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Attorneys for Plaintiff
Kim Embry

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

KIM EMBRY, an individual,

Plaintiff,

v.

THE KROGER CO. dba RALPH'S, an Ohio
corporation RALPH'S GROCERY
COMPANY, an Ohio corporation, and DOES
1 through 100, inclusive,

Defendants.

Case No. HG19024021

[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 The Kroger
4 Co. (“Defendant” or “Kroger”) with Embry and Kroger each individually referred to as a “Party” and
5 collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

7 Embry is a citizen in the state of California and purports to act in the interest of the general
8 public. She seeks to promote awareness of exposures to toxic chemicals and to improve human health
9 by reducing or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendants**

11 Kroger 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 Kroger manufactures, imports, sells, and distributes for sale almonds that
16 contain acrylamide. Embry further alleges that Kroger does so without providing a sufficient health
17 hazard warning as required by Proposition 65 and related Regulations. Pursuant to Proposition 65,
18 acrylamide is listed as a chemical known to cause cancer, birth defects and other reproductive harm.
19 Kroger denies Embry’s allegations that the Products (as defined below) require a Proposition 65
20 warning or that Kroger has violated Proposition 65.

21 **1.5 Notices of Violation**

22 On March 6, 2019, Embry served The Kroger Co., the California Attorney General, and all
23 other required public enforcement agencies with a 60-Day Notice of Violation of California Health and
24 Safety Code section 25249.6 *et seq.*, and on November 5, 2019, served The Kroger Co. and Ralphs
25 Grocery Company with an amended Notice (collectively “Notices”). The Notices alleged that Kroger
26 had violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards
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1 associated with exposures to acrylamide contained in its “Simple Truth Roasted Almonds (Sea Salt).”

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

4 **1.6 Product Description**

5 The products covered by this Consent Judgment are Simple Truth Roasted Almonds (Sea Salt)
6 manufactured or processed or distributed by Kroger that allegedly contain acrylamide and are imported,
7 sold, shipped, delivered or distributed for sale to consumers in California by Releasees (as defined in
8 section 4.1) (“Products”).

9 **1.7 State of the Pleadings**

10 On June 21, 2019, Embry filed a Complaint against Kroger for the alleged violations of Health
11 and Safety Code section 25249.6 that are the subject of the Notices (“Complaint”).

12 **1.8 No Admission**

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

21 **1.9 Jurisdiction**

22 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
23 Court has jurisdiction over Kroger as to the allegations in the Complaint, that venue is proper in the
24 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
25 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.
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1.10 Effective Date and Compliance Date

For purposes of this Consent Judgment, the term “Effective Date” means the date on which the Court grants the motion for approval of this Consent Judgment, as discussed in Section 5. The “Compliance Date” is the date that is sixty (60) days after the Effective Date.

2. INJUNCTIVE RELIEF: COMPLIANCE OF PRODUCTS OR WARNINGS

2.1 Except as otherwise provided herein, any Products that are manufactured by Kroger on and after the Compliance Date that Kroger sells in California or distributes for sale in California shall not exceed 225 parts per billion (“ppb”) of acrylamide based on an average of up to five samples, using tests performed by a laboratory accredited by the State of California, a federal agency, or a nationally recognized accrediting organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), unless such Products comply with the warning requirements of Section 2.3. As used in this Section 2, “distributed for sale in California” means to directly ship Products into California or to sell or distribute Products to a distributor or retailer that Kroger knows will sell Products in California.

2.2 Compliance may be demonstrated by Kroger using the average results of up to five samples of the same Product.

2.3 For Products that contain acrylamide in amounts exceeding the level set forth in Section 2.1, above, and which are manufactured, supplied or distributed for sale in California on or after the Compliance Date, Kroger or its retailer shall provide one of the following Proposition 65 warnings, or any warning for acrylamide in foods such as the Products, that is deemed compliant with Proposition 65 by the State of California:

- 1) **WARNING:** Consuming this product can expose you to chemicals including Acrylamide, which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.
- 2) **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov

The word “**WARNING**” shall be displayed in all capital letters and bold print. This warning statement shall be prominently displayed on the packaging of the Product, or on a placard, shelf tag, or

sign provided that the statement is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual prior to sale. If the warning statement is displayed on the Product's label, it must be set off from other surrounding information. Defendant shall inform all relevant retailers that the same warning shall be posted on any websites where Products are sold into California.

