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16 Attorneys for Plaintiff
17 Kim Embry

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

19 **IN AND FOR THE COUNTY OF ALAMEDA**

20 KIM EMBRY, an individual,

21 Plaintiff,

22 v.

23 DIVAN LOUNGE dba MINA LOUNGE, a
24 California corporation, and DOES 1 through
25 100, inclusive,

26 Defendants.

Case No.: RG19010129

**SECOND REVISED [PROPOSED]
CONSENT JUDGMENT AS TO
DEFENDANT DIVAN LOUNGE**

(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”), Everest
4 Industries, Inc. (erroneously sued as its d/b/as, “Divan Lounge” and “Mina Lounge”) (“Mina”), and
5 its owners, Solaiman Mesdaq (“Mesdaq”) and Sabri Biyik (“Biyik”) (collectively “Owners”) (Mesdaq,
6 Biyik, and Mina are collectively referred to as “Defendant”), with Embry, Mesdaq and Mina
7 individually referred to as a “Party” and collectively as the “Parties.”

8 **1.2 Plaintiff**

9 Embry is an individual in California, acting in the interest of the general public. She seeks to
10 promote awareness of exposures to toxic chemicals and to improve human health by reducing or
11 eliminating hazardous substances.

12 **1.3 Defendant**

13 Plaintiff alleges Mina employs ten or more individuals and is a “person in the course of doing
14 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
15 Safety Code section 25249.6 *et seq.* (“Proposition 65”). Mesdaq and Biyik are the owners of Mina.

16 **1.4 General Allegations**

17 Embry alleges that Defendant failed to inform the People of exposures to carcinogens and/or
18 reproductive toxicants listed on the Proposition 65 list. The toxicants that customers are exposed to in
19 Defendant’s place of business may include but are not limited to: tobacco smoke, carbon monoxide
20 (CO), arsenic, 1,3-butadiene, hexavalent chromium, formaldehyde, cadmium, lead, nickel, nicotine,
21 benzene, quinoline, benzofuran, ethylbenzene, and/or styrene. (“Toxicants”). Embry further alleges
22 that Defendant allows customers to be exposed to these Toxicants by willingly providing materials
23 used for hookah smoking, including charcoals which harbor carcinogens and reproductive toxins
24 without providing a sufficient health hazard warning as required by Proposition 65 and related
25 regulations (“Product(s)”). Pursuant to Proposition 65, carbon monoxide is listed as a chemical known
26 to cause developmental/reproductive harm. Defendant denies that warnings are required under
27 Proposition 65 for any exposures to carbon monoxide or other Toxicants in the Product, and Defendant
28

maintains that it has complied with all applicable federal and state laws, including but not limited to Proposition 65.

1.5 Product Description

For purposes of this Consent Judgment “Product” or “Products” are defined as hookahs, and any other single- or multi-stemmed instrument for vaporizing, burning, or smoking tobacco, charcoal, fuel, coals, coils, stems, hoses, bowls, valves, trays, filters, adapters, shisha, alfahker, al fakher, mu’assel, or any other products used, operated, maintained, imported, sold, or distributed by Defendant for the purposes of smoking tobacco in California by Defendant and Releasees, defined infra.

1.6 Notice of Violation

On October 5, 2018 Embry served Defendant, the California Attorney General, and all other required public enforcement agencies with a 60-Day Notice of Violation of California Health and Safety Code section 25249.6 *et seq.* (“Notice”). The Notice alleged that Defendant violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated with exposures to Toxicants customers are exposed to in Defendant’s place of business or by use of its Products.

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

1.7 Complaint

On March 8, 2019, Embry filed a Complaint against Defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

1.8 No Admission

By stipulating to the entry of this Consent Judgment and agreeing to provide the relief and remedies specified herein, Defendant does not admit that it has violated, or threatened to violate, Proposition 65 or any other law or legal duty.

Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or otherwise affect Defendant’s obligations, responsibilities,

1 and duties under this Consent Judgment, subject to subsequent modifications thereof or Court orders
2 regarding any such obligation, responsibility, and/or duty.

3 **1.9 Jurisdiction**

4 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
5 Court has jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in
6 the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
7 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

8 **1.10 Effective Date and Compliance Date**

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

11 **2. INJUNCTIVE RELIEF**

12 Defendant shall prominently place signage in its location meeting all the requirements of
13 California Health and Safety Code section 25249.6, and Title 27 of the California Code of Regulations,
14 section 25600 et seq.

15 **3. MONETARY SETTLEMENT TERMS**

16 **3.1 Settlement Amount**

17 Defendant shall pay fifty thousand dollars (\$50,000) in settlement and total satisfaction of all
18 the claims referred to in the Notices, the Complaint, and this Consent Judgment. This includes civil
19 penalties in the amount of five thousand dollars (\$5,000) pursuant to Health and Safety Code section
20 25249.7(b) and attorney’s fees and costs in the amount of forty-five thousand dollars (\$45,000)
21 pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code section 25249 et seq.

