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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 FRITO-LAY, INC., and DOES 1 through 100,
18 inclusive

19 Defendants.

Case No. HG19021174

[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 (“Consent Judgment”) is entered into by and between Kim Embry
4 (“Embry”) and Frito-Lay, Inc. (“Frito-Lay”) with Embry and Frito-Lay each individually referred to
5 as a “Party” and collectively referred to 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 Frito-Lay 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
13 Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Embry alleges that Frito-Lay manufactures, imports, sells, and distributes for sale roasted
16 almonds that contain acrylamide and that Proposition 65 warnings are required for such products.
17 Embry further alleges that Frito-Lay has not provided warnings under Proposition 65 for roasted
18 almonds. Pursuant to Proposition 65, acrylamide is listed as a chemical known to cause cancer and
19 reproductive harm. Frito-Lay denies that warnings are required under Proposition 65 for any
20 exposures to acrylamide in roasted almonds, and Frito-Lay maintains that it has complied with all
21 applicable federal and state laws, including but not limited to Proposition 65.

22 **1.5 Notices of Violation**

23 On June 1, 2018, Embry served Frito-Lay, CVS Pharmacy Inc., the California Attorney
24 General, and all other required public enforcement agencies with a 60-Day Notice of Violation of
25 California Health and Safety Code section 25249.6 *et seq.* (“Original Notice”). The Original Notice
26 claims that Frito-Lay violated Proposition 65 by failing to warn consumers in California of alleged
27 exposures to acrylamide in its “Nut Harvest Almonds (Lightly Roasted).” On May 24, 2019, Embry
28 issued a supplemental 60-Day Notice of Violation to claim that Frito-Lay violated Proposition 65 by

1 failing to warn consumers in California of alleged exposures to acrylamide in roasted almonds
2 (“Amended Notice”). The Original Notice and Amended Notice are referred to collectively as the
3 “Notices.”

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

6 **1.6 Product Description**

7 For purposes of this Consent Judgment “Product” or “Products” are defined as roasted almond
8 products containing acrylamide that are manufactured, purchased, distributed, or sold by Frito-Lay
9 and which are sold in California.

10 **1.7 Other Releasees**

11 This Consent Judgment expressly encompasses all of the subject Products, whether sold
12 under Frito-Lay’s own brand name, or some other private label, at all grocery, retail, and other
13 locations and sales channels, as well as derivative products containing other ingredients made with
14 the Products.

15 **1.8 Complaint**

16 On May 31, 2019, Embry filed a Complaint against Frito-Lay for the alleged violations of
17 Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”). Upon entry
18 of this Consent Judgment, the Complaint shall be deemed amended *nunc pro tunc* to include
19 allegations asserted in the Amended Notice as to the Products.

20 **1.9 No Admission**

21 By stipulating to the entry of this Consent Judgment and agreeing to provide the relief and
22 remedies specified herein, Frito-Lay does not admit that it has violated, or threatened to violate,
23 Proposition 65 or any other law or legal duty, and Frito-Lay does not admit that the chemical
24 acrylamide in food poses any risk to human health. The Parties recognize that acrylamide is naturally
25 formed when certain foods, such as the almond products at issue in this case, are heated, and that
26 levels of acrylamide formation are due to a wide variety of factors. Frito-Lay further notes that the
27 U.S. Food & Drug Administration has not advised people to stop eating any fried, roasted, or baked
28 foods because of the presence of acrylamide.

1 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
2 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
3 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.
4 This Section shall not, however, diminish or otherwise affect Frito-Lay's obligations, responsibilities,
5 and duties under this Consent Judgment.

6 **1.10 Jurisdiction**

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

11 **1.11 Effective Date; Compliance Date**

12 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
13 notice of entry of this Consent Judgment by the Court is served upon Frito-Lay. The "Compliance
14 Date" is the date that is six months after the Effective Date.

