required public enforcement
13 agencies with a 60-Day Notice of Violation of California Health and Safety Code section 25249.6 *et*
14 *seq.* (“Notice”). The Notice alleged that these entities violated Proposition 65 by failing to sufficiently
15 warn consumers in California of the health hazards associated with exposures to acrylamide contained
16 in the Products. Embry sent amended notices to the same individuals on July 21, 2017 and September
17 22, 2017, specifying that the alleged exposures violating Proposition 65 resulted from grilling or
18 toasting the Products.

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

21 1.8 Complaint

22 On December 4, 2017, Embry filed a Complaint against Western for the alleged violations of
23 Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

24 1.9 No Admission

25 Western denies the material, factual, and legal allegations in the Notices and Complaint, and
26 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in
27 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
28 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of

1 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an admission
 2 of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not,
 3 however, diminish or otherwise affect Western’s obligations, responsibilities, and duties under this
 4 Consent Judgment.

5 **1.10 Jurisdiction**

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

10 **1.11 Effective Date**

11 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
 12 Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

13 **2. INJUNCTIVE RELIEF**

14 **2.1 Reformulation of the Product**

15 Commencing six (6) months after the Effective Date, and continuing thereafter, Western shall
 16 only ship, sell, or offer for sale in California, reformulated Products pursuant to Section 2.2 or Products
 17 that are labeled with clear and reasonable warning pursuant to Section 2.3.

18 **2.2 Reformulation Standard**

19 “Reformulated Product(s)” shall mean Products that contains less than or equal to 10 parts per
 20 billion (“ppb”) of acrylamide.

21 **2.3 Clear and Reasonable Warnings**

22 Commencing six (6) months after the Effective Date and continuing thereafter, Western shall,
 23 for all Products it sells or distributes in California that are not a Reformulated Products, provide clear
 24 and reasonable warnings as set forth in Proposition 65 and related Regulations. The warning shall be
 25 prominently placed with such conspicuousness as compared with other words, statements, designs, or
 26 devices as to render it likely to be read and understood by an ordinary individual under customary
 27 conditions before purchase or use. Each warning shall be provided in a manner such that the consumer
 28

1 or user is reasonably likely to understand to which Product the warning applies, so as to minimize
2 confusion.

3 With new Regulations set to take effect in 2018, Western has the option, without limitation, to
4 use the language set forth in the current Regulations¹ or the language set forth in the 2018 Regulations.²
5 In the event that the Office of Environmental Health Hazard Assessment promulgate one or more
6 regulations requiring or permitting warning text and/or methods of transmission different than those
7 set forth above, Western shall be entitled to use, at its discretion, such other warning text and/or method
8 of transmission without being deemed in breach of this Consent Judgment.

9 **2.4 Sell-Through Period**

10 Notwithstanding anything else in this Settlement Agreement, the Products that were
11 manufactured prior to the Effective Date and six (6) months thereafter shall be subject to the release of
12 liability pursuant to this Consent Judgment, without regard to when such Products were, or are in the
13 future, distributed or sold to customers. As a result, the obligations of Western, or any Releases, do not
14 apply to these Products manufactured prior to the Effective Date and six (6) months thereafter.

15 **3. MONETARY SETTLEMENT TERMS**

16 **3.1 Settlement Amount**

17 Western shall pay fifty thousand dollars (\$50,000) in settlement and total satisfaction of all the
18 claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil penalties
19 in the amount of five thousand dollars (\$5,000) pursuant to Health and Safety Code section 25249.7(b)
20 and attorney's fees and costs in the amount of forty five thousand dollars (\$45,000) pursuant to Code
21 of Civil Procedure section 1021.5.

22 **3.2 Civil Penalty**

23 The portion of the settlement attributable to civil penalties shall be allocated according to Health
24 and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid

25 _____
26 ¹ 27 CCR § 25603.2 [Repealed Operative August 30, 2018]: “**WARNING:** This product may
27 contain a chemical known to the State of California to cause cancer or birth defects or other
28 reproductive harm.”

² 27 CCR § 25603 [Operative August 30, 2018]: “**WARNING:** This product can expose you
to chemicals, including acrylamide. For more information go to www.P65Warnings.ca.gov.”

1 to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining
2 twenty-five percent (25%) of the penalty paid to Embry.

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

4 Noam Glick
5 Glick Law Group
6 225 Broadway, Suite 2100
7 San Diego, CA 92101

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

10 For United States Postal Service Delivery:

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

16 For Non-United States Postal Service Delivery:

17 Mike Gyurics
18 Fiscal Operations Branch Chief
19 Office of Environmental Health Hazard Assessment
20 1001 I Street
21 Sacramento, CA 95814

22 Western agrees to provide Embry's counsel with a copy of the check payable to OEHHA,
23 simultaneous with its penalty payments to Embry.

24 The Parties, including Embry, will exchange completed IRS 1099, W-9, or other forms as
25 required. Relevant information for Glick Law Group, N&T, and Embry are set out below:

- 26 • "Kim Embry" whose address and tax identification number shall be provided within five
- 27 (5) days after this Settlement Agreement is fully executed by the Parties;
- 28 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.2(a)(i);
- and
- "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

1 imported, sold, or distributed by Western after the Effective Date. This Consent Judgment is a full,
2 final and binding resolution of all claims that were or could have been asserted against Western and/or
3 Releasees for failure to provide warnings for alleged exposures to acrylamide contained in Products.

4 **4.2 Embry's Individual Release of Claims**

5 Embry, in her individual capacity, also provides a release to Western and/or Releasees, which
6 shall be a full and final accord and satisfaction of as well as a bar to all actions, causes of action,
7 obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands by
8 Embry of any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising
9 out of alleged or actual exposures to acrylamide in Products manufactured, imported, sold, or
10 distributed by Western before the Effective Date.

11 **4.3 Western's Release of Embry**

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

17 **5. COURT APPROVAL**

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

21 **6. SEVERABILITY**

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

24 **7. GOVERNING LAW**

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

3 **8. NOTICE**

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

7 For Western:

8 Randall J. Lee
9 Walsworth WFBM, LLP
601 Montgomery Street, Ninth Floor
10 San Francisco, CA 94111

For Embry:

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

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

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

17 **10. POST EXECUTION ACTIVITIES**

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

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1 **11. MODIFICATION**

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

5 **12. AUTHORIZATION**

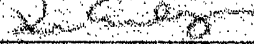
6 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
7 have read, understand, and agree to all of the terms and conditions contained herein.


8
9 **AGREED TO:**

AGREED TO:

10 Date: December 12, 2017

10 Date: 12/22/17

11
12 By: 
13 **KIM EMBRY**

12 By: 
13 **DAVID A. BELTRAN** [print name]
14 **Western Bagel Baking Corp.**

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CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: Embry vs. Western Bagel Baking Corporation
ACTION NO.: RG17884528

I certify that, I am not a party to the within action. I served the foregoing **JUDGMENT PURSUANT TO TERMS OF PROPOSITION 65 SETTLEMENT AND CONSENT JUDGMENT** by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

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

I declare under penalty of perjury that the following is true and correct.

Executed on March 15, 2018 at Oakland, California.

Chad Finke,
Executive Officer/Clerk

By *Pisipino Tungohan*
Deputy Clerk