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9 Attorneys for Plaintiff  
10 Kim Embry

11  
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

14 KIM EMBRY, an individual

15 Plaintiff,

16 v.

17 THE KROGER COMPANY, an Ohio  
corporation; PINNACLE FOODS GROUP,  
18 LLC, a Delaware corporation; BRUEGGER'S  
ENTERPRISES, INC., a Delaware  
19 corporation; and DOES 1 through 100,  
inclusive,

20 Defendants.  
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**Case No. RG18908172**

**[PROPOSED] CONSENT JUDGMENT as  
to BRUEGGER'S ENTERPRISES, INC.**

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

Department: 16  
Judge: Hon. M. Markman

Complaint filed on June 8, 2018

1  
2 **1. INTRODUCTION**

3 **1.1 Parties**

4 This Consent Judgment is entered into by and between Kim Embry (“Embry”) and Bruegger’s  
5 Enterprises, Inc. (“Bruegger’s”) (collectively 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 Embry has alleged that Bruegger’s employs ten or more individuals and is a “person in the  
12 course of doing business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of  
13 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Embry contends that Bruegger’s manufactures, imports, sells, and distributes for sale in  
16 California bagels that, when grilled or toasted, contains acrylamide. Embry further alleges that  
17 Bruegger’s does so without providing a sufficient 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 “Product” or “Products” are defined as bagels that  
22 contain acrylamide and which are authorized to be manufactured, distributed, sold, or offered for sale  
23 in California, including in their toasted or grilled form, by Bruegger’s and Releasees as defined *infra*.

24 **1.6 Releasees**

25 Bruegger’s contends that it is a franchisor and that the acts alleged by Embry are attributable  
26 to other persons in the course of doing business in California. This Consent Judgment expressly  
27 encompasses all bagel products sold under Bruegger’s brand name or in retail locations operated by  
28 its franchisees in California. The term “Products” used throughout this Consent Judgment refers to

1  
2 all such products. The term “Releasee” means Bruegger’s franchisees that sell Products in California  
3 as well as all other entities or persons addressed in the definition of Releasee in Section 4 below.

4 **1.7 Notices of Violation**

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

12 On July 25, 2017, Embry sent Bruegger’s an updated, but substantive duplicate of the July 21,  
13 2017 Notice. On September 15, 2017, Embry notified the California Attorney General’s office that it  
14 was withdrawing its May 2, 2017 notice to Bruegger’s. Subsequently, Embry’s counsel confirmed to  
15 Bruegger’s Franchise Corporation that it had withdrawn its May 2, 2017 notice and would not be  
16 proceeding on those claims or those in its July 25, 2017 notice.

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

19 **1.8 Complaint**

20 On June 8, 2018, Embry filed a Complaint against Bruegger’s, among others, for the alleged  
21 violations of Health and Safety Code section 25249.6 that are the subject of the Notice  
22 (“Complaint”).

23 **1.9 No Admission**

24 Bruegger’s denies the material, factual, and legal allegations in the Notice and Complaint, and  
25 maintains that all of the products it has authorized for sale in California, including the Products as  
26 sold by its franchisees, have been, and are, in compliance with Proposition 65 and all other applicable  
27 laws. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,  
28 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment

be construed as an admission of any fact, finding, <sup>3</sup> conclusion of law, issue of law, or violation of law.

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2 This Section shall not, however, diminish or otherwise affect Bruegger's's obligations,  
3 responsibilities, and duties under this Consent Judgment.

4 **1.10 Jurisdiction**

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

9 **1.11 Effective Date**

10 For purposes of this Consent Judgment, the term "Effective Date" means the date on which  
11 Embry serves notice that the Court has granted a motion for approval and entry of this Consent  
12 Judgment, as discussed in Section 5.

13 **2. INJUNCTIVE RELIEF**

14 **2.1** Commencing within three (3) months following the Effective Date and continuing  
15 thereafter, Bruegger's shall, for all Products it authorizes for sale in California, require its franchisees  
16 to post signs in their California retail outlets containing one of the following clear and reasonable  
17 warnings:

18 **WARNING:** Chemicals known to the State of California to cause cancer and reproductive  
19 toxicity, including acrylamide, are present in coffee, baked goods, and other food or  
20 beverages sold here. Acrylamide is not added to our products, but results from cooking, such  
as when coffee beans are roasted or baked goods are baked.

or, pursuant to 27 Cal. Code Regs. § 25607.6:

