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

7 **NICHOLAS & TOMASEVIC, LLP**
8 Craig M. Nicholas (SBN 178444)
9 Shaun Markley (SBN 291785)
10 Jake Schulte (SBN 293777)
11 225 Broadway, 19th Floor
12 San Diego, California 92101
13 Tel: (619) 325-0492
14 Fax: (619) 325-0496

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 Plaintiff,

21 v.

22 **THE KROGER COMPANY, an Ohio**
23 corporation, **BAY VALLEY FOODS, LLC, a**
24 Delaware corporation; **MONDELEZ GLOBAL,**
25 **LLC, A Delaware corporation; JET.COM, a**
26 Delaware corporation; and **DOES 1 through**
27 **100, inclusive,**

28 Defendants.

Case No.: HIG 19024517

CORRECTED
~~PROPOSED~~ CONSENT JUDGMENT AS
TO MONDELEZ GLOBAL, LLC

FILED
ALAMEDA COUNTY

JAN 14 2020

CLERK OF THE SUPERIOR COURT

By: *Chawalper*

Deputy

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Kim Embry ("Embry") on one hand,
4 and Mondelēz Global, LLC ("Defendant" or "MDLZ") on the other hand, with Embry and Defendant
5 individually referred to as a "Party" and collectively as the "Parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Embry alleges that Defendant manufactures, imports, sells, and distributes for sale in
16 California, graham crackers and biscuits that contain Acrylamide. Embry further alleges that
17 Defendant does so without providing a sufficient health hazard warning as required by Proposition 65
18 and related regulations. Pursuant to Proposition 65, Acrylamide is listed as a chemical known to cause
19 cancer and reproductive harm. MDLZ denies that warnings are required under Proposition 65 for any
20 exposures to acrylamide in the Products, and MDLZ maintains that it has complied with all applicable
21 federal and state laws, including but not limited to Proposition 65.

22 **1.5 Product Description**

23 For purposes of this Consent Judgment, the "Product" or "Products" are defined as Honey
24 Maid Graham Crackers and all Belvita biscuit products (including but not limited to Belvita Cinnamon
25 Brown Sugar Breakfast Biscuits) manufactured, imported, sold, or distributed for sale in California by
26 Defendant.

1 **1.6 Notices of Violation**

2 On May 17, 2018 Embry served Defendant MDLZ, the California Attorney General, and all
3 other required public enforcement agencies with a 60-Day Notice of Violation of California Health
4 and Safety Code section 25249.6 *et seq.* ("First Notice"). The First Notice alleged that Defendant
5 violated Proposition 65 by failing to provide warnings for alleged exposures to acrylamide in Honey
6 Maid Graham Crackers.

7 On August 4, 2017 Embry served Defendant MDLZ, the California Attorney General, and all
8 other required public enforcement agencies with a 60-Day Notice of Violation of California Health
9 and Safety Code section 25249.6 *et seq.* ("Second Notice"). The Second Notice alleged that Defendant
10 violated Proposition 65 by failing to provide warnings for alleged exposures to Acrylamide in Belvita
11 Cinnamon Brown Sugar Breakfast Biscuits.

12 On September 10, 2019, Embry served Defendant MDLZ, the California Attorney General,
13 and all other required public enforcement agencies with a 60-Day Notice of Violation of California
14 Health and Safety Code section 25249.6 *et seq.* ("Third Notice"). The Third Notice alleged that
15 Defendant violated Proposition 65 by failing to provide warnings for alleged exposures to acrylamide
16 in Belvita Breakfast Biscuits. The First, Second and Third Notices are referred to collectively as the
17 "Notices." No public enforcer has commenced or is otherwise prosecuting an action to enforce the
18 violations alleged in the Notices.

19 **1.7 Complaint**

20 On or about June 25, 2019, Embry filed a Complaint against Defendant for the alleged
21 violations of Health and Safety Code section 25249.6 that are the subject of the First and Second
22 Notices ("Complaint"). Upon entry of this Consent Judgment, the Complaint shall be deemed
23 amended *nunc pro tunc* additionally to include allegations asserted in the Third Notice.

24 **1.8 No Admission**

25 By stipulating to the entry of this Consent Judgment and agreeing to provide the relief and
26 remedies specified herein, MDLZ does not admit that it has violated, or threatened to violate,
27 Proposition 65 or any other law or legal duty, and MDLZ does not admit that the chemical acrylamide
28 in food poses any risk to human health.