3. MONETARY SETTLEMENT TERMS

3.1 Settlement Amount

Kroger shall pay fifty thousand dollars (\$50,000.00) in settlement in total satisfaction of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil penalties in the amount of five thousand dollars (\$5,000.00) pursuant to Health and Safety Code section 25249.7(b) and attorney's fees and costs in the amount of forty-five thousand dollars (\$45,000.00) pursuant to Code of Civil Procedure section 1021.5.

3.2 Civil Penalty

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 individually.

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

Noam Glick
Glick Law Group
225 Broadway, Suite 1900
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 Federal Express Two-Day Delivery:

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

For Non-Federal Express Two-Day Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

Kroger agrees to provide Embry's counsel with a copy of the check payable to OEHHA, simultaneous with its penalty payments to Embry.

Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required. Relevant information is 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" 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 claims attorney's fees and costs under Proposition 65, including but not limited to investigating potential violations, suing Kroger, as well as litigating and negotiating a settlement in the public interest.

Kroger shall provide their payment to Embry's counsel in four checks, divided equally, payable to Glick Law Group, PC and Nicholas & Tomasevic, LLP respectively as set out in section 3.4, below.

The addresses for these two entities are:

Noam Glick
Glick Law Group
225 Broadway, 19th Floor
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 as follows:

- Civil penalties of \$5,000 and \$35,000 in attorneys' fees (two checks of \$17,500 each to each law firm) within fourteen (14) days of the Effective Date for a total of \$40,000.
- A final payment of \$10,000 (payable in two checks of \$5,000 to each law firm) (the "Final Payment") within 120 days of the Compliance Date ("Final Payment Date"). Embry and her counsel shall waive the Final Payment, and Kroger shall not owe the Final Payment, if Kroger provides test results showing compliance with the 225 ppb standard on or before the 120th day from the Effective Date.

4. CLAIMS COVERED AND RELEASED

4.1 Embry's Public Release of Proposition 65 Claims

Embry, suing on her own behalf and in the public interest, hereby releases Kroger and each of its past, present and future owners, parents, subsidiaries, affiliated entities under common ownerships, its directors, officers, agents, employees, attorneys, and each entity to whom Kroger directly or indirectly distributes or sells Products, including but not limited to downstream distributors, wholesales, customers, retailers, franchisees, cooperative members and licensees, and their successor and assigns (including Ralphs Grocery Company) (collectively, the "Releasees") for any and all liabilities, claim or violation arising under Proposition 65 alleging a failure to warn about exposures to acrylamide from Products manufactured, imported, sold, or distributed by Kroger prior to the Compliance Date. Releasees include defendant, its parents, and all subsidiaries and affiliates thereof and their respective employees, agents, and assigns that sell Kroger's Products. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide from Products manufactured, imported, sold, or distributed by Kroger after the Effective Date. This Consent Judgment is a full, final and binding resolution of all claims that were or could have been asserted against Kroger and/or Releasees for failure to provide warnings for alleged exposure to acrylamide contained in Products.

4.2 Embry's Individual Release of Claims

Embry, in her individual capacity, on behalf of herself, her past and current agents, representatives, attorneys, successors, and/or assignees also provides a general release to Kroger and Releasees, which shall be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action, obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands of every nature, character, and kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to acrylamide in Products manufactured, imported, sold, or distributed by Kroger before the Effective Date. Embry acknowledges that she is familiar with California Civil Code section 1542, which provides 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, in her individual capacity only, and on behalf of herself, her past and current agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which she may have under, or which may be conferred on her by the provisions of California Civil Code section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that she may lawfully waive such rights or benefits pertaining to the released matters.

4.3 Kroger's Release of Embry

Kroger on its own behalf, and on behalf of Releasees as well as 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 them, in this matter or with respect to the Products.

5. COURT APPROVAL

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

1 **6. SEVERABILITY**

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

4 **7. GOVERNING LAW**

5 The terms of this Consent Judgment shall be governed by the laws of the state of California as
6 applied within the state of California. In the event that, after the Court approves this Consent Judgment,
7 Proposition 65 is repealed, or is otherwise rendered inapplicable for reasons, including but not limited
8 to changes in the law, then Kroger may provide written notice to Embry of any asserted change, and
9 shall have no further injunctive obligations pursuant to this Consent Judgment with respect to, and to
10 the extent that, the Products are so affected. Any such change will have no effect on Kroger's financial
11 obligations set forth in this Consent Judgment.