21 **WARNING:** Certain foods and beverages sold or served here can expose you to  
22 chemicals including acrylamide in many fried or baked foods, and mercury in fish, which are  
23 known to the State of California to cause cancer and birth defects or other reproductive harm.  
For more information go to [www.P65Warnings.ca.gov/restaurant](http://www.P65Warnings.ca.gov/restaurant)

24  
25 The following information may, in whole or in part, accompany the warning statement selected from  
26 the above at Bruegger's discretion:

27 Your personal cancer risk is affected by a wide variety of factors. The FDA has not advised  
28 people to stop drinking coffee or eating baked goods that contain acrylamide. For more

1  
2 information regarding FDA’s views, see [www.fda.gov](http://www.fda.gov). For more information about  
3 acrylamide and Proposition 65, visit [www.oehha.ca.gov/prop65/acrylamide.html](http://www.oehha.ca.gov/prop65/acrylamide.html).

4 **2.2** Bruegger’s shall direct that the signs containing one of the above warning statements  
5 shall be prominently placed in its California franchisees’ retail outlets with such  
6 conspicuousness as compared with other words, statements, designs, or devices as to render it  
7 likely to be read and understood by an ordinary individual under customary conditions before  
8 purchase or use. The posting of a sign no smaller than 5 by 5 inches, printed in no smaller  
9 than 20-point type, placed at the primary point of sale in a Bruegger’s franchisee’s retail  
10 outlet in California where orders are placed shall be deemed to meet this requirement.  
11 Pursuant to 27 Cal. Code Regs § 25607.5, the following alternatives shall also be deemed to  
12 meet the requirement:

- 13 (a) An 8½ by 11 inch sign, printed in no smaller than 28-point type placed so that it is  
14 readable and conspicuous to customers as they enter each public entrance to the  
15 restaurant or facility where food or beverages may be consumed, or  
16 (b) A warning on any menu or list describing food or non-alcoholic beverage  
17 offerings, in a type size no smaller than the largest type size used for the names of  
18 general menu items.

19 **2.3 Effect of Future Determinations and Judgments**

20 In the event that the California Office of Environmental Health Hazard Assessment  
21 (“OEHHA”) promulgates one or more regulations requiring or permitting warning text and/or  
22 methods of transmission different than those set forth above, Bruegger’s shall be entitled to use, at its  
23 discretion, such other warning text and/or method of transmission without being deemed in breach of  
24 this Consent Judgment. In the event Embry enters into an agreement or consent judgment with any  
25 other person addressing alleged violations of Proposition 65 with respect to exposures to acrylamide  
26 from bagels that provides for meeting an acrylamide concentration limit (“Reformulation Standard”) <sup>5</sup>  
27 rather than providing clear and reasonable Proposition 65 warnings or provides for a different  
28 warning commitment than that set forth in Sections 2.2 and 2.3 above; or if a final judgment is  
entered in any Proposition 65 case with respect to exposures to acrylamide from bagels that provides

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2 for a Reformulations Standard applicable to bagels or an alternative Proposition 65 warning; or if  
3 OEHHA adopts a regulation or safe use determination, or issues an interpretative guideline, that  
4 provides for or has the effect of providing for a Reformulation Standard or different treatment of  
5 bagels and acrylamide under Proposition 65; or if Proposition 65 is determined in a final judgment to  
6 be preempted by federal law with respect to acrylamide in bagels or other bread products, then this  
7 Consent Judgment shall be subject to modification at the option of Bruegger's, and without the  
8 objection of Embry, to conform or eliminate the terms of this Section 2 accordingly.

9 **3. MONETARY SETTLEMENT TERMS**

10 **3.1 Settlement Amount**

11 Bruegger's shall pay forty-eight thousand dollars (\$48,000) in settlement and total satisfaction  
12 of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes  
13 civil penalties in the amount of four thousand dollars (\$4,000) pursuant to Health and Safety Code  
14 section 25249.7(b) and reimbursement of Embry's attorney's fees and costs in the amount of forty  
15 four thousand dollars (\$44,000).

16 **3.2 Civil Penalty**

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

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

22 Noam Glick  
23 Glick Law Group  
24 225 Broadway, Suite 2100  
25 San Diego, CA 92101

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

27 For United States Postal Service Delivery:

28 Mike Gyurics  
Fiscal Operations Branch Chief

Office of Environmental Health Hazard Assessment  
P.O. Box 4010  
CONSENT JUDGMENT

1  
2 Sacramento, CA 95812-4010

3 For Non-United States Postal Service Delivery:

4 Mike Gyurics  
5 Fiscal Operations Branch Chief  
6 Office of Environmental Health Hazard Assessment  
7 1001 I Street  
8 Sacramento, CA 95814

9 Bruegger's agrees to provide Embry's counsel with a copy of the check payable to OEHHA,  
10 simultaneous with its penalty payments to Embry.