1 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
2 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
3 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.
4 This Section shall not, however, diminish or otherwise affect Defendant's obligations, responsibilities,
5 and duties under this Consent Judgment, subject to subsequent modifications thereof or Court orders
6 regarding any such obligation, responsibility, and/or duty.

7 **1.9 Jurisdiction**

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

12 **1.10 Effective Date and Compliance Date**

13 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
14 notice of entry of the Consent Judgment is served on Defendant. The Compliance Date is (1) January
15 1, 2020 for Belvita Cinnamon Brown Sugar Breakfast Biscuits and (2) June 1, 2020 for all other
16 Products.

17 **2. INJUNCTIVE RELIEF**

18 **2.1 Reformulation of the Product**

19 Any Products that are manufactured by MDLZ on and after the Compliance Date that are
20 thereafter sold in California or distributed for sale in California shall not exceed 280 ppb on average
21 for Acrylamide, as set forth in this Section 2. As used in this Section 2.1, "distributed for sale in
22 California" means to directly ship a Product into California or to sell a Product to a distributor that
23 MDLZ knows will sell the Product in California.

24 **2.2 Testing**

25 (a) Compliance with the average level shall be determined using LC-MS/MS (Liquid
26 Chromatograph-Mass Spectrometry), GC/MS (Gas Chromatography/Mass Spectrometry), or any
27 other testing method agreed upon by the Parties. Any testing for purposes of Section 2.1 shall be
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1 performed by any laboratory accredited by the State of California, a federal agency, or a nationally
2 recognized organization.

3 (b) The Average Level is determined by randomly selecting and testing, over no less than
4 a ten-day period, one sample from at least five lots (or from as many lots as are available, if fewer than
5 five) and a maximum of ten lots of Products produced at locations that supply such Products to
6 California ("Sampling Data"). The mean and standard deviation shall be calculated using the Sampling
7 Data. Any data points that are more than three standard deviations outside the mean shall be discarded
8 once, and the mean and standard deviation recalculated using the remaining data points. The arithmetic
9 mean determined in accordance with this procedure shall be deemed the "Average Level."

10 (c) For at least three consecutive years after the Compliance Date, MDLZ shall arrange for
11 testing under Section 2.2. The testing shall be at least once per year, with the first testing occurring
12 prior to the Compliance Date. No further testing shall be required unless MDLZ materially modifies
13 the ingredients or cooking process of a Product, at which point testing shall recommence on an annual
14 basis for at least three years.

15 2.3 Sell-Through Period

16 Notwithstanding anything else in this Consent Judgement, the Products that are manufactured
17 on or prior to the Compliance Date shall be subject to release of liability pursuant to this Consent
18 Judgment, without regard to when such products were, or are in the future, distributed or sold to
19 customers. As a result, the obligations in Section 2 do not apply to Products manufactured on or prior
20 to the Compliance Date.

21 3. MONETARY SETTLEMENT TERMS

22 3.1 Settlement Amount

23 Defendant shall pay seventy-five thousand dollars (\$75,000.00) in settlement and total
24 satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment.
25 This includes civil penalties in the amount of eight thousand (\$8,000.00) pursuant to Health and Safety
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1 Code section 25249.7(b) and attorney's fees and costs in the amount of sixty-seven thousand (\$67,000)
2 pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code section 25249 et seq.

3 **3.2 Civil Penalty**

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

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

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

14 All payments owed to OEHHHA (EIN: 68-0284486) shall be delivered directly to OEHHHA (Memo
15 line "Prop 65 Penalties") at the following addresses:

16 For United States Postal Delivery:

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

22 For Non-United States Postal Service Delivery:

23 Mike Gyurics
24 Fiscal Operations Branch Chief
25 Office of Environmental Health Hazard Assessment
26 1001 I Street
27 Sacramento, CA 95814

28 MDLZ agrees to provide Embry's counsel with a copy of the check payable to OEHHHA
simultaneous with its penalty payment to Embry.

