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Attorneys for Plaintiff
Kim Embry

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

KIM EMBRY, an individual

Plaintiff,

v.

BLUE DIAMOND GROWERS, and DOES 1
through 100, inclusive

Defendants.

Case No. HG18908165

[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 Blue
4 Diamond Growers (“BDG”) with Embry and BDG each individually referred to as a “Party” and
5 collectively referred to 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 BDG employs ten or more individuals and is a “person in the course of doing business” for
12 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 BDG manufactures, imports, sells, and distributes for sale Blue Diamond
16 Almonds that contain acrylamide. Embry further alleges that BDG does so without providing a
17 sufficient health hazard warning as required by Proposition 65 and related Regulations. Pursuant to
18 Proposition 65, acrylamide is listed as a chemical known to cause cancer and reproductive harm.

19 **1.5 Notice of Violation**

20 On October 18, 2017, Embry served BDG, Ralph's, the California Attorney General, and all
21 other required public enforcement agencies with a 60-Day Notice of Violation of California Health and
22 Safety Code section 25249.6 *et seq.* (“Notice”). The Notice alleges that BDG violated Proposition 65
23 by failing to sufficiently warn consumers in California of the health hazards associated with exposures
24 to acrylamide contained in its "Blue Diamond Almonds - roasted salted" which include BDG roasted
25 almonds.

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

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1 **1.6 Product Description**

2 For purposes of this Consent Judgment “Product” or “Products” are defined as BDG roasted
3 almonds containing acrylamide that are manufactured, imported, sold, or distributed for sale in
4 California by BDG and Releasees, defined *infra*.

5 **1.7 Other Releasees**

6 This Consent Judgment expressly encompasses all of the subject Products, whether sold under
7 BDG's own brand name, or some other private label, at all grocery, retail, and other locations and sales
8 channels, as well as derivative products containing other ingredients made with the Products.

9 **1.8 BDG Response to the Notice**

10 The material, factual, and legal allegations in the Notice are based upon Embry's testing of
11 one sample of the Products indicating a concentration of 272 parts per billion ("ppb") of acrylamide.
12 Consistent with Section 1.10, BDG denies that this single sample is adequately representative or
13 scientifically reliable to prove a violation of Proposition 65 given the unique characteristics of the
14 Products and expected variability in testing results across samples. Further, BDG denies that this
15 single sample is demonstrative of a Proposition 65 violation that is based upon appropriate
16 consumption rates. Subject to this denial and notwithstanding the limitations presented by Embry's
17 one test result, BDG nonetheless commits itself hereto to reducing average concentrations of
18 acrylamide in the Products in a commercially reasonable and viable manner in order to accomplish at
19 least 20% reduction in average concentrations of acrylamide as compared to historical observations
20 regarding the Products, including but not limited to Embry's one test.

21 **1.9 Complaint**

22 On June 8, 2018, Embry filed a Complaint against BDG for the alleged violations of Health and
23 Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

24 **1.10 No Admission**

25 BDG denies the material, factual, and legal allegations in the Notice 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 BDG's obligations, responsibilities, and duties under this
4 Consent Judgment.

5 **1.11 Jurisdiction**

6 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
7 Court has jurisdiction over BDG 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 **1.12 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 on the Effective Date, and continuing thereafter, BDG shall not manufacture any
16 Product that will be sold or offered for sale in California that exceeds the following acrylamide
17 concentration limits, such concentration to be determined by use of a test performed by an laboratory
18 accredited by the State of California, a federal agency, or a nationally recognized accrediting
19 organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry): the average acrylamide
20 concentration shall not exceed 225 ppb by weight (the "Average Level") for the Products. The Average
21 Level is determined by randomly selecting and testing at least one sample each from five different lots
22 of the Products (or the maximum number of lots available for testing if less than five) during a testing
23 period of at least 60 days.

24 **2.2 Sell-Through Period**

25 Notwithstanding anything else in this Settlement Agreement, the Products that were
26 manufactured prior to the Effective Date and six (6) months thereafter shall be subject to the release of
27 liability pursuant to this Consent Judgment, without regard to when such Products were, or are in the
28

future, distributed or sold to customers. As a result, the obligations of BDG, or any Releases, do not apply to these Products manufactured prior to the Effective Date and six (6) months thereafter.

