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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.

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

Defendants.

Case No. HG-17-885297

[PROPOSED] CONSENT JUDGMENT AS  
TO CALIFORNIA BAKING COMPANY

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 California Baking Company (“Defendant” or “California Baking”) on the other hand, with Embry  
5     and Defendant 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, white bread that contains Acrylamide. Embry further alleges that Defendant does so  
17   without providing a sufficient health hazard warning as required by Proposition 65 and related  
18   regulations. Pursuant to Proposition 65, Acrylamide is listed as a chemical known to cause cancer and  
19   reproductive harm.

20            **1.5 Product Description**

21            For purposes of this Consent Judgment, the “Product” or “Products” are defined as Defendant’s  
22   Cholesterol Free White Bread, that allegedly contains Acrylamide that are manufactured, imported,  
23   sold, or distributed for sale in California by Defendant and Releasees.

24            **1.6 Notices of Violation**

25            On July 21, 2017, Embry served Defendant California Baking, the California Attorney  
26   General, and all other required public enforcement agencies with a 60-Day Notice of Violation of  
27   California Health and Safety Code section 25249.6 *et seq.* (“Notice”). The Notice alleged that  
28

1 Defendant violated Proposition 65 by failing to sufficiently warn consumers in California of the health  
2 hazards associated with exposures to Acrylamide contained in the Products.

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

### 5 **1.7 Complaint**

6 On or about December of 2017, Embry filed a Complaint against Defendant for the alleged  
7 violations of Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

### 8 **1.8 No Admission**

9 Defendant denies the material, factual, and legal allegations in the Notices and Complaint, and  
10 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in  
11 California, including the Products, have been, and are, in compliance with all laws. Nothing in this  
12 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of  
13 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an admission  
14 of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not,  
15 however, diminish or otherwise affect Defendant’s obligations, responsibilities, and duties under this  
16 Consent Judgment, subject to subsequent modifications thereof or Court orders regarding any such  
17 obligation, responsibility, and/or duty.

### 18 **1.9 Jurisdiction**

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

### 23 **1.10 Effective Date**

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

1     **2.     INJUNCTIVE RELIEF**

2             **2.1     Clear and Reasonable Warnings**

3             After the Effective Date, California Baking shall not distribute for sale in California any  
4     Product unless the label of the Product contains a warning that complies with Proposition 65's warning  
5     regulations, including 27 California Code of Regulations Section 25600 et. seq.

6             **2.2     Grace Period for Existing Inventory of Products**

7             The injunctive requirements of Section 2 shall not apply to Products that are already in the  
8     stream of commerce as of the Effective Date, which Products are expressly subject to the releases  
9     provided in Section 4.1.

10    **3.     MONETARY SETTLEMENT TERMS**

11            **3.1     Settlement Amount**

12            Defendant shall pay thirty thousand dollars (\$30,000.00) in settlement and total satisfaction of  
13    all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil  
14    penalties in the amount of three thousand dollars (\$3,000) pursuant to Health and Safety Code section  
15    25249.7(b) and attorney's fees and costs in the amount of twenty-seven thousand dollars (\$27,000)  
16    pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code section 25249 et seq.

17            **3.2     Civil Penalty**

18            The portion of the settlement attributable to civil penalties shall be allocated according to  
19    Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty  
20    paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and the  
21    remaining twenty-five percent (25%) of the penalty paid to Embry. Within ten (10) days of the date  
22    this Settlement Agreement is executed by the Parties, California Baking shall issue two separate  
23    checks for the initial civil penalty payment to (a) "OEHHA" in the amount of two thousand two  
24    hundred and fifty dollars (\$2,250) and (b) Kim Embry, payable to the Glick Law Group Client Trust  
25    Account, in the amount of seven hundred and fifty dollars (\$750).

1 All payments owed to Embry shall be delivered to the following payment addresses:

2 Noam Glick  
3 Glick Law Group  
4 225 Broadway, Suite 2100  
San Diego, CA 92101

5 The penalty will be forwarded to OEHHA by Embry's counsel.

6 **3.3 Attorney's Fees and Costs**

7 The portion of the settlement attributable to attorneys' fees and costs shall be paid to Embry's  
8 counsel, who are entitled to attorney's fees and costs incurred by her in this action, including but not  
9 limited to investigating potential violations, bringing this matter to Defendant's attention, as well as  
10 litigating and negotiating a settlement in the public interest. Defendant shall pay the attorneys' fees  
11 and costs in three payments of nine thousand dollars (\$9,000), each due no later than June 15<sup>th</sup>, 2019;  
12 July 15<sup>th</sup>, 2019; and August 15<sup>th</sup>, 2019. Each payment shall consist of two checks, a check for \$4,500  
13 to "Glick Law Group" and a check for \$4,500 to "Nicholas & Tomasevic, LLP." Defendant shall  
14 issue IRS form W9s to Glick Law Group and Nicholas & Tomasevic for the respective payments.

