

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**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. HG19042100

[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/or distributes for sale Blue Diamond
16 Nut Thins 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 May 22, 2018, Embry served BDG, Ralph's, the California Attorney General, and all other
21 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 Nut Thins products.

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

27 ///

28 ///

1 **1.6 Product Description**

2 For purposes of this Consent Judgment “Product” or “Products” are defined as BDG Nut Thins
3 crackers that are manufactured, imported, sold, or distributed for sale in California by BDG and/or
4 Releasees, defined *infra*. This Consent Judgment expressly encompasses all of the subject Products,
5 whether sold under BDG's own brand name, or some other private label, at all grocery, retail, and other
6 locations and sales channels, as well as all derivative products.

7 **1.7 BDG Response to the Notice**

8 Consistent with Section 1.9, BDG denies the adequacy and reliability of Embry’s testing.
9 BDG affirmatively asserts that the Products do not violate Proposition 65. Subject to this denial,
10 BDG nonetheless commits itself hereto to reducing average concentrations of acrylamide in the
11 Products sold and distributed in California to an average concentration of 280 parts per billion
12 (“ppb”) of acrylamide.

13 **1.8 Complaint**

14 On November 5, 2019, Embry filed a Complaint against BDG for the alleged violations of
15 Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

16 **1.9 No Admission**

17 BDG denies the material, factual, and legal allegations in the Notice and Complaint, and
18 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in
19 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
20 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
21 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an admission
22 of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not,
23 however, diminish or otherwise affect BDG’s obligations, responsibilities, and duties under this
24 Consent Judgment.

25 **1.10 Jurisdiction**

26 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
27 Court has jurisdiction over BDG as to the allegations in the Complaint, that venue is proper in the
28

1 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
2 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

3 **1.11 Effective Date**

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

6 **2. INJUNCTIVE RELIEF**

7 **2.1 Reformulation of the Product**

8 Commencing on the Effective Date, and continuing thereafter, unless sold with a Proposition
9 65 warning, BDG shall not manufacture or sell, or cause to be manufactured or sold, in California any
10 Product that on average exceeds the acrylamide concentration limits set forth in section 1.7, measured
11 in parts per billion ("ppb") by weight, with the determination of the Average Level determined as set
12 forth herein. Such concentrations shall be determined by use of a test performed by a laboratory
13 accredited by the State of California, a federal agency, or a nationally recognized accrediting
14 organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), GC/MS (Gas
15 Chromotography / Mass Spectrometry), or any other testing method agreed by the parties. The Average
16 Level is determined by randomly selecting and testing at least six (6) representative composite samples
17 each from at least five (5) and up to thirty (30) different lots of the subject Product (or the maximum
18 number of lots available for testing if less than five (5)) during a testing period of at least 60 days
19 ("Sampling Data"). The mean and standard deviation shall be calculated using the Sampling Data.
20 Any data points that are more than three standard deviations outside the mean shall be discarded once,
21 and the mean and standard deviation recalculated using the remaining data points. The arithmetic mean
22 determined in accordance with this procedure shall be deemed the "Average Level."

23 **2.2 Sell-Through Period**

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

1 are in the future, distributed or sold. As a result, the obligations of BDG and any Releasees, do not
2 apply to Products manufactured prior to the Effective Date and within six (6) months thereafter.

3 **3. MONETARY SETTLEMENT TERMS**

4 **3.1 Settlement Amount**

5 BDG shall pay seventy-five thousand dollars (\$75,000.00) in settlement and total satisfaction
6 of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes
7 civil penalties in the amount of eight thousand dollars (\$8,000.00) pursuant to Health and Safety Code
8 section 25249.7(b) and attorney's fees and costs in the amount of sixty-seven thousand dollars
9 (\$67,000.00) pursuant to Code of Civil Procedure section 1021.5.

