

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (this "Agreement") is made effective on the date on which it is fully executed (the "Effective Date") by and between Flagstone Foods, Inc. ("Flagstone"), the and Kim Embry ("Embry"). Flagstone and Embry are referred to individually as a "Party" and collectively as the "Parties." The Parties agree as follows:

### **1. INTRODUCTION**

**1.1** On May 13, 2019, Embry issued a 60-day notice letter under Cal. Health & Safety Code § 25249.7 ("Proposition 65") to Bay Valley Foods, LLC and 7-Eleven, Inc. in which she asserted a claim under Proposition 65 for alleged exposures to acrylamide in 7 Select Smoked Almonds, UPC 052548601492 ("7 Select Smoked Almonds").

**1.2** On May 13, 2019, Embry issued a 60-day notice letter under Proposition 65 to Bay Valley Foods, LLC and CVS Pharmacy, Inc. in which she asserted a claim under Proposition 65 for alleged exposures to Gold Emblem Roasted Almonds, UPC 050428477588 ("Golden Emblem Roasted Almonds").

**1.3** The 60-day notices described in Sections 1.1 and 1.2 are collectively referred to as the "Notices." The 7 Select Smoked Almonds and the Golden Emblem Roasted Almonds supplied by Flagstone and/or Bay Valley Foods, LLC are referred to as the "Covered Products."

**1.4** Flagstone is the successor-in-interest to Bay Valley Foods, LLC's subsidiary, Treehouse Foods, Inc. (Bay Valley Foods, LLC and Treehouse Foods, Inc. are jointly referred to as "Bay Valley"), with respect to the Covered Products.

**1.5** More than 60 days have passed since the Notices were served on the Attorney General, public enforcers, and the noticed companies and no designated governmental entity has filed a complaint with regard to the claims in the Notices.

**1.6** The Parties enter into this Agreement in order to achieve a settlement of the Proposition 65 claims arising from or relating to the allegations asserted in the Notices for the purpose of avoiding prolonged litigation. Nothing in this Agreement shall be construed as an admission of Embry or Flagstone of any fact, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by Flagstone of any fact, issue of law or violation of law. Nothing in this Agreement or any document referred to herein, shall be construed as giving rise to any presumption or inference of admission or concession by Flagstone as to any fault, wrongdoing or liability whatsoever. Nothing in this Agreement nor compliance with this Agreement shall constitute or be construed as an admission by any of the Parties or by any of their respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, franchisees, licensees, customers, suppliers, distributors, wholesalers, or retailers of any fact, issue of law, or violation of law. This Agreement is the product of negotiation and compromise and is accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed with respect to the claims in the Notices and shall not be used for any purpose except to enforce the terms of this Agreement. The Parties agree

that this Section shall not diminish or otherwise affect the obligations, responsibilities, and duties of the Parties under this Agreement.

**1.7** The Effective Date of this Agreement is the date on which it is fully executed by all Parties.

## **2. FLAGSTONE'S DUTIES**

**2.1** Beginning on the Effective Date, Flagstone shall not sell in California, or distribute for sale in California, the Covered Products, unless the Agreement is modified in the future pursuant to Sections 2.3 and 9.1.

**2.2** Covered Products that were put into the stream of commerce by Flagstone before the Effective Date are not subject to the obligations of Section 2.1 but are nonetheless subject to the release provisions of Section 6.

**2.3** In the event that Flagstone seeks to relaunch any of the Covered Products for distribution or sale in California after the Effective Date, Flagstone shall notify Embry in writing prior to such distribution or sale and the Parties shall meet and confer to modify this Agreement under Section 9.1.

## **3. SETTLEMENT PAYMENT**

**3.1** In full satisfaction of all potential civil penalties, additional settlement payments, attorney's fees and costs (including, but not limited to, fees and costs incurred by attorneys, experts, and investigators), Flagstone shall pay a total settlement amount of \$40,000. This includes civil penalties in the amount of \$4,000, pursuant to Health and Safety Code section 25249.7(b) and attorney's fees and costs in the amount of \$36,000, pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code section 25249 et seq.

**3.2** 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 delivered to the following payment 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 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

Flagstone agrees 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, Nicholas & Tomasevic, and Embry are set out below:

- "Kim Embry" whose address and tax identification number shall be provided within five (5) days after this Consent Judgement is fully executed by the Parties;
- "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.2;
- "Nicholas & Tomasevic" (EIN: 46-3474065) at address provided in Section 3.3; 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 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 limited to investigating potential violations, bringing this matter to Defendant's attention, as well as litigating and negotiating a settlement in the public interest.

Defendant shall provide its payment to Embry's counsel in two checks, divided equally, payable to Glick Law Group, PC (\$18,000) and Nicholas & Tomasevic, LLP (\$18,000) 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, 19<sup>th</sup> Floor  
San Diego, CA 92101

### **3.4 Timing**

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

## **4. ENFORCEMENT**

**4.1** The Parties agree that any legal action to enforce this Agreement shall be brought in Alameda County Superior Court. The Parties agree that Alameda County Superior Court has subject matter jurisdiction over the enforcement of this Agreement and personal jurisdiction over Flagstone, and that venue is proper in Alameda County.

**4.2** Before seeking any judicial enforcement, the Parties shall attempt in good faith to meet and confer to resolve any dispute arising under this Agreement.

