

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Kim Embry (“Embry”), on the one hand, and CJK Foods, LLC, on the other hand, with Embry and CJK Foods, LLC each individually referred to as a “Party” and collectively as the “Parties.” Embry is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. CJK Foods, LLC employs ten or more individuals and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.6 *et seq.* (“Proposition 65”).

1.2 General Allegations

Embry alleges that CJK Foods, LLC manufactures, sells, and distributes for sale in California, waffle food products that contain Acrylamide and that it does so without first providing the health hazard warning required by Proposition 65. Acrylamide is listed pursuant to Proposition 65 as a chemical known to cause cancer and birth defects or other reproductive harm.

1.3 Product Description

The product covered by this Settlement Agreement is defined as, and expressly limited to, Kitchfix Grain-Free Waffles (all skus) (“Products”), that allegedly contain Acrylamide and that are manufactured, sold or distributed for sale in California by CJK Foods, LLC.

1.4 Notice of Violation

On February 20, 2019, Embry served CJK Foods, LLC, the California Attorney General and other requisite public enforcers with a 60-Day Notice of Violation (“Notice”), alleging that CJK Foods, LLC violated Proposition 65 when it failed to warn its customers and consumers in California of the health risks associated with exposures to Acrylamide from the Products. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

1.5 No Admission

CJK Foods, LLC denies the material, factual, and legal allegations in the Notice and maintains that all of the products it sold and/or distributed for sale in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by CJK Foods, LLC of any fact, finding, conclusion, issue of law or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by CJK Foods, LLC of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by CJK Foods, LLC. This Section shall not, however, diminish or otherwise affect CJK Foods, LLC's obligations, responsibilities and duties under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean ninety (90) days following the execution of this Settlement Agreement by the Parties.

2. INJUNCTIVE RELIEF

2.1 Clear and Reasonable Warnings

Commencing on the Effective Date, and continuing thereafter, CJK Foods, LLC shall not purchase, manufacture, ship, sell, or offer for sale any Products that will be sold or offered for sale in California that exceed the following acrylamide concentration limits (the "Reformulation Levels"), such concentration to be determined by performing a test using either GC/MS (Gas Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry) or any other testing method agreed upon by the Parties, unless accompanied by the warning set forth in Section 2.2

2.1.1

The average acrylamide concentration of Products as used per cooking instructions, shall not exceed, on average, 250 parts per billion ("ppb") by weight (the "Average Level"). The Average Level is determined by randomly selecting at least 5 samples from 5 different lots of Products (or the maximum number of lots available for testing if less than 5) during a testing period of at least 60 days.

2.1.2

The acrylamide concentration of any individual unit, as used per cooking instructions, shall not exceed 300 ppb by weight (the “Unit Level”). Compliance with the Unit Level shall be determined after cooking each of the Products as if prepared for consumption in accordance with the instructions on the packaging label of Products.

2.2 General Warning Requirements

CJK Foods, LLC agrees that each warning shall be prominently placed with such conspicuousness, as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Products the warning applies, so as to minimize the risk of consumer confusion.

For purposes of this Settlement Agreement, a clear and reasonable warning for the Products shall consist of a warning affixed to the packaging, label, tag, or directly to each Products sold in California by CJK Foods, LLC that contains the following statements:

WARNING: Consuming this product can expose you to chemicals including acrylamide which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov/food.

or

WARNING: Cancer – www.P65Warnings.ca.gov

The same warning shall be posted on any websites where the Products are sold in California. In the event the warning is placed on the label of the Products, the warning shall be set off from other information on the Product’s label and enclosed in a box.

2.3 Grace Period for Existing Inventory of Products

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

2.4 Repeal, Amendment, Pre-Emption of Proposition 65

In the event Proposition 65 is repealed ,amended or found to be pre-empted, and as a result of such repeal, finding of pre-emption, or amendment the Products are no longer subject to Proposition 65, then CJK Foods, LLC shall have no further obligation as to injunctive relief pursuant to this Agreement with respect to the Products.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payment

Pursuant to Health and Safety Code § 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, CJK Foods, LLC agrees to pay three thousand dollars (\$3,000.00) in civil penalties. The penalty payment will be allocated in accordance with California Health and Safety Code §§ 25249.12(c)(1) & (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount retained by Embry. Within ten (10) days of the date this Settlement Agreement is executed by the Parties, CJK Foods, LLC shall issue two separate checks for the initial civil penalty payment to (a) “OEHHA” in the amount of \$2,250.00 and (b) Kim Embry, payable to the Glick Law Group Client Trust Account, in the amount of \$750.00.