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

- 4 • "Kim Embry" whose address and tax identification number shall be provided within
5 five (5) days after this Consent Judgement is fully executed by the Parties
- 6 • "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.2;
- 7 • "Nicholas & Tomasevic" (EIN: 46-3474065) at address provided in Section 3.3; and
- 8 • "Office of Environmental Health Hazard Assessment" at 1001 I Street, Sacramento,
9 CA 95814.

10 3.3 Attorney's Fees and Costs

11 The portion of the settlement attributable to attorneys' fees and costs shall be paid to Embry's
12 counsel, who are entitled to attorney's fees and costs incurred by her in this action, including but not
13 limited to investigating potential violations, bringing this matter to Defendant's attention, as well as
14 litigating and negotiating a settlement in the public interest.

15 Defendant shall provide its payment to Embry's counsel in two checks, divided equally,
16 payable to Glick Law Group, PC (\$33,500) and Nicholas & Tomasevic, LLP (\$33,500) respectively.
17 The addresses for these two entities are:

18 Noam Glick
19 Glick Law Group
20 225 Broadway, Suite 2100
San Diego, CA 92101

21 Craig Nicholas
22 Nicholas & Tomasevic, LLP
23 225 Broadway, 19th Floor
San Diego, CA 92101

24 3.4 Timing

25 The above mentioned checks will be issued within fourteen (14) days of the Effective Date.
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1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Embry's Public Release of Proposition 65 Claims**

3 This Consent Judgment is a full, final, and binding resolution between, on the one hand,
4 Embry, on behalf of herself and her attorneys, investigators, agents, heirs, and assigns (collectively
5 referred to as "Embry Releasers") and on behalf of the public in the public interest, and, on the other
6 hand, MDLZ and its parents, subsidiaries, affiliated entities under common ownership, its directors,
7 officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and
8 assigns ("Defendant Entities"), and each entity to whom Defendant directly or indirectly distributes,
9 ships, or sells the Products including but not limited to downstream distributors, wholesalers,
10 customers, retailers, franchisees, cooperative members, and licensees, and their owners, directors,
11 officers, agents, principals, employees, attorneys, insurers, accountants, representatives, predecessors,
12 successors, and assigns (collectively referred to as the "Releasees"), of all claims, actions, causes of
13 action (in law or in equity), suits, liabilities, demands, obligations, damages, costs, fines, penalties,
14 losses, expenses, and fees (including, but not limited to, investigation fees, expert fees, and attorney's
15 fees), and expenses (collectively, "Claims") that have been or could have been asserted under
16 Proposition 65 for any exposures to acrylamide from the Products manufactured, purchased,
17 distributed, or sold by Defendant before the Compliance Date. Compliance with the terms of this
18 Consent Judgment constitutes compliance with Proposition 65 with respect to any exposures to
19 acrylamide from Products manufactured, purchased, sold, or distributed by Defendant on and after the
20 Compliance Date.

21 **4.2 Embry's Individual Release of Claims**

22 Embry, in her individual capacity, on behalf of herself and the Embry Releasers, also waives
23 all rights to institute or participate in, directly or indirectly, any form of legal action, and discharges
24 and releases all Claims as to all Releasees under Proposition 65 or any statutory or common law from
25 the alleged failure to provide warnings for any exposures to acrylamide, or for causing any exposures
26 to acrylamide, in the Products, and in graham cracker products, manufactured, purchased, distributed,
27 or sold by Defendant. The release in this Section 4.2 is effective as a full and final accord and
28 satisfaction, as a bar to all Claims by Embry of any nature, character or kind, whether known or

1 unknown, or suspected or unsuspected. Embry acknowledges that she is familiar with Section 1542
2 of the California Civil Code, which provides as follows:

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

7 Embry understands and acknowledges the significance and consequence of this waiver of California
8 Civil Code section 1542.

9 **4.3 Defendant's Release of Embry**

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

15 **5. COURT APPROVAL**

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

19 **6. SEVERABILITY**

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

23 **7. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the state of California
25 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
26 rendered inapplicable for reasons, including but not limited to changes in the law, then Defendant may
27 provide written notice to Embry of any asserted change, and shall have no further injunctive
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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:

For Defendant:

Sarah Esmaili
Arnold & Porter
Three Embarcadero Center, 10th Fl
San Francisco, CA 94111

For Embry:

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

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 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

10.1 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.