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

- 14 • "Kim Embry" whose address and tax identification number shall be provided within five  
15 (5) days after this Settlement Agreement is fully executed by the Parties;
- 16 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.3;
- 17 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.3; and
- 18 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA  
19 95814.

20 **3.3 Attorney's Fees and Costs**

21 The portion of the settlement attributable to attorney's fees and costs shall be paid to Embry's  
22 counsel, which contend that they should be entitled to attorney's fees and costs incurred by her in this  
23 action, including but not limited to investigating potential violations, bringing this matter to  
24 Bruegger's's attention, as well as litigating and negotiating a settlement in the public interest.

25 Bruegger's shall provide its payment to Embry's counsel in two checks, divided equally,  
26 payable to Glick Law Group, PC (\$22,000) and Nicholas & Tomasevic, LLP (\$22,000) respectively.

27 The addresses for these two entities are:

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

**3.4 Timing**

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

**4. CLAIMS COVERED AND RELEASED**

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

For any claim or violation arising under Proposition 65 alleging a failure to warn about exposures to acrylamide from Products prior to the Effective Date, Embry, acting on her own behalf and in the public interest, releases Bruegger's of any and all liability. This release extends to Bruegger's' parents, subsidiaries, affiliated entities under common ownership, it and their directors, officers, agents, employees, attorneys, and each entity to whom Bruegger's authorizes to sell the Products, including but not limited to, its franchisees and licensees (collectively, the "Releasees"). 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 the Products after the Effective Date.

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

Given the nature of the injunctive relief to be provided herein, Embry, in her individual capacity, also provides a release to Bruegger's and/or Releasees, which shall be a full and final accord and satisfaction of as well as a bar to all actions, causes of action, obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands by Embry of any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to chemicals in addition to acrylamide that have been listed under Proposition 65 before the Effective Date to the extent that such exposures have arisen as the result of products sold in Bruegger's-branded stores in California. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about such exposures after the Effective Date.



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2           **4.3     Bruegger’s Release of Embry**

3           Bruegger’s, on its own behalf, and on behalf of Releasees as well as its past and current  
4 agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims  
5 against Embry and her attorneys and other representatives, for any and all actions taken or  
6 statements made by Embry and her attorneys and other representatives, whether in the course of  
7 investigating claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with  
8 respect to the Products.

9           **5.     COURT APPROVAL**

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

13           **6.     SEVERABILITY**

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

17           **7.     GOVERNING LAW**

18           The terms of this Consent Judgment shall be governed by the laws of the State of California  
19 and apply within the State of California. In the event that Proposition 65 is repealed, or is otherwise  
20 rendered inapplicable for reasons, including but not limited to changes in the law, then Bruegger’s  
21 may provide written notice to Embry of any asserted change, and shall have no further injunctive  
22 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are  
23 so affected.

24           **8.     NOTICE**

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

3           General Counsel  
4           Coffee & Bagel Brands  
5           555 Zang Street, Suite 300  
6           Lakewood, CO 80228

7           With a copy to:

8           Robert Falk  
9           Morrison & Foerster LLP  
10          425 Market Street, 32nd Floor  
11          San Francisco, CA 94105

For Embry:

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

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

14           **9.        COUNTERPARTS; FACSIMILE SIGNATURES**

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

18           **10.       POST EXECUTION ACTIVITIES**

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

28           **11.       MODIFICATION**

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

1  
2 **12. AUTHORIZATION**


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

5  
6 **AGREED TO:**

**AGREED TO:**

7 Date: 11/26/2018

Date: \_\_\_\_\_

8   
9 By: \_\_\_\_\_  
10 KIM EMBRY

By: \_\_\_\_\_ [print name]  
BRUGGER'S ENTERPRISES, INC.

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**12. AUTHORIZATION**

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

**AGREED TO:**

**AGREED TO:**

Date:

Date: November 28, 2018

By: \_\_\_\_\_

KIM EMBRY

By: 

Michael W. Davis - SVP, General Counsel [print name]  
BRUGGER'S ENTERPRISES, INC.