## **5. APPLICATION**

This Agreement may apply to, be binding upon, and benefit the Parties and their respective officers, directors, attorneys, shareholders, employees, agents, parent companies, subsidiaries, divisions, franchisees, licensees, customers (excluding private labelers), distributors, wholesalers, retailers, predecessors, successors, and assigns. This Agreement shall have no application to any Covered Product which is distributed or sold outside the State of California.

## **6. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

**6.1** This Consent Judgment is a full, final, and binding resolution between, on the one hand, Embry, in her individual capacity, on behalf of herself and her attorneys, investigators, agents, heirs, and assigns (collectively referred to as "Embry Releasers") and, Flagstone, and its parents, subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, predecessors-in-interest (including but not limited to Bay Valley), successors, and assigns (collectively, "Flagstone Releasees"), and each entity to whom any of them distributed, shipped, or sold the Covered Products including but not limited to downstream distributors, wholesalers, customers, retailers (including but not limited to CVS Pharmacy, Inc. and 7-Eleven, Inc.), franchisees, cooperative members, and licensees, and their owners, directors, officers, agents, principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and assigns of any of them (collectively, "Downstream Releasees"), of all claims, actions, causes of action (in law or in

equity), suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, expenses, and fees (including, but not limited to, investigation fees, expert fees, and attorney's fees), and expenses (collectively, "Claims") that have been or could have been asserted under Proposition 65 for any exposures to acrylamide from the Covered Products.

**6.2** It is possible that other claims not known to the Parties, arising out of the facts alleged in the Notice, and relating to the Covered Products, will develop or be discovered. Embry, in her individual capacity, and on behalf of herself the Embry Releasors, acknowledges that this Agreement is expressly intended to cover and include all such claims up through and including the Effective Date, including all rights of action therefore. Embry, on behalf of herself the Embry Releasors, acknowledges that the claims released in Sections 6.1 and 6.2 above may include unknown claims, and nevertheless waives California Civil Code section 1542 as to any such unknown claims. California Civil Code section 1542 reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Embry acknowledges and understands the significance and consequences of this specific waiver of California Civil Code section 1542.

**6.3** Flagstone, on its own behalf, and on behalf of Released Parties as well as its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Embry and the Embry Releasors, for any and all actions taken or statements made by Embry and her attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with respect to the Products.

## **7. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

In the event that any of the provisions of this Agreement are held by a court to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

## **8. GOVERNING LAW**

The terms and conditions of this Agreement shall be governed by and construed in accordance with the laws of the State of California.

## **9. MODIFICATION**

**9.1** If Flagstone seeks to re-launch any of the Covered Products for sale in California or distribution in California after the Effective Date, Flagstone shall provide written notice the Embry's counsel. The Parties shall then meet and confer for a period of at least 90 days on the appropriate terms to modify, subject to the provisions of this Section 9.

**9.2** If a final decision of a court determines that warnings for acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are preempted or otherwise unlawful or unconstitutional in a manner that applies to the Covered Products or products similar to the Covered Products, then Flagstone shall be entitled to modify this Agreement to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results. However, any such modification shall have no bearing on the financial obligations owed/paid by Flagstone under this Agreement.

**9.3** If there is any other change in law, regulation or guidance for which Flagstone believes a modification to this Agreement is appropriate, including but not limited to a determination that warnings for acrylamide in foods or in products similar to the Covered Products are not required under Proposition 65, Flagstone shall be entitled to modify this Agreement accordingly. However, any such modification shall have no bearing on the financial obligations owed/paid by Flagstone under this Agreement.

**9.4** If Plaintiff is a party to a consent judgment or a settlement agreement that sets an acrylamide standard for products that are substantially similar to the Covered Products, Flagstone shall be entitled to sell or distribute the Covered Products without prior notice to Plaintiff as long as Flagstone meets such acrylamide standard.

**9.5** If a dispute should arise concerning the modification rights under this Section 9, then the Parties shall meet and confer in good faith to attempt to resolve the dispute, but if it cannot be resolved in that manner, either Party may present the dispute to the Alameda County Superior Court for resolution.

## **10. PROVISION OF NOTICE**

All notices required to be given to either Party to this Agreement by the other shall be in writing and sent to the following agents listed below via email and first-class mail.

**For Embry:**

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

**For Flagstone:**

Sarah Esmaili  
ARNOLD & PORTER KAYE SCHOLER LLP  
Three Embarcadero Center, 10th Floor  
San Francisco, CA 94111  
Telephone: (415) 471-3283  
Facsimile: (415) 471-3400  
Email: sarah.esmaili@arnoldporter.com

**11. EXECUTION AND COUNTERPARTS**

This Agreement may be executed in counterparts, which taken together shall be deemed to constitute one document. A facsimile or .pdf signature shall be construed to be as valid as the original signature.

**12. DRAFTING**

The terms of this Agreement have been reviewed by the respective counsel for each Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and conditions with legal counsel. The Parties agree that, in any subsequent interpretation and construction of this Agreement, no inference, assumption, or presumption shall be drawn, and no provision of this Agreement shall be construed against any Party, based on the fact that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any portion of the Agreement. It is conclusively presumed that all of the Parties participated equally in the preparation and drafting of this Agreement.

**13. AUTHORIZATION**

Each signatory to this Agreement certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Agreement.

**AGREED:**

Dated: 12/11, 2019

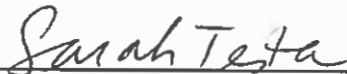
KIM EMBRY



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Dated: 12/11, 2019

FLAGSTONE FOODS, INC.



Print name: *Sarah Testa*

Title: *SVP Strategy and Product Development*