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19 Attorneys for Plaintiff  
20 Kim Embry

21 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
22 **IN AND FOR THE COUNTY OF ALAMEDA**

23 KIM EMBRY, an individual

24 Plaintiff,

25 v.

26 NONNI'S FOODS, LLC., a Delaware  
27 corporation, WALMART, INC., a Delaware  
28 corporation, and DOES 1 through 100,  
inclusive

Defendants.

Case No. HG-17-885297

[PROPOSED] CONSENT JUDGMENT AS  
TO NONNI'S FOODS, LLC.

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Kim Embry (“Embry”) and Nonni’s  
4 Foods, LLC (“Defendant or “Nonni’s”) (collectively the “Parties”).

5 **1.2 Plaintiff**

6 Embry is an individual residing in California and acting in the interest of the general public.  
7 She seeks to promote awareness of exposures to toxic chemicals and to improve human health by  
8 reducing or eliminating hazardous substances in consumer products.

9 **1.3 Defendant**

10 Nonni’s employs ten or more individuals and is a “person in the course of doing business” for  
11 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code  
12 section 25249.6 et seq. (“Proposition 65”).

13 **1.4 General Allegations**

14 Embry alleges that Nonni’s manufactures, imports, sells, and distributes for sale baked biscotti  
15 (“Italian cookie”) products that contain acrylamide. Embry further alleges that Nonni’s does so  
16 without providing a sufficient health hazard warning as required by Proposition 65 and related  
17 Regulations. Pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer and  
18 reproductive harm.

19 **1.5 Covered Products**

20 For purposes of this Consent Judgment “Covered Products” means all baked biscotti (“Italian  
21 cookie”) products containing acrylamide, including but not limited to traditional biscotti,  
22 THINaddictives and biscotti cookie bites, that are manufactured, imported, sold, or distributed by  
23 Defendant Releasees, defined below, for sale in California.

24 **1.6 Releasees**

25 “Releasees” means and includes: A. Nonni’s, its parents, subsidiaries, affiliated entities,  
26 directors, officers, employees, agents, shareholders, successors, assigns, insurers, and attorneys (the  
27 “Defendant Releasees”) and all entities to which Defendant Releasees directly or indirectly distribute  
28 or sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers,

1 franchisees, licensors, and licensees, including but not limited to Walmart Inc. its parents, subsidiaries,  
2 affiliated entities, directors, officers, employees, agents, shareholders, successors, assigns, insurers,  
3 and attorneys (the “Downstream Defendant Releasees”).

4 **1.7 Notices of Violation**

5 On March 15, 2019 Embry served Defendant, the California Attorney General, and all other  
6 required public enforcement agencies with a 60-Day Notice of Violation of California Health and  
7 Safety Code section 25249.6 *et seq.* (“Notice”). The Notice alleged that Defendant violated  
8 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated  
9 with exposures to Acrylamide contained in the Products.

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

12 **1.8 Complaint**

13 On or about \_\_\_\_\_, Embry filed a Complaint against Defendant alleging the  
14 violations of Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

15 **1.9 No Admission**

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

24 **1.10 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           **1.11 Effective Date**

2           For purposes of this Consent Judgment, the term “Effective Date” means that date certain  
3 falling six calendar months after the date on which the Court grants the motion for approval and entry  
4 of this Consent Judgment, as discussed in Section 5.

5           **2. INJUNCTIVE RELIEF**

6           **2.1 Reformulation of the Product**

7           Commencing on the Effective Date, and continuing thereafter, Defendant Releasees shall only  
8 manufacture, ship, sell, or offer for sale Covered Products that: (a) contain an average acrylamide  
9 concentration by weight (the “Average Level”) of 280 parts per billion or less; or (b) are labeled with  
10 a clear and reasonable warning pursuant to Section 2.2. The Average Level shall be determined: (a)  
11 by randomly selecting and testing at least one sample each from five different lots of the product (or  
12 the maximum number of lots available for testing if less than five) that were produced on dates spread  
13 out roughly evenly over a period of at least 60 days; and (b) using tests performed by a laboratory  
14 accredited by the State of California, a federal agency, or a nationally recognized accrediting  
15 organization, using LC-MS (Liquid Chromatograph-Mass Spectrometry) or any other testing method  
16 agreed upon by the Parties.