12 **8. NOTICE**

13 Unless otherwise specified herein, all correspondence and notice required by this Consent
14 Judgment shall be in writing and sent by: (1) personal delivery; (ii) first-class, registered, or certified
15 mail, return receipt requested; or (iii) a recognized overnight courier to the following addresses:

16 If to Kroger:

17 Gregory P. O'Hara
18 Lauren M. Michals
19 Nixon Peabody LLP
20 One Embarcadero Center, 32nd Floor
21 San Francisco, CA 94111

16 If to Embry:

17 Noam Glick
18 Glick Law Group, PC
19 225 Broadway, 19th Floor
20 San Diego, CA 92101

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

23 **9. COUNTERPARTS; DIGITAL SIGNATURES**

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

27 **10. POST EXECUTION ACTIVITIES**

28 Embry agrees to comply with the reporting form requirements referenced in Health and Safety
Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code

1 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
2 motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to
3 mutually employ their best efforts, including those of their counsel, to support the entry of this
4 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
5 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for approval,
6 responding to any objection that any third-party may make, and appearing at the hearing before the
7 Court if so requested.

8 **11. MODIFICATION**

9 11.1 This Consent Judgment may be modified from time to time or terminated (1) by express
10 written agreement of the Parties, with the approval of the Court, or (2) by an order of this Court upon
11 motion by a particular Party.

12 **11.2 Feasibility.** If, despite using commercially reasonable and good faith efforts, Kroger
13 has not achieved compliance with Section 2.1 by the Compliance Date, the Parties shall meet and confer
14 as to an extension of the Compliance Date not shorter than one year. The Parties may also agree to any
15 other modification that the Parties agree is appropriate and in the public interest. Grounds for an
16 extension or other modification may include, but are not limited to, that, despite Defendant's good faith
17 efforts to comply with Section 2.1, it is not reasonably commercially feasible for one or more Products
18 to comply with that standard.

19 **11.3 Other Embry or Environmental Health Advocates Settlements.** Defendant may
20 move to modify this Consent Judgment to substitute higher reformulation levels that Embry or her
21 counsel on behalf of Environmental Health Advocates agrees to in a future consent judgment applicable
22 to products sufficiently similar to the Products, and Embry agrees not to oppose any such motion except
23 for good cause shown.

24 **11.4 Court Decision Regarding Similar Products.** If a court of competent jurisdiction
25 renders a final judgment that one or more products that are sufficiently similar to the Products do not
26 require a warning for acrylamide under Proposition 65, then Defendant may move to modify this
27 Consent Judgment to conform to such ruling.
28

1 **11.5 Other Court Decisions.** If a final decision of a court determines that warnings for
2 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are
3 unconstitutional, preempted, or otherwise unlawful or unnecessary with respect to products that are
4 similar to the Products, then Defendant may move to modify this Consent Judgment to conform to such
5 ruling in order to avoid unfair, inconsistent, or anti-competitive results.

6 **11.6 Change in Proposition 65.** If Proposition 65 or its implementing regulations are
7 changed from their terms as they exist on the date of entry of this Consent Judgment in a manner that
8 impacts Section 2.1 through 2.3, or if OEHHA or a federal regulatory agency takes some other final
9 regulatory action for products similar to the Products in a manner that impacts reformulation standards,
10 or that determines that warnings for acrylamide are not required or necessary or desired for such
11 products, then Defendant may seek to modify this Consent Judgment.

12 **11.7 Scientific Studies.** If an agency of the federal government, including, but not limited to
13 the U.S. Food and Drug Administration, states through any guidance, regulation, or legally binding act,
14 following a review of scientific studies and following public notice and comment, a cancer potency
15 estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms per day,
16 then Defendant shall be entitled to seek a modification of this Consent Judgment to be relieved of its
17 obligations to meet any requirements of this Consent Judgment that are inconsistent with such a change.

18 **11.8 Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
19 agency of the federal government, including, but not limited to the U.S. Food and Drug Administration,
20 states through any guidance, regulation, or legally binding act that federal law has preemptive effect
21 on any of the requirements of this Consent Judgment, then this Consent Judgment may be modified in
22 accordance with the procedure for noticed motions set forth herein to bring it into compliance with or
23 avoid conflict with federal law.

24 **11.9** Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet
25 and confer with the other Party prior to filing a motion to modify or terminate the Consent Judgment.

26 **11.10** Any requested modification pursuant to this Section 11 will have no effect on Kroger's
27 financial obligations set forth in this Consent Judgment.
28

12. AUTHORIZATION

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

13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES


If a dispute arises with respect to either Party's compliance with the terms of this Consent Judgment entered by the Court, the Parties shall meet and confer in person, or 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

This Consent Judgment 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.

AGREED TO:

Date: March 29, 2021.

By: 
KIM EMBRY**AGREED TO:**

Date: 3/30/2021

By: 
THE KROGER CO.**IT IS SO ORDERED.**

Date: _____

JUDGE OF THE SUPERIOR COURT