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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 STEVEN-ROBERT ORIGINALS, LLC dba
25 TICKLEBELLY DESSERTS, a Colorado
26 Limited Liability Corporation, and DOES 1
27 through 100, inclusive

28 Defendants.

Case No. RG2005726

**[PROPOSED] CONSENT JUDGMENT AS
TO STEVEN-ROBERT ORIGINALS,
LLC dba TICKLEBELLY DESSERTS**

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 Steven-Robert Originals, LLC dba Ticklebelly Desserts (“Defendant” or “Ticklebelly”) on the
5 other hand, with Embry and Defendant individually referred to as a “Party” and collectively as the
6 “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 Embry alleges that Defendant manufactures, imports, sells, and distributes for sale in
17 California, Ticklebelly Cakebars Dark Chocolate that contains Acrylamide. Embry further alleges
18 that Defendant does so without providing a sufficient health hazard warning as required by
19 Proposition 65 and related regulations. Pursuant to Proposition 65, Acrylamide is listed as a
20 chemical known to cause cancer and reproductive harm.

21 **1.5 Product Description**

22 For purposes of this Consent Judgment, the “Product” or “Products” are defined as
23 Defendant’s cake bar products including, but not limited to, Ticklebelly Cakebars Dark Chocolate,
24 that allegedly contain Acrylamide that are manufactured, imported, sold, or distributed for sale in
25 California by Defendant and Releasees.

26 **1.6 Notices of Violation**

27 On June 3, 2019, Embry served Defendant, the California Attorney General, and all other
28 required public enforcement agencies with a 60-Day Notice of Violation of California Health and

1 Safety Code section 25249.6 *et seq.* (“Notice”). The Notice alleged that Defendant violated
2 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards
3 associated with exposures to Acrylamide contained in the Products. No public enforcer has
4 commenced or is otherwise prosecuting an action to enforce the violations alleged in the Notice.

5 **1.7 Complaint**

6 On March 6, 2020, Embry filed a Complaint against Defendant for the alleged violations of
7 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 Notice 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
13 of law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
14 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
15 not, however, diminish or otherwise affect Defendant’s obligations, responsibilities, and duties under
16 this Consent Judgment, subject to subsequent modifications thereof or Court orders regarding any
17 such obligation, responsibility, and/or duty.

18 **1.9 Jurisdiction**

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

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
25 the Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

26 **1.11 Compliance Date**

27 For the purposes of this Consent Judgment, the term “Compliance Date” means 180 days
28 after the Effective Date.

1 **2. INJUNCTIVE RELIEF**

2 **2.1.1 Reformulation of the Product**

3 Any Products that are manufactured by Ticklebelly on and after the Compliance Date that are
4 thereafter sold in California or distributed for sale in California shall not exceed 250 parts per billion
5 ("ppb") by weight (the "Average Level").

6 **2.1.2**

7 The acrylamide concentration of any individual unit, of the Products sold in California after
8 the Compliance Date, shall not exceed 300 ppb by weight (the "Unit Level").

9 **2.2 Testing**

10 (a) Compliance with the Average Level and the Unit Level shall be determined using
11 LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), GC/MS (Gas Chromatography/Mass
12 Spectrometry), or any other testing method agreed upon by the Parties in a test performed on the
13 entire Product by a laboratory accredited by the State of California, a federal agency, or a nationally
14 recognized organization.

15 (b) The Average Level is determined by randomly selecting and testing, over a daily
16 production run of Products, five samples, one at the start, three during, and one at the end of the run,
17 at each location that supplies such Products in California ("Sampling Data"). The mean and standard
18 deviation shall be calculated using the Sampling Data. Any data points that are more than three
19 standard deviations outside the mean shall be discarded once, and the mean and standard deviation
20 recalculated using the remaining data points. The arithmetic mean determined in accordance with
21 this procedure shall be deemed the "Average Level."

22 (c) For at least three consecutive years after the Compliance Date, Ticklebelly shall
23 arrange for testing under Section 2.2. The testing shall be at least once per year, with the first testing
24 occurring prior to the Compliance Date. No further testing shall be required unless Ticklebelly
25 materially modifies the ingredients or cooking process of a Product, at which point testing on the
26 modified product only shall commence on an annual 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 obligation of Ticklebelly does not apply to these Products manufactured
6 on or prior to the Compliance Date.

7 **2.4 Warnings for Products**

8 To the extent defendants ship or sell Products to California after the Compliance Date that do
9 not meet the reformulation standards set forth in sections 2.1.1 and 2.1.2 above, defendants will
10 provide warnings on such Products that comply with Proposition 65's warning regulations, including
11 27 California Code of Regulations Section 25600 et seq. Defendants need not provide any such
12 warnings on or for Products sold into California that meet the reformulation standards of sections
13 2.1.1 and 2.1.2.

14 **3. MONETARY SETTLEMENT TERMS**

15 **3.1 Settlement Amount**

16 Defendant shall pay fifty thousand dollars (\$50,000)_ in settlement and total satisfaction of
17 all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes
18 civil penalties in the amount of \$5,000 pursuant to Health and Safety Code section 25249.7(b) and
19 attorney's fees and costs in the amount of \$45,000 pursuant to Code of Civil Procedure section
20 1021.5 and Health and Safety Code section 25249 et seq.