10 **3.2 Civil Penalty**

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

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

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

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

21 For United States Postal Service Delivery:

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

26 For Non-United States Postal Service Delivery:

27 Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
28 1001 I Street

Sacramento, CA 95814

BDG agrees to provide Embry's counsel with a copy of the check payable to OEHHA, simultaneous with its civil 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 (\$33,500.00) and Nicholas & Tomasevic, LLP (\$33,500.00) 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 lawsuit, claim, or violation arising under Proposition 65 alleging a failure to warn

1 about exposures to acrylamide from Products manufactured, imported, sold, or distributed by or on
2 behalf of BDG prior to the Effective Date and within six (6) months thereafter, Embry, acting on her
3 own behalf and in the public interest, releases BDG and the Releasees (as hereinafter defined) of any
4 and all liability of any nature, including any statutory or common law claims, and under any theory
5 whatsoever. This includes BDG's parents, subsidiaries, affiliated entities under common ownership,
6 its directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors,
7 successors, and assigns, the unidentified and unnamed DOES 1 through 100, and each entity that
8 directly or indirectly manufactures, produces, distributes, ships, or sells the Products, including but
9 not limited to, upstream suppliers of ingredients used in the Products, entities that manufacture,
10 process, or otherwise produce the Products for BDG, and all downstream distributors, wholesalers,
11 customers, retailers, franchisees, cooperative members, and licensees, and their owners, directors,
12 officers, agents, principals, employees, attorneys, insurers, accountants, representatives,
13 predecessors, successors, and assigns (collectively, the "Releasees"). Releasees specifically includes
14 Ralph's and the manufacturer/producer of the Products. Compliance with the terms of this Consent
15 Judgment constitutes compliance with Proposition 65 with respect to the alleged or actual failure to
16 warn about exposures to acrylamide from Products manufactured, imported, sold, or distributed by
17 BDG and/or the Releasees for the period commencing six (6) months after the Effective Date. This
18 Consent Judgment is a full, final and binding resolution of all claims that were or could have been
19 asserted against BDG and/or Releasees for failure to provide warnings for alleged exposures to
20 acrylamide contained in the Products or any other theory whatsoever.

21 **4.2 Embry's Individual Release of Claims**

22 Embry, in her individual capacity, also provides a release to BDG and/or Releasees, which shall
23 be a full and final accord and satisfaction of as well as a bar to all actions, causes of action, obligations,
24 costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands by Embry of any
25 nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out of alleged
26 or actual exposures to acrylamide in Products manufactured, imported, sold, or distributed by BDG
27 and/or Releasees before the Effective Date and within twelve (12) months from the Effective Date.

28 ///

1 **4.3 BDG’s Release of Embry**

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

7 **4.4 Mutual Release of Known and Unknown Claims**

8 Embry, on behalf of herself and her agents, representatives, successors, and assigns, in her
9 respective individual capacity only and not in her representative capacity, and BDG, including the
10 Releasees, hereby each provide a general release of the others, which shall be effective as a full and
11 final accord and satisfaction, as a bar to all claims of any nature, character or kind, known or
12 unknown, suspected or unsuspected, arising out of alleged violations of Proposition 65, or any other
13 theory of recovery, whether known or unknown, with respect to the Products. Embry and BDG each
14 acknowledge that they are each familiar with Section 1542 of the California Civil Code, which
15 provides as follows:

16 A general release does not extend to claims that the creditor or
17 releasing party does not know or suspect to exist in his or her favor at
18 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.

19 **5. COURT APPROVAL**

20 This Consent Judgment is not effective until it is approved and entered by the Court and shall
21 be null and void if it is not approved and entered by the Court within one year after it has been fully
22 executed by the Parties, or by such additional time as the Parties may agree to in writing. BDG shall
23 cooperate with Embry’s efforts to obtain Court approval and refrain from opposing or delaying in any
24 manner the Court approval process.

25 **6. SEVERABILITY**

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

28 ///

1 **7. GOVERNING LAW**

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

9 **8. NOTICE**

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

13 For BDG:

14 Merton A. Howard
15 Hanson Bridgett LLP
16 425 Market Street, 26th Floor
San Francisco, CA 94115

For Embry:

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

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

23 **10. POST EXECUTION ACTIVITIES**

24 Embry agrees to comply with the reporting form requirements referenced in Health and Safety
25 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
26 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
27 motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to
28 mutually employ their best efforts, including those of their counsel, to support the entry of this

1 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
2 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for approval,
3 responding to any objection that any third-party may make, and appearing at the hearing before the
4 Court if so requested.

5 **11. MODIFICATION**

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

9 **12. AUTHORIZATION**


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

12 **AGREED TO:**

13 **AGREED TO:**

14 Date: 01/07/2020

14 Date: December 30, 2019

15
16 By: 
17 KIM EMBRY

16 By: 
17 Dean LaVallee [print name]
18 Blue Diamond Growers