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**ENDORSED
 FILED
 ALAMEDA COUNTY**

SEP 25 2018

**CLERK OF THE SUPERIOR COURT
 By PAM WILLIAMS
 Deputy**

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14 Attorneys for Plaintiff,
 Kim Embry

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

18 **KIM EMBRY, an individual**
 19 **Plaintiff,**

20 v.

21 **BAUDUCCO FOODS INC., a California**
 corporation, and DOES I through 100,
 22 inclusive

23 **Defendants.**

Case No.: RG17885287

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

Reservation No.: R-1987127

Date: September 25, 2018

Time: 9:00 a.m.

Dept.: 17

Judge: Hon. Ioana Petrou

Case Filed: December 8, 2017

Trial Date: None Set


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

1 Plaintiff Kim Embry and Defendant Bauducco Foods agreed through their respective
2 counsel to enter judgment pursuant to the terms of their settlement in the form of a stipulated
3 judgment ("Consent Judgment"). This Court issued an Order approving the Proposition 65
4 Settlement and Consent Judgment on September 25, 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.

10
11 **IT IS SO ORDERED.**

12
13
14 Dated: 9/25/18



Hon. Ioana Petrou
JUDGE OF THE SUPERIOR COURT

EXHIBIT A

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Kim Embry

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

KIM EMBRY, an individual

Plaintiff,

v.

BAUDUCCO FOODS, INC. and DOES 1
through 100, inclusive

Defendants.

Case No..RG17885287

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Kim Embry (“Embry”) and Bauducco
4 Foods, Inc. (“Bauducco Foods”) (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 Bauducco Foods employs ten or more individuals and is a “person in the course of doing
11 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
12 Safety Code section 25249.6 *et seq.* (“Proposition 65”).

13 **1.4 General Allegations**

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

19 **1.5 Product Description**

20 For purposes of this Consent Judgment “Product” or “Products” is defined as Bauducco®
21 wafers that are manufactured, imported, sold, or distributed for sale in California by Bauducco Foods
22 and Releasees, defined *infra*.

23 **1.6 Other Releasees**

24 Bauducco Foods sells its Bauducco® Wafer-Vanillas, at grocery and retail outlets such as
25 Target.

26 **1.7 Notices of Violation**

27 On August 25, 2017, Embry served Bauducco Foods, Target Corporation, the California
28 Attorney General, and all other required public enforcement agencies with a 60-Day Notice of

1 Violation of California Health and Safety Code section 25249.6 *et seq.* (“Notice”). The Notice
2 alleged that Bauducco Foods violated Proposition 65 by failing to sufficiently warn consumers in
3 California of the health hazards associated with exposures to acrylamide contained in the Product.

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

6 **1.8 Complaint**

7 On December 8, 2017, Embry filed a Complaint against Bauducco Foods for the alleged
8 violations of Health and Safety Code section 25249.6 that are the subject of the Notice
9 (“Complaint”).

10 **1.9 No Admission**

11 Bauducco Foods denies the material, factual, and legal allegations in the Notice and
12 Complaint, and maintains that all of the products it has manufactured, imported, sold, and/or
13 distributed for sale in California, including the Products, have been, and are, in compliance with all
14 laws. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
15 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
16 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.
17 This Section shall not, however, diminish or otherwise affect Bauducco Foods’s obligations,
18 responsibilities, and duties under this Consent Judgment.

19 **1.10 Jurisdiction**

20 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
21 Court has jurisdiction over Bauducco Foods as to the allegations in the Complaint, that venue is
22 proper in the County of Alameda, and that the Court has jurisdiction to enter and enforce the
23 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section
24 664.6.

25 **1.11 Effective Date**

26 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
27 the Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.
28

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation of the Product**

3 Commencing six (6) months after the Effective Date, and continuing thereafter, Bauducco
4 Foods shall only ship, sell, or offer for sale in California, reformulated Products pursuant to Section
5 2.2 or Products that are labeled with clear and reasonable warning pursuant to Section 2.3.

6 **2.2 Reformulation Standard**

7 "Reformulated Product(s)" shall mean Products that contains less than or equal to 70 parts per
8 billion ("ppb") of acrylamide. Commencing on the Effective Date, and continuing thereafter,
9 Bauducco shall not manufacture any Product that will be sold or offered for sale in California that
10 exceeds the following acrylamide concentration limits, such concentration to be determined by use of
11 a test performed by an laboratory accredited by the State of California, a federal agency, or a
12 nationally recognized accrediting organization, using LC-MS/MS (Liquid Chromatograph-Mass
13 Spectrometry): the average acrylamide concentration shall not exceed 70 ppb by weight (the
14 "Average Level") for the Products. The Average Level is determined by randomly selecting and
15 testing at one wafer sample each from five different lots of the Products (or the maximum number of
16 lots available for testing if less than five) during a testing period of at least 60 days.

