

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (“Agreement”) is made effective on the date on which it is fully executed (the “Effective Date”) by and between Kim Embry (“Embry”) and KeHE Distributors, LLC (“KeHE”). Embry and KeHE are referred to individually as a “Party” and collectively as the “Parties.” The Parties agree as follows:

### **1. INTRODUCTION**

**1.1** This Agreement is limited to this Matter, which is defined as all claims and allegations related to the Notice of Violation of California Health & Safety Sections 25249.5 *et seq.* (“Proposition 65”), against KeHE dated June 25, 2018 that was served on KeHE, the California Attorney General, and other public enforcers (“Notice”). In the Notice, Embry alleges that Cadia Organic Honey Graham Crackers (“Covered Product”) manufactured, distributed, or sold by KeHE requires warnings under Proposition 65 for alleged exposures to acrylamide. KeHE denies Embry’s Proposition 65 claim.

**1.2** More than 60 days have passed since the Notice was served on the Attorney General, public enforcers, and KeHE and no designated governmental entity has filed a complaint against KeHE with regard to the Covered Product or the alleged violations.

**1.3** The Parties enter into this Agreement in order to achieve a settlement of the claims as stated in Section 1.1 for the purpose of avoiding prolonged litigation. Nothing in this Agreement shall be construed as an admission of Embry or KeHE of any fact, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by KeHE 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 KeHE 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 in this matter 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.

**1.4** The Effective Date of this Agreement is the date on which it is fully executed by all Parties. The Compliance Date is three (3) months after the Effective Date.

### **2. KEHE’S DUTIES**

**2.1** Beginning on the Compliance Date, KeHE shall not sell in California, or distribute into California for sale, any Covered Products, except as provided in Section 9. Covered Products that KeHE put into the stream of commerce before the Compliance Date are

not subject to the obligation of Section 2.1, but those Covered Products are subject to the release of claims in Section 6 as to all Released Parties (as that term is defined in Section 6).

### **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), KeHE shall make a total payment of \$40,000 ("Total Settlement Amount") to Embry within fifteen (15) calendar days of the Effective Date ("Due Date"). The Total Settlement Amount shall be apportioned as follows:

**3.2** \$4,000 shall be considered a civil penalty pursuant to California Health and Safety Code section 25249.7(b)(1). KeHE shall remit 75% (\$3,000) of the civil penalty to the Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety Code section 25249.12(c). Embry will retain the remaining 25% (\$1,000) of the civil penalty, payable to the Glick Law Group Client Trust Account.

All payments owed to OEHHA (EIN: 68-0284486), pursuant to this Section 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  
Sacramento, CA 95814

All penalty payments owed to Embry shall be sent to:

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

**3.3** \$36,000 shall be distributed to Embry's counsel as reimbursement of all of Embry's attorney's fees and reasonable costs incurred in connection with the Notice and the settlement of the claims in the Notice. Payment shall be delivered in the form of two checks: (1) one check for \$18,000 payable to "Glick Law Group"; and one check for \$18,000 payable to "Nicholas & Tomasevic LLP" sent to Nicholas & Tomasevic, LLP, 225 Broadway, 19<sup>th</sup>

Floor, San Diego, CA 92101. Except as explicitly provided herein, each Party shall bear its own fees and costs.

#### **4. ENFORCEMENT**

**4.1** If Embry purchases the Covered Product in California that has a best-by or sell-by (or equivalent) date or other code that reflects that the Covered Product was manufactured by or for Settling Defendant on or after the Compliance Date, or if the manufacture date is not apparent from the label, Embry shall inform KeHE in a reasonably prompt manner, including information sufficient to permit KeHE to identify the alleged violation of this Agreement. KeHE shall, within thirty (30) days following such notice, provide Embry with documentation that the Covered Product is in fact being discontinued in the State of California or other information to demonstrate that KeHE is in compliance with the terms of this Agreement. The Parties shall first attempt to resolve the matter prior to Embry taking any further legal action.

