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17 Attorneys for Plaintiff
18 Kim Embry

19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
20 **IN AND FOR THE COUNTY OF ALAMEDA**

21 KIM EMBRY, an individual

22 Plaintiff,

23 v.

24 COLOMBINA USA, a Florida corporation,
25 and DOES 1 through 100, inclusive

26 Defendant.

27 Case No. RG19041476

28 [PROPOSED] CONSENT JUDGMENT AS
TO COLOMBINA USA.

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Kim Embry (“Embry”) on one hand,
4 and Colombina USA (“Defendant or “Colombina”) on the other hand, with Embry and Defendant
5 individually referred to as a “Party” and collectively 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 Defendant employs ten or more individuals and is a “person in the course of doing business”
12 for 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 Defendant manufactures, imports, sells, and distributes for sale in
16 California wafer products that contain Acrylamide. Embry further alleges that Defendant does so
17 without providing a sufficient health hazard warning as required by Proposition 65 and related
18 regulations. Pursuant to Proposition 65, Acrylamide is listed as a chemical known to cause cancer and
19 reproductive harm.

20 **1.5 Product Description**

21 For purposes of this Consent Judgment, the “Product” or “Products” are defined as Defendant’s
22 wafer products, which includes, without limitation, “Sugar Wafer,” “Bridge,” and “Capri” brands that
23 allegedly contain Acrylamide that are manufactured, imported, sold, or distributed for sale in
24 California by Defendant and Releasees.

25 **1.6 Notices of Violation**

26 On March 15, 2019 Embry served Defendant, the California Attorney General, and all other
27 required public enforcement agencies with a 60-Day Notice of Violation of California Health and
28 Safety Code section 25249.6 *et seq.* (“Notice”). The Notice alleged that Defendant violated

1 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated
2 with exposures to Acrylamide contained in the Products.

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

5 **1.7 Complaint**

6 On or about October 31, 2019, Embry filed a Complaint against Defendant for the alleged
7 violations of Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

8 **1.8 No Admission**

9 Defendant denies the material, factual, and legal allegations in the Notices and Complaint, and
10 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in
11 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
12 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
13 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an admission
14 of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not,
15 however, diminish or otherwise affect Defendant’s obligations, responsibilities, and duties under this
16 Consent Judgment, subject to subsequent modifications made pursuant to Section 11 of this Consent
17 Judgment, by action of California’s Office of Environmental Health Hazard Assessment (“OEHHA”),
18 or any successor agency, by court order regarding any such obligation, responsibility, and/or duty, or
19 otherwise by operation of law.

20 **1.9 Jurisdiction**

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

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term “Effective Date” means the date six calendar
27 months after the date on which the Court grants the motion for approval of this Consent Judgment.
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1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation of the Product**

3 Any Products that are manufactured by Colombina on and after the Effective Date that are
4 thereafter sold in California or distributed for sale in California shall either: (a) contain an average
5 acrylamide concentration by weight (“Average Level”) not to exceed 115 parts per billion (“ppb”); or
6 (b) be labeled with a clear and reasonable warning pursuant to Section 2.2. As used in this Section 2.1,
7 “distributed for sale in California” means to directly ship a Product into California or to sell a Product
8 to a distributor that Colombina knows will sell the Product in California. The Average Level shall be
9 determined: (a) by randomly selecting and testing at least one sample each from five different lots of
10 the tested product (or the maximum number of lots available for testing if less than five) that were
11 produced on dates spread out over a period of at least 60 days; and (b) using tests performed by a
12 laboratory accredited by the State of California, a federal agency, or a nationally recognized
13 accrediting organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry).

14 **2.2 Clear and Reasonable Warnings**

15 Commencing on the Effective Date, as an alternative to reformulation under Section 2.1,
16 Defendant shall not distribute for sale in California any Product unless the label of the Product contains
17 a clear and reasonable warning that complies with Proposition 65’s warning regulations, including 27
18 California Code of Regulations Section 25600 et. seq.

19 **2.3 Grace Period for Existing Inventory of Products**

20 The requirements of this Consent Judgment shall not apply to Products manufactured as of the
21 Effective Date, which Products are expressly subject to the releases provided in Section 4.

22 **2.4 Court Approval of Less Onerous Compliance Measures**

23 If a California court approves a Proposition 65 consent judgment concerning acrylamide in any
24 wafer or closely related product that provides for materially less onerous compliance measures, the
25 Court, upon application by Colombina, shall modify this Consent Judgment to replace the more
26 onerous compliance measures set forth herein with those less onerous compliance measures.

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1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Settlement Amount**

3 Defendant shall pay fifty-five thousand dollars (\$55,000.00) in settlement and total satisfaction
4 of all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes
5 civil penalties in the amount of five thousand five hundred dollars (\$5,500.00) pursuant to Health and
6 Safety Code section 25249.7(b) and attorney's fees and costs in the amount of forty-nine thousand
7 five hundred dollars (\$49,500.00) pursuant to Code of Civil Procedure section 1021.5 and Health and
8 Safety Code section 25249 et seq.