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

3.2 Attorney Fees and Costs

The Parties reached an accord on the compensation due to Embry and her counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, within ten (10) days of the date this Settlement Agreement is executed by the Parties, CJK Foods, LLC agrees to pay twenty-seven thousand dollars (\$27,000.00) to Embry and her counsel for all fees and costs incurred in investigating, bringing this matter to the attention of CJK Foods, LLC's management and negotiating a settlement. CJK Foods, LLC's payment shall be delivered in eight monthly installments of \$3,375 each, provided that no other Proposition 65 enforcer has filed a 60-day notice of violation ("NOV") on the Products on or before November 30, 2019. In the event that CJK Foods, LLC receives a Proposition 65 NOV on any of the Products prior to November 30, 2019, then any outstanding payments to Embry and her counsel shall be null and void. Each monthly installment shall be payable as follows: (1) one check for \$1,687.50 payable to "Glick Law Group"; and (2) one check for \$1,687.50 payable to "Nicholas & Tomasevic LLP." Each monthly installment shall be sent on or before the fifteenth (15th) calendar day of the month, beginning April 2019 through November 2019. In the event any payment is missed or late by five (5) or more business days, CJK Foods, LLC agrees to pay interest at 5% per annum, compounding monthly, and prorated for the late time period on the missed payment amount.

3.3 Payment Address

All payments required under this Section shall be delivered to:

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

4. CLAIMS COVERED AND RELEASED

4.1 Embry's Release of CJK Foods, LLC

This Settlement Agreement is a full, final, and binding resolution between Embry, on her own behalf and not on behalf of the public, and CJK Foods, LLC of any violation of Proposition 65 that was or could have been asserted by Embry, on her own behalf, on behalf of her past and current agents, representatives, attorneys, successors and assignees, against CJK Foods, LLC and each of its respective parents, subsidiaries, affiliated entities under common ownership, directors, officers, members, employees, attorneys, each upstream entity from whom the Products were purchased by CJK Foods, LLC, and each entity to whom CJK Foods, LLC directly or indirectly distributes or sells the Products, including, but not limited to, its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees ("Releasees"), based on the failure to warn about exposures to Acrylamide in the Products manufactured, sold or distributed for sale in California by CJK Foods, LLC before the Effective Date, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, Embry on her own behalf and not on behalf of the public, on behalf of her past and current agents, representatives, attorneys, successors and assignees hereby waives any and all rights she may have to institute or participate in, directly or indirectly, any form of legal action and releases all claims against CJK Foods, LLC and Releases including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses including, but not exclusively, investigation fees, expert fees and attorney fees arising under Proposition 65 with respect to the alleged or actual failure to warn about exposures to Acrylamide in the Products manufactured, distributed, sold or offered for sale by CJK Foods, LLC, before the Effective Date.

4.2 CJK Foods, LLC's Release of Embry

CJK Foods, LLC, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Embry and her attorneys and other representatives, 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.

4.3 California Civil Code Section 1542

It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Products will develop or be discovered. Embry on behalf of herself only, on one hand, and CJK Foods, LLC on behalf of itself only, on the other hand, acknowledge that this Settlement Agreement is expressly intended to cover and include all such claims up through the Effective Date. The Parties acknowledge that the claims released in Sections 4.1 and 4.2 may include unknown claims, and nevertheless waive 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 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

5. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

6. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California.

7. NOTICE

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For CJK Foods, LLC:

Abhishek K. Gurnani
Amin Talati Upadhye, LLP
100 South Wacker Drive, Suite 2000
Chicago, IL 60606

For Embry:

Shaun Markley
Nicholas & Tomasevic, LLC
225 Broadway, Suite 1900
San Diego, CA 92101

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

8. COUNTERPARTS; FACSIMILE SIGNATURES

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

9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Embry and her attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code § 25249.7(f).

10. MODIFICATION

This Settlement Agreement may be modified only by written agreement of the Parties.

11. ATTORNEYS' FEES

In any action to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and costs.


11. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Settlement Agreement.

AGREED TO:

3/15/2019

Date: _____

By:  _____

KIM EMBRY

AGREED TO:

3/15/2019

Date: _____

By:  _____

CJK Foods, LLC Luke Forbing