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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. a Delaware corporation, TARGET CORPORATION, a Minnesota corporation, THE KROGER COMPANY dba RALPH'S, an Ohio corporation, FLOWER BAKERIES, LLC, a Georgia corporation, CALIFORNIA BAKING COMPANY, a California corporation, SMART & FINAL STORES, INC., a Delaware corporation, HOSTESS BRANDS, LLC, a Delaware corporation, WALGREENS COMPANY, an Illinois corporation, AMERIFOODS TRADING CO., a Florida corporation, NATURE'S BEST, INC., a California corporation, JIMBO'S NATURAL FAMILY, INC., a California corporation, DSD PARTNERS, INC., a Virginia corporation, CVS PHARMACY, INC., a Rhode Island corporation BAYS MICHIGAN CORPORATION, a Michigan corporation, WAL-MART STORES, INC., a California corporation and DOES 1 through 100, inclusive,

Defendants.

Case No.: HG 17-885297

[PROPOSED] CONSENT JUDGMENT AS
TO DSD PARTNERS, INC. AND CVS
PHARMACY, INC.

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 DSD Partners, Inc. and CVS Pharmacy, Inc. (collectively “Defendants”) on the other hand, with
5 Embry and Defendants 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 Defendants**

11 Defendants employ ten or more individuals and are 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 Defendants manufacture, import, sell, and distribute for sale in California,
16 white bread that contains Acrylamide. Embry further alleges that before service of a 60 Day Notice of
17 Violation by Plaintiff, Defendants did so without providing a sufficient health hazard warning as
18 required by Proposition 65 and related regulations. Pursuant to Proposition 65, Acrylamide is listed as
19 a chemical known to cause cancer and reproductive harm.

20 **1.5 Product Description**

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

24 **1.6 Notices of Violation**

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

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

3 On July 21, 2017, Embry served Defendants, the California Attorney General, and all other
4 required public enforcement agencies with a 60-Day Amended Notice of Violation of California Health
5 and Safety Code section 25249.6 *et seq.* (“Amended Notice”). The Amended Notice supplemented the
6 Notice and specified that the alleged exposure is a result of grilling or toasting the Products to a golden
7 brown.

8 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
9 violations alleged in the Amended Notice.

10 **1.7 Complaint**

11 In December of 2017, Embry filed a Complaint against Defendant for the alleged violations of
12 Health and Safety Code section 25249.6 that are the subject of the Amended Notice (“Complaint”).

13 **1.8 No Admission**

14 Defendants deny the material, factual, and legal allegations in the Amended Notice and
15 Complaint, and maintain that all of the products either Defendant has manufactured, imported, sold,
16 and/or distributed for sale in California, including the Products, have been, and are, in compliance with
17 all laws. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
18 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
19 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.
20 This Section shall not, however, diminish or otherwise affect Defendants’ obligations, responsibilities,
21 and duties under this Consent Judgment, subject to subsequent modifications thereof or Court orders
22 regarding any such obligation, responsibility, and/or duty.

23 **1.9 Jurisdiction**

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

28 **1.10 Effective Date**

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

3 **2. INJUNCTIVE RELIEF**

4 **2.1 Clear and Reasonable Warnings**

5 After receipt of the 60 Day Notice of Violation from the Plaintiff, Defendants began labeling
6 the Product with a warning that complies with Proposition 65’s warning regulations, and in particular,
7 27 California Code of Regulations Section 25600 *et. seq.* Plaintiff represents and warrants that the
8 sufficiency of that label will not be challenged and Defendants represent and warrant that after the
9 Effective Date, Defendants will continue to distribute for sale the Product in California with a label
10 that contains a warning that complies with Proposition 65’s warning regulations, and in particular, 27
11 California Code of Regulations Section 25600 *et. seq.* There shall be no requirement to reformulate
12 the Product as part of this settlement.

13 **2.2 Reformulation Option**

14 Releasees have the right, but not the obligation, to reformulate Products, for packaging and
15 distribution in California that, as packaged, regardless of type, form or branding, will contain
16 acrylamide concentrations of 0.200 parts per million ("ppm") or less as a single sample maximum and
17 0.100 ppm or less as an average of at least three (3) samples.¹

18 **2.3 Reformulation Modification**

19 In the event Plaintiff enters into an agreement or consent judgment with any other person
20 manufacturing Covered Products addressing alleged violations of Proposition 65 with respect to
21 exposures to acrylamide that provides for less stringent standards than that set forth in Paragraph 2.2
22 above or a different commitment than that set forth in Paragraph 2.2 above (including no such
23 commitment); or if a judgment is entered in any Proposition 65 case with respect to exposures to
24 acrylamide from Covered Products that provides for less stringent requirements than those set forth in
25 Section 2.2; or if the California Office of Environmental Health Hazard Assessment adopts a regulation
26

27 ¹ This reformulation protocol was approved in Order Approving Proposition 65 Settlement
28 and Consent Judgment as to Bimbo Bakeries USA, Inc. and Bays Michigan Corporation and entered
on August 20, 2019.

1 or safe use determination, or issues an interpretative guideline that exempts or, has the effect of
2 increasing the levels set forth in Section 2.2 or otherwise has the effect of allowing Covered Products
3 from meeting Proposition 65's requirements as to acrylamide at a level less stringent than that provided
4 in Paragraph 2.2; or if Proposition 65 is determined to be preempted by federal law with respect to
5 acrylamide in Covered Products, then this Consent Judgment shall be subject to modification at the
6 option of the Defendant, and without the objection of the Plaintiff, to conform or eliminate the terms
7 of Section 2.2 accordingly. Any such requested modification shall have no impact on the provision for
8 penalties, fees and/or costs as provided in this Agreement.