17 **2.3 Clear and Reasonable Warnings**

18 Commencing six (6) months after the Effective Date and continuing thereafter, Bauducco
19 Foods shall, for all Products it sells or distributes in California that are not a Reformulated Products,
20 provide clear and reasonable warnings as set forth in Proposition 65 and related Regulations. The
21 warning shall be prominently placed with such conspicuousness as compared with other words,
22 statements, designs, or devices as to render it likely to be read and understood by an ordinary
23 individual under customary conditions before purchase or use. Each warning shall be provided in a
24 manner such that the consumer or user is reasonably likely to understand to which Product the
25 warning applies, so as to minimize confusion.

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

8 **2.4 Sell-Through Period**

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

14 **3. MONETARY SETTLEMENT TERMS**

15 **3.1 Settlement Amount**

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

21 **3.2 Civil Penalty**

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

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

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

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

3 All payments owed to Embry shall be paid to the Glick Law Group Client Trust Account and
4 delivered to the following payment address:

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

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

11 For United States Postal Service Delivery:

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

17 For Non-United States Postal Service Delivery:

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

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

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

- 27 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 28 • "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 **3.3 Attorney's Fees and Costs**

2 The portion of the settlement attributable to attorney's fees and costs shall be paid to Embry's
3 counsel, who are entitled to attorney's fees and costs incurred by her in this action, including but not
4 limited to investigating potential violations, bringing this matter to Bauducco Foods's attention, as
5 well as litigating and negotiating a settlement in the public interest.

6 Bauducco Foods shall provide its payment to Embry's counsel in two checks, divided equally,
7 payable to Glick Law Group, PC (\$22,500) and Nicholas & Tomasevic, LLP (\$22,500) respectively.
8 The addresses for these two entities are:

9 Noam Glick
10 Glick Law Group
11 225 Broadway, Suite 2100
12 San Diego, CA 92101

13 Craig Nicholas
14 Nicholas & Tomasevic, LLP
15 225 Broadway, 19th Floor
16 San Diego, CA 92101

17 **3.4 Timing**

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

19 **4. CLAIMS COVERED AND RELEASED**

20 **4.1 Embry's Public Release of Proposition 65 Claims**

21 For any claim or violation arising under Proposition 65 alleging a failure to warn about
22 exposures to acrylamide from Products manufactured, imported, sold, or distributed by Bauducco
23 Foods prior to the Effective Date, Embry, acting on her own behalf and in the public interest,
24 releases Bauducco Foods of any and all liability. This includes Bauducco Foods's parents,
25 subsidiaries, affiliated entities under common ownership, its directors, officers, agents, employees,
26 attorneys, and each entity to whom Bauducco Foods directly or indirectly distributes or sells the
27 Products, including but not limited to, downstream distributors, wholesalers, customers, retailers,
28 franchisees, cooperative members and licensees (collectively, the "Releasees"). Releasees shall
include Target Corporation, who sells Bauducco products. 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 Products manufactured, imported, sold, or

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

5 **4.2 Embry's Individual Release of Claims**

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

12 **4.3 Bauducco Foods's Release of Embry**

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

19 **5. COURT APPROVAL**

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

23 **6. SEVERABILITY**

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

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1 **7. GOVERNING LAW**

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

8 **8. NOTICE**

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

12 For Bauducco Foods:

13 Garth Ward
14 Lewis Brisbois
15 701 B Street, Suite 1900
16 San Diego, CA 92101

12 For Embry:

13 Noam Glick
14 Glick Law Group, PC
15 225 Broadway, 21st Floor
16 San Diego, CA 92101

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

23 **10. POST EXECUTION ACTIVITIES**

24 Embry agrees to comply with the reporting form requirements referenced in Health and Safety
25 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
26 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
27 motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to
28 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

1 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for
2 approval, responding to any objection that any third-party may make, and appearing at the hearing
3 before the Court if so requested.

4 **11. MODIFICATION**

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

8 **12. AUTHORIZATION**

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

11 **AGREED TO:**

AGREED TO:

12
13 Date: June 12, 2018

Date: 7-18-18

14 By: 

15 KIM EMBRY

14 By: 

15
16 MAGDALENA A. LOPEZ [print name]
17 Bauducco Foods, Inc.