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7  
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **IN AND FOR THE COUNTY OF ALAMEDA**

10 KIM EMBRY, an individual

11 Plaintiff,

12 v.

13 WESTERN BAGEL BAKING CORP., an  
California corporation, and DOES 1 through  
14 100, inclusive

15 Defendants.

Case No. RG17884528

**[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 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  
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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 Regulations<sup>1</sup> or the language set forth in the 2018 Regulations.<sup>2</sup>  
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 <sup>1</sup> 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  
reproductive harm.”

28 <sup>2</sup> 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](http://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           **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 Western’s attention, as well as  
5 litigating and negotiating a settlement in the public interest.

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

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

11                                                      Craig Nicholas  
12                                                      Nicholas & Tomasevic, LLP  
                                                    225 Broadway, 19th Floor  
                                                    San Diego, CA 92101

13           **3.4     Timing**

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

15           **4.     CLAIMS COVERED AND RELEASED**

16           **4.1     Embry’s Public Release of Proposition 65 Claims**

17           For any claim or violation arising under Proposition 65 alleging a failure to warn about  
18 exposures to acrylamide from Products manufactured, imported, sold, or distributed by Western prior  
19 to the Effective Date, Embry, acting on her own behalf and in the public interest, releases Western of  
20 any and all liability. This includes Western’s parents, subsidiaries, affiliated entities under common  
21 ownership, its directors, officers, agents, employees, attorneys, and each entity to whom Western  
22 directly or indirectly distributes or sells the Products, including but not limited to, downstream  
23 distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees  
24 (collectively, the “Releasees”). Releasees include CVS, who sales Western bagel products under the  
25 Cottage Hearth label, DSD, Unified Grocers (now SuperValu, Inc.), and Ralphs. Compliance with  
26 the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to the  
27 alleged or actual failure to warn about exposures to acrylamide from Products manufactured,  
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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  
10 601 Montgomery Street, Ninth Floor  
11 San Francisco, CA 94111

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 which  
13 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 signature, each of  
16 which shall be deemed an original, and all of which, when taken together, shall constitute one and the  
17 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 approval,  
26 responding to any objection that any third-party may make, and appearing at the hearing before the  
27 Court if so requested.  
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**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.

**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: December 12, 2017

Date: 12/22/17

By:   
KIM EMBRY

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