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10 Attorneys for Plaintiff
Kim Embry
11

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF ALAMEDA**

14 KIM EMBRY, an individual

15 Plaintiff,

16 v.

17 MONDELÉZ GLOBAL, LLC., a Delaware
Corporation; RALPHS., a Ohio corporation;
18 and DOES 1 through 100, inclusive

19 Defendants.
20

Case No.: HG 19023388

[PROPOSED] CONSENT JUDGMENT AS
TO MONDELÉZ GLOBAL, LLC

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 Mondelēz Global, LLC (“Defendant” or “MDLZ”) 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 cookies and chocolate chip cookies that contain acrylamide. Embry further alleges
17 that Defendant has not provided warnings under Proposition 65 for such products. Pursuant to
18 Proposition 65, Acrylamide is listed as a chemical known to cause cancer and reproductive harm.
19 MDLZ denies that warnings are required under Proposition 65 for any exposures to acrylamide in the
20 Products, and MDLZ maintains that it has complied with all applicable federal and state laws,
21 including but not limited to Proposition 65.

22 **1.5 Product Description**

23 For purposes of this Consent Judgment, the “Product” or “Products” are defined as Biscos
24 Sugar Wafers and Chips Ahoy Double Chocolate Thins manufactured, imported, sold, or distributed
25 for sale in California by Defendant.

26 **1.6 Notices of Violation**

27 On March 15, 2019 Embry served Defendant MDLZ, the California Attorney General, and all
28 other required public enforcement agencies with a 60-Day Notice of Violation of California Health

1 and Safety Code section 25249.6 *et seq.* (“First Notice”). The First Notice alleged that Defendant
2 violated Proposition 65 by failing to provide warnings for alleged exposures to acrylamide in Biscos
3 Sugar Wafers.

4 On May 3, 2019 Embry served MDLZ, the California Attorney General, and all other required
5 public enforcement agencies with a 60-Day Notice of Violation of California Health and Safety Code
6 section 25249.6 *et seq.* (“Second Notice”). The Second Notice alleged that Defendant violated
7 Proposition 65 by failing to provide warnings for alleged exposures to acrylamide in Chips Ahoy
8 Double Chocolate Thins.

9 The First and Second Notices are referred to collectively as the “Notices.” No public enforcer
10 has commenced or is otherwise prosecuting an action to enforce the violations alleged in the Notices.

11 **1.7 Complaint**

12 On or about June 18, 2019, Embry filed a Complaint against Defendant for the alleged
13 violations of Health and Safety Code section 25249.6 that are the subject of the Notices (“Complaint”).

14 **1.8 No Admission**

15 By stipulating to the entry of this Consent Judgment and agreeing to provide the relief and
16 remedies specified herein, MDLZ does not admit that it has violated, or threatened to violate,
17 Proposition 65 or any other law or legal duty, and MDLZ does not admit that the chemical acrylamide
18 in food poses any risk to human health.

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

24 **1.9 Jurisdiction**

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

1 **1.10 Effective Date and Compliance Date**

2 For purposes of this Consent Judgment, the term “Effective Date” means the date on notice of
3 entry of the Consent Judgment is served on Defendant. The Compliance Date is June 1, 2020.

4 **2. INJUNCTIVE RELIEF**

5 **2.1 Reformulation of the Product**

6 Any Products that are manufactured by MDLZ on and after the Compliance Date that are
7 thereafter sold in California or distributed for sale in California shall not exceed 280 ppb acrylamide
8 on average, as set forth in this Section 2. As used in this Section 2.1, “distributed for sale in California”
9 means to directly ship a Product into California or to sell a Product to a distributor that MDLZ knows
10 will sell the Product in California.

11 **2.2 Testing**

12 (a) Compliance with the average level shall be determined using LC-MS/MS (Liquid
13 Chromatograph-Mass Spectrometry), GC/MS/MS (Gas Chromatography/Mass Spectrometry), or any
14 other testing method agreed upon by the Parties. Any testing for purposes of Section 2.1 shall be
15 performed by any laboratory accredited by the State of California, a federal agency, or a nationally
16 recognized accrediting organization.

17 (b) The Average Level is determined by randomly selecting and testing, over no less than
18 a ten-day period, one sample from at least five lots (or from as many lots as are available, if fewer than
19 five) and a maximum of ten lots of Products produced at locations that supply such Products to
20 California (“Sampling Data”). The mean and standard deviation shall be calculated using the
21 Sampling Data. Any data points that are more than three standard deviations outside the mean shall be
22 discarded once, and the mean and standard deviation recalculated using the remaining data points. The
23 arithmetic mean determined in accordance with this procedure shall be deemed the “Average Level.”

24 (c) For at least three consecutive years after the Compliance Date, MDLZ shall arrange for
25 testing under Section 2.2. The testing shall be at least once per year, with the first testing occurring
26 prior to the Compliance Date. No further testing shall be required unless MDLZ materially modifies
27 the ingredients or cooking process of a Product, at which point testing shall recommence on an annual
28 basis for at least three years.