21 **3.2 Civil Penalty**

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

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

27 Noam Glick
28 Glick Law Group

225 Broadway, Suite 2100
San Diego, CA 92101

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

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

Ticklebelly agrees to provide Embry's counsel with a copy of the check payable to OEHHHA simultaneous with its penalty payment 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.

1 **3.3 Attorney's Fees and Costs**

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

6 Defendant shall provide its payment to Embry's counsel in two checks, divided equally,
7 payable to Glick Law Group, PC (\$22,500) and Nicholas & Tomasevic, LLP (\$22,500) respectively.
8 The addresses for these two entities are:

9 Noam Glick
10 Glick Law Group
11 225 Broadway, Suite 2100
12 San Diego, CA 92101

13 Crag Nicholas
14 Nicholas & Tomasevic, LLP
15 225 Broadway, 19th Floor
16 San Diego, CA 92101

17 **3.4 Timing**

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

19 **4. CLAIMS COVERED AND RELEASED**

20 **4.1 Embry's Public Release of Proposition 65 Claims**

21 For any claim or violation arising under Proposition 65 alleging a failure to warn about
22 exposures to Acrylamide from Products or related products manufactured, imported, sold, or
23 distributed by Defendant prior to the Compliance Date, Embry, acting on her own behalf and in the
24 public interest, releases Defendant of any and all liability. This includes Defendant's owners,
25 parents, subsidiaries, affiliated entities under common ownership, its directors, officers, agents,
26 employees, attorneys, and each entity to whom Defendant directly or indirectly distributes or sells
27 the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers,
28 franchisees, cooperative members and licensees, including but not limited to Ticklebelly
 (collectively, the "Releasees"). Releasees include defendant, its parent, and all subsidiaries and
 affiliates thereof and their respective employees, agents, and assigns that sell Defendant's Products.

1 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
2 with respect to the alleged or actual failure to warn about exposures to Acrylamide from Products
3 manufactured, imported, sold, or distributed by Defendant after the Effective Date. This Consent
4 Judgment is a full, final and binding resolution of all claims that were or could have been asserted
5 against Defendant and/or Releasees for failure to provide warnings for alleged exposures to
6 Acrylamide contained in Products.

7 **4.2 Embry's Individual Release of Claims**

8 Embry, in her individual capacity, also provides a release to Defendant and/or Releasees,
9 which shall be a full and final accord and satisfaction of as well as a bar to all actions, causes of
10 action, obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands
11 by Embry of any nature, character, or kind, whether known or unknown, suspected or unsuspected,
12 arising out of alleged or actual exposures to Acrylamide in Products manufactured, imported, sold,
13 or distributed by Defendant before the Compliance Date.

14 **4.3 Defendant's Release of Embry**

15 Defendant, on its own behalf, and on behalf of Releasees as well as its past and current
16 agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims
17 against Embry and her attorneys and other representatives, for any and all actions taken or
18 statements made by Embry and her attorneys and other representatives, whether in the course of
19 investigating claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with
20 respect to the Products.

21 **5. COURT APPROVAL**

22 This Consent Judgment is not effective until it is approved and entered by the Court and shall
23 be null and void if it is not approved and entered by the Court within one year after it has been fully
24 submitted to the Court by the Parties, or by such additional time as the Parties may agree to in
25 writing.
26
27
28

1 **6. SEVERABILITY**

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

5 **7. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the state of California
7 for all purposes and apply within the state of California. In the event that Proposition 65 is repealed,
8 or is otherwise rendered inapplicable for reasons, including but not limited to changes in the law or a
9 final, unappealable order of a court of competent jurisdiction, then Defendant may provide written
10 notice to Embry of any asserted change, and shall have no further injunctive obligations pursuant to
11 this Consent Judgment with respect to, and to the extent that, the Products are so affected. None of
12 the terms of this Consent Judgment shall apply to Products sold outside the State of California.

13 **8. NOTICE**

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

17 For Defendant:

18 James A. Geocaris
19 Lewis Brisbois
20 650 Town Center Drive, Suite 1400
21 Costa Mesa, CA 92626

22 For Embry:

23 Noam Glick
24 Glick Law Group, P.C.
25 225 Broadway, 21st Floor
26 San Diego, CA 92101

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

29 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

1 **10. POST EXECUTION ACTIVITIES**

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

11 **11. MODIFICATION**

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

15 **12. AUTHORIZATION**

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

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

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


23 **14. ENTIRE AGREEMENT**

24 This Consent Judgment contains the sole and entire agreement and understanding of the
25 Parties with respect to the entire subject matter herein, and any and all prior discussions,
26 negotiations, commitments, and understandings related hereto. No representations, oral or otherwise,
27 express or implied, other than those contained herein have been made by any Party. No other
28

1 agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist or to
2 bind any Party.


3
4 **AGREED TO:**

5 Date: 4/24/2020

6 
7 By: _____
8 KIM EMBRY

AGREED TO BY (DEFENDANT)

Date: 4-21-20

By: 
STEVEN-ROBERT ORIGINAL LLC, dba
TICKLEBELLY DESSERTS