15 **3.4 Cure of any Late Payments.**

16 Embry's counsel shall provide written notice, by email or U.S. Mail, of any missed payment  
17 for attorneys' fees by Defendant. Defendant shall have five days (5) business days from its receipt of  
18 the notice to cure any late payment of attorneys' fees provided in this agreement.

19 **3.5 Attorneys' Fees in Event of Breach**

20 In the event of an action for breach of this agreement, the prevailing party shall be entitled to  
21 its reasonable attorneys' fees and costs. In such an action, Plaintiff expressly reserves the right to  
22 pursue an alter ego claim against Defendant's owner.

23 **4. CLAIMS COVERED AND RELEASED**

24 **4.1 Embry's Public Release of Proposition 65 Claims**

25 For any claim or violation arising under Proposition 65 alleging a failure to warn about  
26 exposures to Acrylamide from Products or related products manufactured, imported, sold, or  
27 distributed by Defendant prior to the Effective Date, Embry, acting on her own behalf and in the public  
28 interest, releases Defendant of any and all liability. This includes Defendant's owners, parents,

1 subsidiaries, affiliated entities under common ownership, its directors, officers, agents, employees,  
2 attorneys, and each entity to whom Defendant directly or indirectly distributes or sells the Products,  
3 including but not limited to, downstream distributors, wholesalers, customers, retailers, franchisees,  
4 cooperative members and licensees, including but not limited to California Baking (collectively, the  
5 “Releasees”). Releasees include defendant, its parent, and all subsidiaries and affiliates thereof and  
6 their respective employees, agents, and assigns that sell Defendant’s Products. Compliance with the  
7 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to the alleged  
8 or actual failure to warn about exposures to Acrylamide from Products manufactured, imported, sold,  
9 or distributed by Defendant after the Effective Date. This Consent Judgment is a full, final and binding  
10 resolution of all claims that were or could have been asserted against Defendant and/or Releasees for  
11 failure to provide warnings for alleged exposures to Acrylamide contained in Products.

#### 12 **4.2 Embry’s Individual Release of Claims**

13 Embry, in her individual capacity, also provides a release to Defendant and/or Releasees,  
14 which shall be a full and final accord and satisfaction of as well as a bar to all actions, causes of action,  
15 obligations, costs, expenses, attorney’s fees, damages, losses, claims, liabilities, and demands by  
16 Embry of any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising  
17 out of alleged or actual exposures to Acrylamide in Products manufactured, imported, sold, or  
18 distributed by Defendant before the Effective Date.

#### 19 **4.3 Defendant’s Release of Embry**

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

### 25 **5. COURT APPROVAL**

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

1     **6. SEVERABILITY**

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

5     **7. GOVERNING LAW**

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

12    **8. NOTICE**

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

16    For Defendant:

17    Manuel Levy  
18    California Baking Company  
19    681 Anita Street, Suite 106  
20    Chula Vista, CA 91911

21    For Embry:

22    Noam Glick  
23    Glick Law Group, PC  
24    225 Broadway, 21st Floor  
25    San Diego, CA 92101

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

28    **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**

          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

1 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which  
2 motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to  
3 mutually employ their best efforts, including those of their counsel, to support the entry of this  
4 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For  
5 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for  
6 approval, responding to any objection that any third-party may make, and appearing at the hearing  
7 before the Court if so requested.

8 **11. MODIFICATION**

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

12 **12. AUTHORIZATION**

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

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

16 If a dispute arises with respect to either Party’s compliance with the terms of this Consent  
17 Judgment entered by the Court, the Parties shall meet and confer in person, by telephone, and/or in  
18 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed  
19 in the absence of such a good faith attempt to resolve the dispute beforehand.

20 **14. ENTIRE AGREEMENT**

21 This Consent Judgment contains the sole and entire agreement and understanding of the Parties  
22 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,  
23 commitments, and understandings related hereto. No representations, oral or otherwise, express or  
24 implied, other than those contained herein have been made by any Party. No other agreements, oral  
25 or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.  
26  
27  
28




1 **AGREED TO:**

2 Date: May 31, 2019

3  
4 By:   
5 KIM EMBRY

**AGREED TO BY CALIFORNIA BAKING  
COMPANY**

6 Date: May 31, 2019

7  
8 By:   
9  
10 [print name]  
11 MANUEL LEVY  
12 PRESIDENT  
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