3. MONETARY SETTLEMENT TERMS

3.1 Settlement Amount

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

3.2 Civil Penalty

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

All payments owed to Embry shall be made payable to the Glick Law Group Client Trust Account, and shall be delivered to the following address:

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 Service 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

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

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

- "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" at 1001 I Street, Sacramento, CA 95814.

3.3 Attorney's Fees and Costs

The portion of the settlement attributable to attorney's 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 limited to investigating potential violations, bringing this matter to BDG's attention, as well as litigating and negotiating a settlement in the public interest.

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

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

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

3.4 Timing

The above mentioned checks will be issued within fourteen (14) 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

1 exposures to acrylamide from Products manufactured, imported, sold, or distributed by BDG prior to
2 the Effective Date, Embry, acting on her own behalf and in the public interest, releases BDG of any
3 and all liability. This includes BDG's parents, subsidiaries, affiliated entities under common
4 ownership, its directors, officers, principals, agents, employees, attorneys, insurers, accountants,
5 predecessors, successors, and assigns, and each entity to whom BDG directly or indirectly distributes,
6 ships, or sells the Products, including but not limited to, downstream distributors, wholesalers,
7 customers, retailers, franchisees, cooperative members, and licensees, and their owners, directors,
8 officers, agents, principals, employees, attorneys, insurers, accountants, representatives,
9 predecessors, successors, and assigns (collectively, the "Releasees"). Releasees include Ralph's.
10 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with
11 respect to the alleged or actual failure to warn about exposures to acrylamide from Products
12 manufactured, imported, sold, or distributed by BDG after the Effective Date. This Consent Judgment
13 is a full, final and binding resolution of all claims that were or could have been asserted against BDG
14 and/or Releasees for failure to provide warnings for alleged exposures to acrylamide contained in
15 Products.

16 **4.2 Embry's Individual Release of Claims**

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

23 **4.3 BDG's Release of Embry**

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

1 **4.4 Mutual Release of Known and Unknown Claims**

2 Embry, on behalf of herself and her agents, attorneys, representatives, successors, and assigns,
3 in her respective individual capacity only and not in her representative capacity, and BDG, each
4 provide a general release of the other including the Releasees herein which shall be effective as a full
5 and final accord and satisfaction, as a bar to all claims of any nature, character or kind, known or
6 unknown, suspected or unsuspected, arising out of alleged violations of Proposition 65 with respect
7 to the Products. Embry and BDG each acknowledge that they are each familiar with Section 1542 of
8 the California Civil Code, which provides as follows:

9 A general release does not extend to claims which the creditor does not
10 know or suspect to exist in his or her favor at the time of executing the
11 release, which if known by him or her must have materially affected his
 or her settlement with the debtor.

12 **5. COURT APPROVAL**

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

16 **6. SEVERABILITY**

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

19 **7. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the state of California and
21 apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
22 rendered inapplicable for reasons, including but not limited to changes in the law, or if the state of
23 California's No Significant Risk Level (NSRL) for acrylamide is increased by OEHHA or through
24 other legal process to a level greater than or equal to 1.0 mcg/day, then BDG may provide written
25 notice to Embry of any asserted change, and shall have no further injunctive obligations pursuant to
26 this Consent Judgment with respect to, and to the extent that, the Products are so affected.

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1 **8. NOTICE**

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

5 For BDG:

6 Merton A. Howard
7 Hanson Bridgett LLP
8 425 Market Street, 26th Floor
9 San Francisco, CA 94115

5 For Embry:

6 Noam Glick
7 Glick Law Group, PC
8 225 Broadway, 21st Floor
9 San Diego, CA 92101

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

11 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

12 This Consent Judgment may be executed in counterparts and by signature through facsimile or
13 portable document format (PDF), each of which shall be deemed an original, and all of which, when
14 taken together, shall constitute one and the same document.

15 **10. POST EXECUTION ACTIVITIES**

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

25 **11. MODIFICATION**

26 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
27 entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or application
28 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:

Date: June 13, 2018

By: 
KIM EMBRY

AGREED TO:

Date: June 15, 2018

By: 
Dean LaVallee [print name]
Blue Diamond Growers