1 **2.3 Sell-Through Period**

2 Notwithstanding anything else in this Consent Judgement, the Products that are manufactured
3 on or prior to the Compliance Date shall be subject to release of liability pursuant to this Consent
4 Judgement, without regard to when such products were, or are in the future, distributed or sold to
5 customers. As a result, the obligations in Section 2 do not apply to these Products manufactured on or
6 prior to the Compliance Date.

7 **3. MONETARY SETTLEMENT TERMS**

8 **3.1 Settlement Amount**

9 Defendant shall pay seventy-five thousand dollars (\$75,000.00) in settlement and total
10 satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment.
11 This includes civil penalties in the amount of eight thousand (\$8,000.00) pursuant to Health and Safety
12 Code section 25249.7(b) and attorney’s fees and costs in the amount of sixty-seven thousand (\$67,000)
13 pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code section 25249 et seq.

14 **3.2 Civil Penalty**

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

19 All payments owed to Embry shall be delivered to the following payment address:

20
21 Noam Glick
22 Glick Law Group
23 225 Broadway, Suite 2100
24 San Diego, CA 92101

25 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA (Memo
26 line “Prop 65 Penalties”) at the following addresses:

27
28 For United States Postal Delivery:

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

6 For Non-United States Postal Service Delivery:

7 Mike Gyurics
8 Fiscal Operations Branch Chief
9 Office of Environmental Health Hazard Assessment
10 1001 I Street
11 Sacramento, CA 95814

12 MDLZ agrees to provide Embry's counsel with a copy of the check payable to OEHHA
13 simultaneous with its penalty payment to Embry.

14 The Parties, including Embry, will exchange completed IRS 1099, W-9, or other forms as
15 required. Relevant information for Glick Law Group, Nicholas & Tomasevic, and Embry are set out
16 below:

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

23 **3.3 Attorney's Fees and Costs**

24 The portion of the settlement attributable to attorneys' fees and costs shall be paid to Embry's
25 counsel, who are entitled to attorney's fees and costs incurred by her in this action, including but not
26 limited to investigating potential violations, bringing this matter to Defendant's attention, as well as
27 litigating and negotiating a settlement in the public interest.
28

1 Defendant shall provide its payment to Embry's counsel in two checks, divided equally,
2 payable to Glick Law Group, PC (\$33,500) and Nicholas & Tomasevic, LLP (\$33,500) respectively.
3 The addresses for these two entities are:

4 Noam Glick
5 Glick Law Group
6 225 Broadway, Suite 2100
7 San Diego, CA 92101

8 Craig Nicholas
9 Nicholas & Tomasevic, LLP
10 225 Broadway, 19th Floor
11 San Diego, CA 92101

12 **3.4 Timing**

13 The above mentioned checks will be issued within fourteen (14) days of the Effective Date.

14 **4. CLAIMS COVERED AND RELEASED**

15 **4.1 Embry's Public Release of Proposition 65 Claims**

16 This Consent Judgment is a full, final, and binding resolution between, on the one hand,
17 Embry, on behalf of herself and her attorneys, investigators, agents, heirs, and assigns (collectively
18 referred to as "Embry Releasers") and on behalf of the public in the public interest, and, on the other
19 hand, MDLZ and its parents, subsidiaries, affiliated entities under common ownership, its directors,
20 officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and
21 assigns ("Defendant Entities"), and each entity to whom Defendant directly or indirectly distributes,
22 ships, or sells the Products including but not limited to downstream distributors, wholesalers,
23 customers, retailers, franchisees, cooperative members, and licensees, and their owners, directors,
24 officers, agents, principals, employees, attorneys, insurers, accountants, representatives, predecessors,
25 successors, and assigns (collectively referred to as the "Releasees"), of all claims, actions, causes of
26 action (in law or in equity), suits, liabilities, demands, obligations, damages, costs, fines, penalties,
27 losses, expenses, and fees (including, but not limited to, investigation fees, expert fees, and attorney's
28 fees), and expenses (collectively, "Claims") that have been or could have been asserted under
Proposition 65 for any exposures to acrylamide from the Products manufactured, purchased,

1 distributed, or sold by Defendant before the Compliance Date. Compliance with the terms of this
2 Consent Judgment constitutes compliance with Proposition 65 with respect to any exposures to
3 acrylamide from Products manufactured, purchased, sold, or distributed by Defendant on and after the
4 Compliance Date.

5 **4.2 Embry's Individual Release of Claims**

6 Embry, in her individual capacity, on behalf of herself and the Embry Releasors, also waives
7 all rights to institute or participate in, directly or indirectly, any form of legal action, and discharges
8 and releases all Claims as to all Releasees under Proposition 65 or any statutory or common law from
9 the alleged failure to provide warnings for any exposures to acrylamide, or for causing any exposures
10 to acrylamide, in the Products and in wafer and chocolate chip cookie products manufactured,
11 purchased, distributed, or sold by Defendant. The release in this Section 4.2 is effective as a full and
12 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
13 attorney's fees, damages, losses, claims, liabilities, and demands by Embry of any nature, character or
14 kind, whether known or unknown, or suspected or unsuspected. Embry acknowledges that she is
15 familiar with Section 1542 of the California Civil Code, which provides as follows:

16 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
17 THAT THE CREDITOR OR RELEASING PARTY DOES NOT
18 KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT
19 THE TIME OF EXECUTING THE RELEASE AND THAT, IF
20 KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY
21 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR
22 OR RELEASED PARTY.