1 **11. ENFORCEMENT**

2 Prior to bringing any motion or order to show cause to enforce the terms of this Consent
3 Judgment, a Party seeking to enforce the Consent Judgment shall provide the other Party written
4 notice of the alleged violation. The Parties shall meet and confer in an effort to try to reach
5 agreement on an appropriate cure for the alleged violation. Embry shall not bring an enforcement
6 action or institute a judicial proceeding if MDLZ demonstrates it has complied with the requirements
7 of Section 2. MDLZ is entitled to designate such information as confidential.

8 In the event that meet and confer efforts are unsuccessful, the Party alleging a violation may
9 initiate a judicial proceeding to enforce this Consent Judgment no earlier than 60 days after issuing
10 the written notice specified in Section 11. In the event that a Party initiates such a judicial proceeding,
11 the prevailing Party shall be entitled to recover its reasonable attorneys' fees and costs.

12 **12. MODIFICATION**

13 **12.1 Modification.** This Consent Judgment may be modified only by: (i) a written
14 agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a
15 successful motion or application of any Party, and the entry of a modified consent judgment thereon
16 by the Court.

17 **12.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
18 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the
19 Consent Judgment.

20 **12.3 Change in Proposition 65.** If Proposition 65 or its implementing regulations
21 (including but not limited to the published "no significant risk level" for acrylamide set forth at Cal.
22 Code Regs., tit. 27, section 25705, subdivision (c)(2) or any "alternative risk level" adopted by
23 regulation or court decision) are changed from their terms as they exist on the date of entry of this
24 Consent Judgment, or if OEHHA takes some other final regulatory action that determines that
25 warnings for acrylamide are not required or modifies the standard for warnings for acrylamide, then
26 MDLZ may seek to modify this Consent Judgment.

27 **12.4 Other Court Decisions.** If a final decision of a court determines that warnings for
28 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are

1 preempted or otherwise unlawful or unconstitutional, then MDLZ may move to modify this Consent
2 Judgment to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results.

3 **12.5. Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
4 agency of the federal government, including, but not limited to, the U.S. Food and Drug
5 Administration, states through any guidance, regulation or legally binding act that federal law has
6 preemptive effect on any of the requirements of this Consent Judgment, then this Consent Judgment
7 may be modified in accordance with the procedure for noticed motions set forth in Section 12.1 to bring
8 it into compliance with or avoid conflict with federal law.

9 **12.6 Scientific Studies.** If an agency of the federal government, including, but not limited
10 to the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally
11 binding act, following a review of scientific studies and following public notice and comment, a cancer
12 potency estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms
13 per day, then MDLZ shall be entitled to seek a modification of this Consent Judgment.

14 **12.7** Before filing any motion to modify the Consent Judgment, MDLZ shall provide written
15 notice to Embry to initiate the meet and confer procedure in Section 12.2. If the Parties do not agree
16 on the proposed modification during informal meet and confer efforts, MDLZ may file a motion to
17 modify the Consent Judgment within sixty (60) days of the date of the written notice that MDLZ
18 provides to Embry under this Section 12.

19 **13. RETENTION OF JURISDICTION**

20 This Court shall retain jurisdiction of this matter to implement or modify the Consent
21 Judgment. Notwithstanding the provisions of Section 12, nothing in this Consent Judgment limits or
22 affects the Court's authority to modify this Consent Judgment as provided by law.

23 **14. AUTHORIZATION**

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

26 **15. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

27 If a dispute arises with respect to either Party's compliance with the terms of this Consent
28 Judgment entered by the Court, the Parties shall meet and confer in person, by telephone, and/or in

1 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed
2 in the absence of such a good faith attempt to resolve the dispute beforehand.

3 **16. ENTIRE AGREEMENT**

4 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
5 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,
6 commitments, and understandings related hereto. No representations, oral or otherwise, express or
7 implied, other than those contained herein have been made by any Party. No other agreements, oral
8 or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

9 **AGREED TO:**

AGREED TO BY (DEFENDANT)

10 Date: September 26, 2019

11 Date: Sep 23, 2019

12 By: 

13 KIM EMBRY

14 By: 

MELISSA HARRUP

VP & Chief Counsel – North America

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16
17 **IT IS SO ORDERED.**

18 Dated: 1/14/20

19 
20 JUDGE OF THE SUPERIOR COURT
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