22 **3.2 Civil Penalty**

23 The portion of the settlement attributable to civil penalties shall be allocated according to
24 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty
25 paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and the
26 remaining twenty-five percent (25%) of the penalty paid to Embry.
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1 All payments owed to Embry, shall be delivered to the following payment address:

2 Noam Glick
3 Glick Law Group
4 225 Broadway, Suite 2100
5 San Diego, CA 92101

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

8 For United States Postal Delivery:

9 Mike Gyuries
10 Fiscal Operations Branch Chief
11 Office of Environmental Health Hazard Assessment
12 P.O Box 4010
13 Sacramento, CA 95812-4010

14 For Non-United States Postal Service Delivery:

15 Mike Gyuries
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 1001 I Street
19 Sacramento, CA 95814

20 Defendant agrees to provide Embry's counsel with a copy of all checks payable to OEHHA
21 simultaneous with its payment to OEHHA

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

- 24 • "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.2;
- 25 • "Nicholas & Tomasevic" (EIN: 46-3474065) at address provided in Section 3.3; and
- 26 • "Office of Environmental Health Hazard Assessment at 1001 I Street, Sacramento, CA
27 95814.

28 **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

1 limited to investigating potential violations, bringing this matter to Defendant's attention, as well as
2 litigating and negotiating a settlement in the public interest.

3 Defendant shall provide its payment to Embry's counsel divided equally, \$22,500 payable to
4 Glick Law Group, PC and \$22,500 payable to Nicholas & Tomasevic, LLP respectively. The addresses
5 for these two entities are:

6 Noam Glick
7 Glick Law Group
8 225 Broadway, Suite 2100
9 San Diego, CA 92101

10 Craig Nicholas
11 Nicholas & Tomasevic, LLP
12 225 Broadway, Suite 2100
13 San Diego, CA 92101

14 **3.4 Timing of Payment**

15 As stated above, the total civil penalty in this matter is \$5,000, with 75% of the penalty (**\$3,750**)
16 payable to the OEHHA, and 25% of the penalty (**\$1,250**) payable to Embry. The total amount of
17 attorney's fees and costs is **\$45,000**. These civil penalties and attorney's fees and costs will be paid
18 over time by Defendant as detailed below. The date payments will begin (the "Payment Initiation
19 Date") is 14 days after the Court grants the motion to approve this consent judgment if that date is
20 later than: (1) July 1, 2020.

21 Defendant will issue one or more checks every 30 days ("Month") following the Payment
22 Initiation Date, as identified in the below schedule:

23 **July 1, 2020:** Defendant shall issue a check in the amount \$500 payable to the OEHHA;

24 **August 1, 2020:** Defendant shall issue a check in the amount \$500 payable to the OEHHA;

25 **September 1, 2020:** Defendant shall issue a check in the amount \$500 payable to the OEHHA;

26 **October 1, 2020:** Defendant shall issue a check in the amount \$500 payable to the OEHHA;

27 **November 1, 2020:** Defendant shall issue a check in the amount \$500 payable to the OEHHA;

28 **December 1, 2020:** Defendant shall issue a check in the amount \$500 payable to the OEHHA;

January 1, 2021: Defendant shall issue a check in the amount \$500 payable to the OEHHA;

1 **February 1, 2021:** Defendant shall issue two checks, one in the amount \$250 payable to the
2 OEHHA; and one in the amount of \$250 payable to Embry;

3 **March 1, 2021:** Defendant shall issue three checks, one in the amount of \$1,000 payable to
4 Embry, one in the amount of \$2,000 payable to Glick Law Group, P.C., and one in the amount of
5 \$2,000 payable to Nicholas & Tomasevic, LLP.

6 **April 1, 2021:** Defendant shall issue two checks, one in the amount of \$2,500 payable to Glick
7 Law Group, P.C., and one in the amount of \$2,500 payable to Nicholas & Tomasevic, LLP.

8 **May 1, 2021:** Defendant shall issue two checks, one in the amount of \$2,500 payable to Glick
9 Law Group, P.C., and one in the amount of \$2,500 payable to Nicholas & Tomasevic, LLP.

10 **June 1, 2021:** Defendant shall issue two checks, one in the amount of \$2,500 payable to Glick
11 Law Group, P.C., and one in the amount of \$2,500 payable to Nicholas & Tomasevic, LLP.

12 **July 1, 2021:** Defendant shall issue two checks, one in the amount of \$2,500 payable to Glick
13 Law Group, P.C., and one in the amount of \$2,500 payable to Nicholas & Tomasevic, LLP.

14 **August 1, 2021:** Defendant shall issue two checks, one in the amount of \$2,500 payable to
15 Glick Law Group, P.C., and one in the amount of \$2,500 payable to Nicholas & Tomasevic, LLP.

16 **September 1, 2021:** Defendant shall issue two checks, one in the amount of \$2,500 payable
17 to Glick Law Group, P.C., and one in the amount of \$2,500 payable to Nicholas & Tomasevic, LLP.

18 **October 1, 2021:** Defendant shall issue two checks, one in the amount of \$2,500 payable to
19 Glick Law Group, P.C., and one in the amount of \$2,500 payable to Nicholas & Tomasevic, LLP.