17           **2.2 Clear and Reasonable Warnings**

18           Commencing on the Effective Date and continuing thereafter, Defendant Releasees shall, for  
19 all Covered Products that do not contain an Average Level of 280 parts per billion or less, provide  
20 clear and reasonable warnings as set forth in Proposition 65 and related Regulations.

21           In the event that the Office of Environmental Health Hazard Assessment promulgates one or  
22 more regulations requiring or permitting warning text, permitting the absence of warning text, and/or  
23 permitting methods of transmission different than those set forth above, Defendant Releasees shall be  
24 entitled to use, at their discretion, such other warning text and/or method of transmission without being  
25 deemed in breach of this Consent Judgment.

26           **2.3 Sell-Through Period**

27           Notwithstanding anything else in this Settlement Agreement, Covered Products that were  
28 manufactured before the Effective Date shall be subject to a full release of all liability pursuant to this

1 Consent Judgment, without regard to when such Covered Products were, or are in the future,  
2 distributed or sold to customers. The obligations of Defendant Releasees, do not apply to Covered  
3 Products manufactured before the Effective Date. Claims concerning those earlier manufactured  
4 products are released nonetheless.

5 **2.4 Court Approval of Less Onerous Compliance Measures**

6 If a California court approves a Proposition 65 consent judgment concerning acrylamide for  
7 one or more competitors of any Defendant Releasee that provides for materially less onerous  
8 compliance measures, the Court, upon application by Nonni's, shall modify this Consent Judgment to  
9 replace the more onerous compliance measures set forth herein with those less onerous compliance  
10 measures.

11 **3. MONETARY SETTLEMENT TERMS**

12 **3.1 Settlement Amount**

13 Nonni's shall pay sixty-five thousand dollars (\$65,000) in settlement and total satisfaction of  
14 all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil  
15 penalties in the amount of seven thousand dollars (\$7,000) pursuant to Health and Safety Code section  
16 25249.7(b) and attorney's fees and costs in the amount of fifty-eight thousand dollars (\$58,000)  
17 pursuant to Code of Civil Procedure section 1021.5.

18 **3.2 Civil Penalty**

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

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

24 Noam Glick  
25 Glick Law Group  
26 225 Broadway, Suite 2100  
San Diego, CA 92101

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

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For United States Postal Delivery:

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

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

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

- "Kim Embry" whose address and tax identification number shall be provided within five (5) days after this Consent Judgement is fully executed by the Parties
- "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.2;
- "Nicholas & Tomasevic" (EIN: 46-3474065) at address provided in Section 3.3; and
- "Office of Environmental Health Hazard Assessment at 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 fifty-eight thousand dollars (\$58,000) 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 limited to investigating potential violations, bringing this matter to Nonni's attention, as well as litigating and negotiating a settlement in the public interest.

1 Nonni's shall provide its payment to Embry's counsel in two checks, divided equally, payable  
2 to Glick Law Group, PC twenty-nine thousand dollars (\$29,000) and Nicholas & Tomasevic, LLP  
3 twenty-nine thousand dollars (\$29,000) respectively. The addresses for these two entities are:

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

9 Crag Nicholas  
10 Nicholas & Tomasevic, LLP  
11 225 Broadway, 19<sup>th</sup> Floor  
12 San Diego, CA 92101

### 13 3.4 Timing

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

## 15 4. CLAIMS COVERED AND RELEASED

### 16 4.1 Embry's Public Release of Proposition 65 Claims

17 Embry, acting for the general public, releases each and all Releasees from all claims arising  
18 under Proposition 65, based on exposure to and/or failure to warn about exposure to, acrylamide from  
19 Covered Products manufactured, imported, sold, or distributed before the Effective Date.