9 Otherwise, modification of the injunctive relief provisions set forth in this Section 2 due to
10 changed circumstances shall be subject to Section 11 below.

11 **2.4 Grace Period for Existing Inventory of Products**

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

15 **3. MONETARY SETTLEMENT TERMS**

16 **3.1 Settlement Amount** Defendants shall pay seventy thousand dollars (\$70,000.00) in
17 settlement and total satisfaction of all the claims referred to in the Amended Notice, the Complaint,
18 and this Consent Judgment. This includes civil penalties in the amount of seven thousand dollars
19 (\$7,000.00) pursuant to Health and Safety Code section 25249.7(b) and attorney's fees and costs in the
20 amount of sixty-three thousand dollars (\$63,000.00) pursuant to Code of Civil Procedure section
21 1021.5 and Health and Safety Code section 25249 et seq.

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

27 All payments owed to Embry shall be delivered to the following payment address:
28

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

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

For United States Postal Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

Defendants agree to provide Embry's counsel with a copy of the check payable to OEHHA simultaneous with its penalty payment to Embry.

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

- "Kim Embry" whose address and tax identification number shall be provided within five (5) days after this Settlement Agreement is fully executed by the Parties;
- "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.

3.3 Attorney's Fees and Costs

The portion of the settlement attributable to attorneys' fees and costs shall be paid to Embry's counsel, who are entitled to attorney's fees and costs incurred by her in this action, including but not

1 limited to investigating potential violations, bringing this matter to Defendants' attention, as well as
2 litigating and negotiating a settlement in the public interest. Defendants shall make two company
3 checks of \$31,500 each payable to "Nicholas & Tomasevic, LLP" (EIN 46-3474065) and the "Glick
4 Law Group" (EIN 47-1838518) respectively and shall deliver payment to the address listed in Section
5 3.2 within fourteen (14) days following the Effective Date.

6 **3.4 Cure of any Late Payments.**

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

10 **3.5 Attorneys' Fees in Event of Breach**

11 In the event of an action for breach of this agreement, the prevailing party shall be entitled to
12 its reasonable attorneys' fees and costs.

13 **4. CLAIMS COVERED AND RELEASED**

14 **4.1 Embry's Public Release of Proposition 65 Claims**

15 For any claim or violation arising under Proposition 65 alleging a failure to warn about
16 exposures to Acrylamide from Products or related products manufactured, imported, sold, or
17 distributed by Defendants prior to the Effective Date, Embry, acting on her own behalf and in the
18 public interest, releases Defendants of any and all liability. This includes Defendants' owners,
19 parents, subsidiaries, affiliated entities under common ownership, its directors, officers, agents,
20 employees, attorneys, and each entity to whom Defendants directly or indirectly distribute or sell the
21 Products, including but not limited to, downstream distributors, wholesalers, customers, retailers,
22 franchisees, cooperative members and licensees, including but not limited to Defendants (collectively,
23 the "Releasees"). Releasees include Defendants, their parents, and all subsidiaries and affiliates
24 thereof and their respective employees, agents, and assigns that sell Defendants' Products as well as
25 all manufacturers or suppliers of the Products sold by Defendants with respect to the manufacture or
26 sale of the Products. Compliance with the terms of this Consent Judgment constitutes compliance
27 with Proposition 65 with respect to the alleged or actual failure to warn about exposures to
28 Acrylamide from Products manufactured, imported, sold, or distributed by Defendants after the

1 Effective Date. This Consent Judgment is a full, final and binding resolution of all claims that were
2 or could have been asserted against Defendants and/or Releasees for failure to provide warnings for
3 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 Defendants and/or Releasees,
6 which 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 Defendants before the Effective Date.

11 **4.3 Defendants' Release of Embry**

12 Defendants, on their own behalf, and on behalf of Releasees as well as their past and current
13 agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against
14 Embry and her attorneys and other representatives, for any and all actions taken or statements made
15 by Embry and her attorneys and other representatives, whether in the course of investigating claims,
16 otherwise 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 submitted to the Court 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 Defendants may
28

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 Defendants:

8 Paul Burleigh
9 Klinedinst PC
777 South Figueroa Street, Suite 2800
10 Los Angeles, CA 90017

For Embry:

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

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

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

17 **10. POST EXECUTION ACTIVITIES**

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

Defendant agrees to cooperate with efforts of Plaintiff's counsel to seek court approval of this Consent Judgment, provide materials requested by the Court in a timely fashion, and refrain from opposing or delaying court approval in any manner.

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.

13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES

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

14. ENTIRE AGREEMENT

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

AGREED TO:

AGREED TO BY DSD PARTNERS, INC.

Date: 12/2/2019


Date: 12/2/2019

By: KIM EMBRY 

By: 
Jason Garrett [Print name]

1 **AGREED TO:**

2 Date: 12/2/2019

3
4 By: 
5 KIM EMBRY

AGREED TO BY CVS PHARMACY, INC.

Date: 11/25/19

By: 

KEVIN BLAKE, ESQ. [print name]
SR. LEGAL COUNSEL