20 **November 1, 2021:** Defendant shall issue two checks, one in the amount of \$1,500 payable to
21 Glick Law Group, P.C., and one in the amount of \$1,500 payable to Nicholas & Tomasevic, LLP.

22 **December 1, 2021:** Defendant shall issue two checks, one in the amount of \$1,500 payable to
23 Glick Law Group, P.C., and one in the amount of \$1,500 payable to Nicholas & Tomasevic, LLP.

24 In the event that any payment is received five days later than the payment dates identified
25 above, all remaining payments **shall be due and payable immediately thereafter.**

26 **4. CLAIMS COVERED AND RELEASED**

27 **4.1 Embry's Public Release of Proposition 65 Claims**

28 For any claim or violation arising under Proposition 65 alleging a failure to warn about

1 exposures Toxicants from Products or related products manufactured, imported, sold, or distributed
2 by Defendant or used on Defendant's premises prior to the Effective Date, Embry, acting on her
3 own behalf and in the public interest, releases Defendant of any and all liability. This includes
4 Defendant's owners, parents, subsidiaries, affiliated entities under common ownership, its
5 directors, officers, agents, employees, attorneys, and each entity to whom Defendant directly or
6 indirectly distributes or sells the Products, including but not limited to, downstream distributors,
7 wholesalers, customers, retailers, franchisees, cooperative members and licensees, (collectively,
8 the "Releasees"). Releasees include defendant, its parent, and all subsidiaries and affiliates thereof
9 and their respective employees, agents, and assigns that sell Defendant's Products. Compliance
10 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 Toxicants from Products
12 manufactured, imported, sold, or distributed by Defendant or used on Defendant's premises after
13 the Effective Date. This Consent Judgment is a full, final and binding resolution of any claim or
14 violation arising under Proposition 65 alleging a failure to warn about exposures Toxicants from
15 Product that were or could have been asserted against Defendant and/or Releasees for failure to
16 provide warnings for alleged exposures to Toxicants contained in Products.

17 **4.2 Embry's Individual Release of Claims**

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

24 **4.3 Defendant's Release of Embry**

25 Defendant, on its own behalf, and on behalf of Releasees as well as its past and current agents,
26 representatives, attorneys, successors, and assignees, hereby waives any and all claims against Embry
27 and her attorneys and other representatives, for any and all actions taken or statements made by Embry
28 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.

1 **5. COURT APPROVAL**

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

5 **6. SEVERABILITY**

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

9 **7. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the state of California
11 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
12 rendered inapplicable for reasons, including but not limited to changes in the law, then Defendant may
13 provide written notice to Embry of any asserted change, and shall have no further injunctive
14 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
15 so affected.

16 **8. NOTICE**

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

20 For Defendant:

21 Matthew Soleimanpour, Esq.
22 Soleiman APC
23 5771 La Jolla Blvd., Suite 4
24 La Jolla, CA 92037

20 For Embry:

21 Noam Glick, Esq.
22 Glick Law Group, PC
23 225 Broadway, 21st Floor
24 San Diego, CA 92101

25 Any Party may, from time to time, specify in writing to the other, a change of address to which
26 all notices and other communications shall be sent.
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1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

2 This Consent Judgment may be executed in counterparts and by facsimile signature, each of
3 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
4 same document.

5 **10. POST EXECUTION ACTIVITIES**

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

15 **11. MODIFICATION**

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

19 **12. AUTHORIZATION**

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

22 **13. ENFORCEMENT**

23 Mina, Solaiman Mesdaq, and Sabri Biyik agree they shall be jointly and severally liable for all
24 payments required under this Consent Judgment (See Sections 3.1-3.4). In any action to enforce the
25 payment provision of this Consent Judgment, the prevailing party shall be entitled to its reasonable
26 attorney’s fees and costs.

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1 **14. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

2 If a dispute arises with respect to any Party's compliance with the terms of this Consent
3 Judgment entered by the Court, the Parties shall meet and confer in person, by telephone, and/or in
4 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed
5 in the absence of such a good faith attempt to resolve the dispute beforehand.


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1 **15. ENTIRE AGREEMENT**

2 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
3 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,
4 commitments, and understandings related hereto. No representations, oral or otherwise, express or
5 implied, other than those contained herein have been made by any Party. No other agreements, oral
6 or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.
7


8
9 **AGREED TO BY PLAINTIFF**
KIM EMBRY:

10
11 Date: November 17, 2020

12
13 By: 
14 Kim Embry

AGREED TO BY DEFENDANT
EVEREST INDUSTRIES, INC.:

15
16 Date: 11/19/20

17 By: 
18 Solaiman Mesdaq
19 For Everest Industries, Inc.
20 (Sued as Divan Lounge)

21 **AGREED TO BY SOLAIMAN MESDAQ:**

22
23 Date: 11/19/20

24 By: 
25 Solaiman Mesdaq

AGREED TO BY SABRI BIYIK:

26 Date: 11/19/20

27 By: 
28 Sabri Biyik

IT IS SO ORDERED.

Date:

JUDGE OF THE SUPERIOR COURT