20 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition  
21 65 with respect to all alleged or actual failure(s) to warn about exposures to acrylamide from Covered  
22 Products that are manufactured, imported, sold, or distributed after the Effective Date. This Consent  
23 Judgment is a full, final and binding resolution of all claims that were or could have been asserted  
24 against Releasees for exposure to acrylamide from Covered Products and/or failure to warn about  
25 exposure to acrylamide from Covered Products.

### 26 4.2 Embry's Individual Release of Claims

27 Embry, in her individual capacity, hereby releases each and all Releasees, which shall be a full  
28 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

1 exposures to acrylamide in Covered Products manufactured, imported, sold, or distributed by  
2 Releasees before the Effective Date, and/or that were or could have been alleged or asserted in the  
3 Complaint.

4 **4.3 Defendant's Release of Embry**

5 Nonni's, for itself and the Defendant Releasees, hereby waives any and all claims against  
6 Embry and her attorneys and other representatives, for any and all actions taken or statements made  
7 by Embry and her attorneys and other representatives, whether in the course of investigating claims or  
8 otherwise, committed or omitted in the process of seeking to enforce Proposition 65 against it with  
9 respect to Covered Products through the date of Nonni's execution of this Stipulation.

10 **5. COURT APPROVAL**

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

14 **6. SEVERABILITY**

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

18 **7. GOVERNING LAW**

19 The terms of this Consent Judgment shall be governed by the laws of the state of California as  
20 applied within the state. If Proposition 65 is repealed, or is otherwise rendered inapplicable for any  
21 reason, including but not limited to changes in the law, then Nonni's shall have no further obligations  
22 pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so  
23 affected.

24 **8. NOTICE**

25 Unless otherwise specified herein, all correspondence and notice required or permitted by this  
26 Consent Judgment shall be in writing and sent: (1) by personal delivery or by US Mail (first-class,  
27 registered, or certified mail, return receipt requested), or by a recognized overnight courier, to the  
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1 physical address provided below, (2) with copies, not themselves constituting notice, emailed to each  
2 email address provided below:

3 If to Nonni's:

4 Lucas Quass  
5 Latham & Watkins, LLP  
6 650 Town Center Drive, 20th Floor  
7 Costa Mesa, CA 92626

If to Embry:

Noam Glick  
Glick Law Group, P.C.  
225 Broadway, 21st Floor  
San Diego, CA 92101

7 Any Party may, from time to time, specify in writing to the other, a change of mailing or email  
8 addresses to which notices and other communications shall be sent. Any and all Notices shall be  
9 effective only if sent in compliance with this section, and after the emailed copies have been sent  
10 without reported error.

11 **9. COUNTERPARTS; DIGITAL SIGNATURES**

12 This Consent Judgment may be executed in counterparts and executed by digital, faxed, or  
13 otherwise reproduced signature. Each counterpart shall be deemed an original, and all counterparts  
14 taken together shall constitute one and the same document.

15 **10. POST EXECUTION ACTIVITIES**

16 Embry agrees to comply with the reporting form requirements referenced in Health and Safety  
17 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code  
18 section 25249.7(f), a noticed motion is required to obtain judicial approval of this proposed settlement,  
19 which motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree  
20 to mutually employ commercially reasonable efforts, including those of their counsel, to support the  
21 entry of this agreement as judgment, and to obtain judicial approval of their settlement in a timely  
22 manner. For purposes of this Section, "commercially reasonable efforts" shall include, at a minimum,  
23 supporting the motion for approval, responding to any objection that any third-party may make, and  
24 appearing at the hearing before the Court if so requested.

25 **11. MODIFICATION**

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

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**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, 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:**

**AGREED TO BY (DEFENDANT)**

Date: September 25, 2019

Date: 9/25/2019

By:   
KIM EMBRY

By:   
Brian T Hansberry [print name]