15 **2. INJUNCTIVE RELIEF**

16 **2.1** Any Products that are manufactured by or for Frito-Lay on and after the Compliance
17 Date that are thereafter sold in California or distributed for sale in California shall not exceed 225 ppb
18 on average, as set forth in this Section 2. As used in this Section 2.1, "distributed for sale in
19 California" means to directly ship a Product into California for sale in California or to sell a Product
20 to a distributor that Frito-Lay knows will sell the Product in California.

21 **2.2 Testing**

22 (a) Compliance with the Average Level shall be determined using LC-MS/MS
23 (Liquid Chromatograph-Mass Spectrometry), GC/MS (Gas Chromatography/Mass Spectrometry), or
24 any other testing method agreed upon by the Parties. Any testing for purposes of Section 2.1 shall be
25 performed by any laboratory accredited by the State of California, a federal agency, or a nationally
26 recognized accrediting organization.

27 (b) The Average Level is determined by randomly selecting and testing, over no
28 less than a ten-day period, one sample from at least five batches (or from as many batches as are

1 available, if fewer than five) and a maximum of ten batches of Products produced at locations that
2 supply such Products to California (“Sampling Data”). The mean and standard deviation shall be
3 calculated using the Sampling Data. Any data points that are more than three standard deviations
4 outside the mean shall be discarded once, and the mean and standard deviation recalculated using the
5 remaining data points. The arithmetic mean determined in accordance with this procedure shall be
6 deemed the “Average Level.”

7 (c) For at least three consecutive years after the Compliance Date, Frito-Lay shall
8 arrange for testing under Section 2.2. The testing shall be at least once per year, with the first testing
9 occurring prior to the Compliance Date. No further testing shall be required unless Frito-Lay
10 changes roasted almond suppliers, at which point testing shall recommence on an annual basis for at
11 least three years.

12 **2.3 Sell-Through Period**

13 Notwithstanding anything else in this Consent Judgment, the Products that were manufactured
14 prior to the Compliance Date shall be subject to the release provisions of Section 2.1, without regard
15 to when such Products were, or are in the future, distributed or sold to customers. As a result, the
16 obligations in Section 2.1 do not apply to Products manufactured prior to the Compliance Date.

17 **3. MONETARY SETTLEMENT TERMS**

18 **3.1 Settlement Amount**

19 Frito-Lay shall pay one hundred fifteen thousand dollars (\$115,000.00) in settlement and total
20 satisfaction of all the claims referred to in the Notice, the Complaint, and this Consent Judgment.
21 This includes civil penalties in the amount of twelve thousand dollars (\$12,000.00) pursuant to
22 Health and Safety Code section 25249.7(b) and attorney’s fees and costs in the amount of one
23 hundred and three thousand dollars (\$103,000.00) pursuant to Code of Civil Procedure section
24 1021.5.

25 **3.2 Civil Penalty**

26 The portion of the settlement attributable to civil penalties shall be allocated according to
27 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the
28

1 penalty paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and
2 the remaining twenty-five percent (25%) of the penalty paid to Embry.

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

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

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

11 For United States Postal Service Delivery:

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

17 For Non-United States Postal Service Delivery:

18 Mike Gyurics
19 Fiscal Operations Branch Chief
20 Office of Environmental Health Hazard Assessment
21 1001 I Street
22 Sacramento, CA 95814

23 Frito-Lay agrees to provide Embry’s counsel with a copy of the check payable to OEHHA,
24 simultaneous with its penalty payments to Embry.

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

- 27 • “Kim Embry” whose address and tax identification number shall be provided within five
28 (5) days after this Consent Judgment is fully executed by the Parties;
- “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” at 1001 I Street, Sacramento, CA
95814.

1 **3.3 Attorney’s Fees and Costs**

2 The portion of the settlement attributable to attorney’s fees and costs shall be paid to Embry’s
3 counsel, who are entitled to attorney’s fees and costs incurred by her in this action, including but not
4 limited to investigating potential violations, bringing this matter to Frito-Lay’s attention, as well as
5 litigating and negotiating a settlement in the public interest.