23 Embry understands and acknowledges the significance and consequence of this waiver of California
24 Civil Code section 1542.

25 **4.3 Defendant's Release of Embry**

26 Defendant, on its own behalf, and on behalf of Releasees as well as its past and current agents,
27 representatives, attorneys, successors, and assignees, hereby waives any and all claims against Embry
28 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.

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 six months 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 Sarah Esmaili
22 Arnold & Porter
23 Three Embarcadero Center, 10th Fl
San Francisco, CA 94111

For Embry:

Noam Glick
Glick Law Group, PC
225 Broadway, 21st Floor
San Diego, CA 92101

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

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. ENFORCEMENT**

16 Prior to bringing any motion or order to show cause to enforce the terms of this Consent
17 Judgment, a Party seeking to enforce the Consent Judgment shall provide the other Party written
18 notice of the alleged violation. The Parties shall meet and confer in an effort to try to reach
19 agreement on an appropriate cure for the alleged violation. Embry shall not bring an enforcement
20 action or institute a judicial proceeding if MDLZ demonstrates it has complied with the requirements
21 of Section 2. MDLZ is entitled to designate such information as confidential.

22 In the event that meet and confer efforts are unsuccessful, the Party alleging a violation may
23 initiate a judicial proceeding to enforce this Consent Judgment no earlier than 60 days after issuing
24 the written notice specified in Section 11. In the event that a Party initiates such a judicial proceeding,
25 the prevailing Party shall be entitled to recover its reasonable attorneys' fees and costs.

26 **12. MODIFICATION**

27 **12.1 Modification.** This Consent Judgment may be modified only by: (i) a written
28 agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a

1 successful motion or application of any Party, and the entry of a modified consent judgment thereon
2 by the Court.

3 **12.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
4 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the
5 Consent Judgment.

6 **12.3 Change in Proposition 65.** If Proposition 65 or its implementing regulations
7 (including but not limited to the published "no significant risk level" for acrylamide set forth at Cal.
8 Code Regs., tit. 27, section 25705, subdivision (c)(2) or any "alternative risk level" adopted by
9 regulation or court decision) are changed from their terms as they exist on the date of entry of this
10 Consent Judgment, or if OEHHA takes some other final regulatory action that determines that
11 warnings for acrylamide are not required or modifies the standard for warnings for acrylamide, then
12 MDLZ may seek to modify this Consent Judgment.

13 **12.4 Other Court Decisions.** If a final decision of a court determines that warnings for
14 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are
15 preempted or otherwise unlawful or unconstitutional, then MDLZ may move to modify this Consent
16 Judgment to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive results.

17 **12.5. Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
18 agency of the federal government, including, but not limited to, the U.S. Food and Drug
19 Administration, states through any guidance, regulation or legally binding act that federal law has
20 preemptive effect on any of the requirements of this Consent Judgment, then this Consent Judgment
21 may be modified in accordance with the procedure for noticed motions set forth in Section 12.1 to bring
22 it into compliance with or avoid conflict with federal law.

23 **12.6 Scientific Studies.** If an agency of the federal government, including, but not limited
24 to the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally
25 binding act, following a review of scientific studies and following public notice and comment, a cancer
26 potency estimate for acrylamide that equates to a no significant risk level higher than 0.2 micrograms
27 per day, then MDLZ shall be entitled to seek a modification of this Consent Judgment.
28

1 **12.7** Before filing any motion to modify the Consent Judgment, MDLZ shall provide written
2 notice to Embry to initiate the meet and confer procedure in Section 12.2. If the Parties do not agree
3 on the proposed modification during informal meet and confer efforts, MDLZ may file a motion to
4 modify the Consent Judgment within sixty (60) days of the date of the written notice that MDLZ
5 provides to Embry under this Section 12.

6 **13. RETENTION OF JURISDICTION**

7 This Court shall retain jurisdiction of this matter to implement or modify the Consent
8 Judgment. Notwithstanding the provisions of Section 12, nothing in this Consent Judgment limits or
9 affects the Court’s authority to modify this Consent Judgment as provided by law.

10 **12. AUTHORIZATION**

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

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

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

18 **14. ENTIRE AGREEMENT**


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

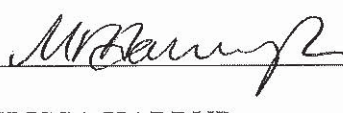
AGREED TO:

AGREED TO BY (DEFENDANT)

Date: September 26, 2019

Date: Sept 23, 2019

By: 
KIM EMBRY

By: 
MELISSA HARRUP
VP & Chief Counsel – North America

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