#### **5. APPLICATION**

This Agreement shall apply to, be binding upon, and inure to the benefit of the Parties and their respective heirs, 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 Agreement is a full, final, and binding resolution between, on the one hand, Embry, on behalf of herself and her attorneys, investigators, agents, heirs, and assigns (collectively, “Embry Releasors”) and, on the other hand, KeHE and its officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers, franchisees, licensees, customers, manufacturers, distributors, wholesalers, retailers, and all other upstream and downstream entities in the distribution chain of any Covered Product, and the predecessors, successors, and assigns of any of them (collectively, “Released Parties”). Embry, on behalf of herself and the Embry Releasors, hereby fully releases and discharges the Released Parties from any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses asserted, or that could have been asserted, from the handling, use, or consumption of the Covered Product, as to any alleged violation of Proposition 65 or its implementing regulations arising from the failure to provide Proposition 65 warnings on the Covered Product regarding acrylamide for a Covered Product manufactured, distributed, or sold prior to the Compliance Date. This Section does not restrict Embry’s attorneys’ practice of law consistent with California rules.

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 Product, will develop or be discovered. Embry, on behalf of herself and 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 and the Embry Releasors, further 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.

**6.2** The Parties agree that compliance with the terms of this Agreement shall be deemed to constitute compliance with Proposition 65 by any Released Party regarding alleged exposures to acrylamide in the Covered Product manufactured, distributed, or sold on or after the Compliance Date.

## **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 This Agreement may be modified by written agreement of the Parties or by order of the Alameda County Superior Court.

9.2 KeHE may request that Embry agree to modify this Agreement to substitute an acrylamide concentration standard that Embry agrees to in a future consent judgment or settlement agreement applicable to products manufactured by other companies that are similar to the Covered Product, and to allow KeHE thereafter to launch the Covered Product for sale in California again. If a dispute should arise concerning the applicability of this provision, 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.

9.3 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 with respect to products similar to the Covered Product, then KeHE may request that Embry agree to modify this Agreement to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results. If a dispute should arise concerning the applicability of this provision, 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.

9.4 If there is any other change in law for which KeHE believes a modification to this Agreement is appropriate, then KeHE may request that Embry agree to modify this Agreement accordingly. If a dispute should arise concerning the applicability of this provision, 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 Kim Embry:**

Craig Nicholas  
NICHOLAS & TOMASEVIC LLP  
225 Broadway, 19th Floor  
San Diego, California 92101  
Telephone: (619) 325-0492  
Facsimile: (619) 325-0496  
Email: cnicholas@nicholaslaw.org

### **For KeHE Distributors, LLC:**

Sarah Esmaili  
ARNOLD & PORTER  
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. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES

If a dispute arises with respect to either Party's compliance with the terms of this Agreement, 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, AUTHORIZATION

**14.1** This Agreement 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.

**14.2** 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.

#### IT IS SO STIPULATED:

Dated: July 9, 2019

KIM EMBRY

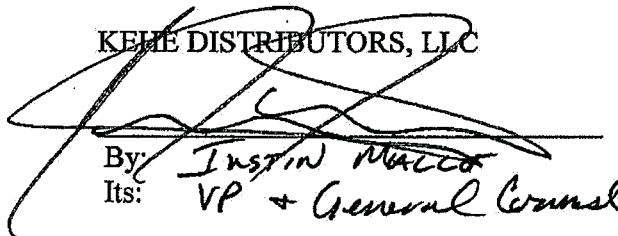


By: \_\_\_\_\_

Kim Embry

Dated: July 3, 2019

KEHE DISTRIBUTORS, LLC



By: \_\_\_\_\_

Its: \_\_\_\_\_

Justin Maccia  
VP + General Counsel

#### APPROVED AS TO FORM:

Dated: July 9, 2019

NICHOLAS & TOMASEVIC LLP

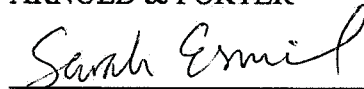


Shaun Markley

Attorneys for Kim Embry

Dated: 7/9, 2019

ARNOLD & PORTER



Sarah Esmaili

Attorneys for KeHE Distributors, LLC