6 Frito-Lay shall provide its payment to Embry’s counsel in two checks, divided equally,
7 payable to Glick Law Group, PC (\$51,500.00) and Nicholas & Tomasevic, LLP (\$51,500.00)
8 respectively. The addresses for these two entities are:

9 Noam Glick
10 Glick Law Group
 225 Broadway, Suite 2100
 San Diego, CA 92101

11 Craig Nicholas
12 Nicholas & Tomasevic, LLP
 225 Broadway, 19th Floor
 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 This Consent Judgment is a full, final, and binding resolution between, on the one hand,
18 Embry, on behalf of herself and her attorneys, investigators, agents, heirs, and assigns (collectively
19 referred to as “Embry Releasors”) and on behalf of the public in the public interest, and, on the
20 other hand, Frito-Lay and its parents, subsidiaries, affiliated entities under common ownership, its
21 directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors,
22 successors, and assigns (“Frito-Lay Entities”), and each entity to whom Frito-Lay directly or
23 indirectly distributes, ships, or sells the Products including but not limited to downstream
24 distributors, wholesalers, customers, retailers (including but not limited to CVS Pharmacy, Inc.),
25 franchisees, cooperative members, and licensees, and their owners, directors, officers, agents,
26 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors,
27 and assigns (collectively referred to as the “Releasees”), of all claims that have been or could have
28

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

6 **4.2 Embry's Individual Release of Claims**

7 Embry, in her individual capacity, on behalf of herself and the Embry Releasers, also waives
8 all rights to institute or participate in, directly or indirectly, any form of legal action, and discharges
9 and releases all claims, actions, causes of action (in law or in equity), suits, liabilities, demands,
10 obligations, damages, costs, fines, penalties, losses, expenses, and fees (including, but not limited to,
11 investigation fees, expert fees, and attorney's fees), and expenses (collectively, "Claims") as to all
12 Releasees under Proposition 65 or any statutory or common law from the alleged failure to provide
13 warnings for any exposures to acrylamide, or for causing any exposures to acrylamide, in the
14 Products and in any other nut products that are manufactured, purchased sold, or distributed by Frito-
15 Lay, provided that such products meet the standard in Section 2.1 of this Consent Judgment . The
16 release in this Section 4.2 is effective as a full and final accord and satisfaction, as a bar to all Claims
17 of any nature, character or kind, whether known or unknown, or suspected or unsuspected. Embry
18 acknowledges that she is familiar with Section 1542 of the California Civil Code, which provides as
19 follows:

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

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

26 **4.3 Frito-Lay's Release of Embry**

27 Frito-Lay, on its own behalf, and on behalf of the Frito-Lay Entities, hereby waives any and
28 all claims against Embry and her attorneys and other representatives, for any and all actions taken or

1 statements made by Embry and her attorneys and other representatives, whether in the course of
2 investigating claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with
3 respect to the Products. The release in this Section 4.3 is effective as a full and final accord and
4 satisfaction, as a bar to all Claims of any nature, character or kind, whether known or unknown, or
5 suspected or unsuspected. Frito-Lay acknowledges that it is familiar with Section 1542 of the
6 California Civil Code, which provides as follows:

7 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
8 THAT THE CREDITOR OR RELEASING PARTY DOES NOT
9 KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT
10 THE TIME OF EXECUTING THE RELEASE AND THAT, IF
11 KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY
12 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR
13 OR RELEASED PARTY.

11 Frito-Lay understands and acknowledges the significance and consequence of this waiver of
12 California Civil Code section 1542.

13 **4.4** Nothing in Section 4 affects or limits the right of any Party to enforce the terms of
14 this Consent Judgment.

15 **5. COURT APPROVAL**

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

19 **6. SEVERABILITY**

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

23 **7. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the state of California
25 and apply within the state of California.