9 **3.2 Civil Penalty**

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

14 All payments owed to Embry shall be delivered to the following payment addresses:

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

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

21 For United States Postal Delivery:

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

27 For Non-United States Postal Service Delivery:

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

1 Colombina agrees to provide Embry's counsel with a copy of the check payable to OEHHA
2 simultaneous with its penalty payment to Embry.

3 Embry and her counsel will provide completed IRS 1099, W-9, or other forms as required.
4 Relevant information for Glick Law Group, N&T, and Embry are set out below:

- 5 • "Kim Embry" whose address and tax identification number shall be provided within
6 five (5) days after this Consent Judgment is fully executed by the Parties
- 7 • "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.2;
- 8 • "Nicholas & Tomasevic" (EIN: 46-3474065) at address provided in Section 3.3; and
- 9 • "Office of Environmental Health Hazard Assessment at 1001 I Street, Sacramento, CA
10 95814.

11 **3.3 Attorney's Fees and Costs**

12 The portion of the settlement attributable to attorneys' fees and costs shall be paid to Embry's
13 counsel, who are entitled to attorney's fees and costs incurred by her in this action, including but not
14 limited to investigating potential violations, bringing this matter to Defendant's attention, as well as
15 litigating and negotiating a settlement in the public interest.

16 Defendant shall provide its payment to Embry's counsel in two checks, divided equally,
17 payable to Glick Law Group, PC (\$24,750.00) and Nicholas & Tomasevic, LLP (\$24,750.00)
18 respectively. The addresses for these two entities are:

19 Noam Glick
20 Glick Law Group
21 225 Broadway, Suite 2100
22 San Diego, CA 92101

23 Crag Nicholas
24 Nicholas & Tomasevic, LLP
25 225 Broadway, 19th Floor
26 San Diego, CA 92101

27 **3.4 Timing**

28 The above-mentioned checks will be issued within fourteen (14) days of the date on which the
Court grants the motion for approval of this Consent Judgment.

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1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Embry's Public Release of Proposition 65 Claims**

3 For any claim or violation arising under Proposition 65 alleging a failure to warn about
4 exposures to Acrylamide from Products or related products manufactured, imported, sold, or
5 distributed by Defendant prior to the Effective Date, Embry, acting on her own behalf and in the public
6 interest, releases Defendant; Defendant's owners, parents, subsidiaries, affiliated entities, directors,
7 officers, agents, employees, shareholders, successors, assigns, insurers, and attorneys; and each entity
8 to whom Defendant directly or indirectly distributes or sells the Products, including but not limited to,
9 distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and
10 licensees, including but not limited to 99 Cents Only Stores LLC (collectively, the "Releasees") of
11 any and all liability. Compliance with the terms of this Consent Judgment constitutes compliance with
12 Proposition 65 with respect to the alleged or actual failure to warn about exposures to Acrylamide
13 from Products or related products manufactured, imported, sold, or distributed after the Effective Date.
14 This Consent Judgment is a full, final and binding resolution of all claims that were or could have
15 been asserted against Defendant and/or Releasees for failure to provide warnings for alleged exposures
16 to Acrylamide contained in Products or related 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,
19 which 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, arising
22 out of alleged or actual exposures to Acrylamide in Products manufactured, imported, sold, or
23 distributed by Defendant and/or Releasees 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

1 and her attorneys and other representatives, whether in the course of investigating claims, otherwise
2 seeking to enforce Proposition 65 against it, in this matter or with respect to the Products.

3 **5. COURT APPROVAL**

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

7 **6. SEVERABILITY**

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

11 **7. GOVERNING LAW**

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

17 **8. NOTICE**

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

21 **For Defendant:**

22 Sean Newland
23 DLA Piper, LLP
24 400 Capital Mall #2400
Sacramento, CA 95814

For Embry:

Noam Glick
Glick Law Group, P.C.
225 Broadway, 21st Floor
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. The Parties agree to mutually employ their best efforts, including
10 those of their counsel, to support the entry of this agreement as judgment, and not to unreasonably
11 oppose or delay court approval. For purposes of this Section, "best efforts" shall include, at a
12 minimum, supporting the motion for approval, responding to any objection that any third-party may
13 make, and appearing at the hearing before the Court if so requested.

14 **11. MODIFICATION**

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

18 **12. AUTHORIZATION**

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

21 **13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

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

26 **14. ENTIRE AGREEMENT**

27 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
28 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,

1 commitments, and understandings related hereto. No representations, oral or otherwise, express or
2 implied, other than those contained herein have been made by any Party. No other agreements, oral or
3 otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

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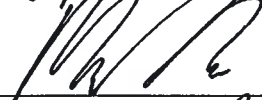
AGREED TO:

Date: 2/7/2020

By: 
KIM EMBRY

AGREED TO BY (DEFENDANT)

Date: 2/14/2020

By: 

Title: General Manager
COLOMBINA USA