1 **8. NOTICE**

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

5 For Frito-Lay:

6 Trent Norris
7 Sarah Esmaili
8 Arnold & Porter
9 Three Embarcadero Center, 10th Floor
10 San Francisco, CA 94111

5 For Embry:

6 Noam Glick
7 Glick Law Group, PC
8 225 Broadway, 21st Floor
9 San Diego, CA 92101

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

11 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

12 This Consent Judgment may be executed in counterparts and by signature through facsimile
13 or portable document format (PDF), each of which shall be deemed an original, and all of which,
14 when 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 the settlement, which
19 motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to
20 mutually employ their best efforts, including those of their counsel, to support the entry of this
21 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
22 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for
23 approval, responding to any objection that any third-party may make, and appearing at the hearing
24 before the Court if so requested.

25 **11. ENFORCEMENT**

26 Prior to bringing any motion or order to show cause to enforce the terms of this Consent
27 Judgment, a Party seeking to enforce the Consent Judgment shall provide the other Party written
28 notice of the alleged violation. The Parties shall meet and confer in an effort to try to reach

1 agreement on an appropriate cure for the alleged violation. Embryo shall not bring an enforcement
2 action or institute a judicial proceeding if Frito-Lay demonstrates it has complied with the
3 requirements of Section 2. Frito-Lay is entitled to designate such information as confidential.

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

8 **12. MODIFICATION**

9 **12.1 Modification.** This Consent Judgment may be modified only by: (i) a written
10 agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a
11 successful motion or application of any Party, and the entry of a modified consent judgment thereon
12 by the Court.

13 **12.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
14 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the
15 Consent Judgment.

16 **12.3 Change in Proposition 65.** If Proposition 65 or its implementing regulations
17 (including but not limited to the published "no significant risk level" for acrylamide set forth at Cal.
18 Code Regs., tit. 27, section 25705, subdivision (c)(2) or any "alternative risk level" adopted by
19 regulation or court decision) are changed from their terms as they exist on the date of entry of this
20 Consent Judgment, or if OEHHA takes some other final regulatory action that determines that
21 warnings for acrylamide are not required or modifies the standard for warnings for acrylamide, then
22 Frito-Lay may seek to modify this Consent Judgment.

23 **12.4 Other Court Decisions.** If a final decision of a court determines that warnings for
24 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are
25 preempted or otherwise unlawful or unconstitutional, then Frito-Lay may move to modify this
26 Consent Judgment to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive
27 results.
28

1 **12.5. Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
2 agency of the federal government, including, but not limited to, the U.S. Food and Drug
3 Administration, states through any guidance, regulation or legally binding act that federal law has
4 preemptive effect on any of the requirements of this Consent Judgment, then this Consent Judgment
5 may be modified in accordance with the procedure for noticed motions set forth in Section 12.1 to
6 bring it into compliance with or avoid conflict with federal law.

7 **12.6 Scientific Studies.** If an agency of the federal government, including, but not limited
8 to the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally
9 binding act, following a review of scientific studies and following public notice and comment, a
10 cancer potency estimate for acrylamide that equates to a no significant risk level higher than 0.2
11 micrograms per day, then Frito-Lay shall be entitled to seek a modification of this Consent Judgment.

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

17 **13. RETENTION OF JURISDICTION**

18 This Court shall retain jurisdiction of this matter to implement or modify the Consent
19 Judgment. Notwithstanding the provisions of Section 12, nothing in this Consent Judgment limits or
20 affects the Court's authority to modify this Consent Judgment as provided by law.

21 **14. AUTHORIZATION**

22 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
23 have read, understand, and agree to all of the terms and conditions contained herein.
24
25
26
27
28

1 **AGREED TO:**

2 Date: 6/12/19

3
4 By: 

5 Kim Embry

AGREED TO:

6 Date: 6/11/19

7 By: 

8 Frito-Lay, Inc.