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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF ALAMEDA**

10 KIM EMBRY, an individual

11 Plaintiff,

12 v.

13 JOHN B. SANFILIPPO & SON, INC., and
DOES 1 through 100, inclusive

14 Defendants.
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Case No. RG 19025632

[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 John B. Sanfilippo & Sons, Inc. (“Sanfilippo”) with Embry and Sanfilippo each
5 individually referred to 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 Sanfilippo 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 Sanfilippo manufactures, imports, sells, and/or distributes for sale roasted
16 almonds that contain acrylamide and that Proposition 65 warnings are required for such products.
17 Embry further alleges that Sanfilippo does so without providing a sufficient health hazard warning as
18 required by Proposition 65 and related Regulations. Pursuant to Proposition 65, acrylamide is listed as
19 a chemical known to cause cancer and reproductive harm. Sanfilippo denies that warnings are required
20 under Proposition 65 for any exposures to acrylamide in roasted almonds, and Sanfilippo maintains
21 that it has complied with all applicable federal and state laws, including but not limited to Proposition
22 65.

23 **1.5 Notice of Violation**

24 On April 27, 2018, Embry served Target Corporation (“Target”), the California Attorney
25 General, and all other required public enforcement agencies with a 60-Day Notice of Violation of
26 California Health and Safety Code section 25249.6 *et seq.* (“Target Notice”). The Notice alleges that
27 Target violated Proposition 65 by failing to sufficiently warn consumers in California of the health
28 hazards associated with exposures to acrylamide contained in its “Archer Farms Roasted Almonds.”

1 On May 3, 2018, Embry served Rite Aid Corporation (“Rite Aid”), the California Attorney
2 General, and all other required public enforcement agencies with a 60-Day Notice of Violation of
3 California Health and Safety Code section 25249.6 *et seq.* (“Rite Aid Notice”). This Notice alleges
4 that Rite Aid violated Proposition 65 by failing to sufficiently warn consumers in California of the
5 health hazards associated with exposures to acrylamide contained in its “Big Win Roasted Almonds
6 Salted.”

7 On June 5, 2019, Embry served Sanfilippo a supplemental 60-Day Notice of Violation to
8 claim that Sanfilippo violated Proposition 65 by failing to warn consumers in California of alleged
9 exposures to acrylamide in roasted almonds (“Amended Notice”). The Target Notice, Rite Aid Notice
10 and Amended Notice are referred to collectively as the “Notices.”

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

13 **1.6 Product Description**

14 For purposes of this Consent Judgment, “Product” or “Products” are defined as roasted almond
15 products containing acrylamide that are manufactured, purchased, distributed, or sold by Sanfilippo
16 and which are sold in California.

17 **1.7 Other Releases**

18 This Consent Judgment expressly encompasses all of the subject Products, whether sold under
19 Sanfilippo’s own brand name, or some other private label, at all grocery, retail, and other locations
20 and sales channels, as well as derivative products containing other ingredients made with the
21 Products.

22 **1.8 Complaint**

23 On June 25, 2019, Embry filed a Complaint against Sanfilippo for the alleged violations of
24 Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”). Upon entry
25 of this Consent Judgment, the Complaint shall be deemed amended *nunc pro tunc* to include allegations
26 asserted in the Amended Notice as to the Products.

1 **1.9 No Admission**

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

6 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
7 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
8 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law.
9 This Section shall not, however, diminish or otherwise affect Sanfilippo’s obligations, responsibilities,
10 and duties under this Consent Judgment.

11 **1.10 Jurisdiction**

12 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
13 Court has jurisdiction over Sanfilippo as to the allegations in the Complaint, that venue is proper in the
14 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
15 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

16 **1.11 Effective Date and Compliance Date**

17 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
18 Court grants the motion for approval of this Consent Judgment, as discussed in Section 5. Due to the
19 fact that the Products are subject to other regulatory requirements and any reformulation must ensure
20 compliance with these other applicable regulatory requirements, the “Compliance Date” is the date that
21 is six (6) months after the Effective Date.

22 **2. INJUNCTIVE RELIEF**

23 **2.1 Reformulation of the Product**

24 Any Products that are manufactured by Sanfilippo on and after the Compliance Date that are
25 thereafter sold in California or distributed for sale in California shall not exceed 225 ppb on average
26 for acrylamide, as set forth in this Section 2. As used in this Section 2.1, “distributed for sale in
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1 California” means to directly ship a Product into California for sale in California or to sell a Product to
2 a distributor that Sanfilippo knows will sell the Product in California.

3 **2.2 Testing**

4 (a) Compliance with the Average Level shall be determined using LC-MS/MS (Liquid
5 Chromatograph-Mass Spectrometry), GC/MS (Gas Chromatography/Mass Spectrometry), or any other
6 testing method agreed upon by the Parties. On the Compliance Date, and continuing thereafter,
7 Sanfilippo shall not manufacture any Product that will be sold or offered for sale in California that
8 exceeds the following acrylamide concentration limits, such concentration to be determined by use of
9 a test performed by a laboratory accredited by the State of California, a federal agency, or a nationally
10 recognized accrediting organization.

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

19 (c) For at least three consecutive years after the Compliance Date, Sanfilippo shall arrange
20 for testing under Section 2.2. The testing shall be at least once per year, with the first testing occurring
21 prior to the Compliance Date. No further testing shall be required unless Sanfilippo materially modifies
22 its almond roasting processes, at which point testing shall recommence on an annual basis for at least
23 three years.

24 **2.2 Sell-Through Period**

25 Notwithstanding anything else in this Consent Judgment, the Products that are manufactured
26 on or prior to the Compliance Date shall be subject to the release of liability pursuant to this Consent
27 Judgment, without regard to when such Products were, or are in the future, distributed or sold to
28

1 customers. As a result, the obligations of Sanfilippo, or any Releases (if applicable), do not apply to
2 these Products manufactured on or prior to the Compliance Date.

3 **3. MONETARY SETTLEMENT TERMS**

4 **3.1 Settlement Amount**

5 Sanfilippo shall pay seventy-five thousand dollars (\$75,000.00) in settlement and total
6 satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment. This
7 includes civil penalties in the amount of eight thousand dollars (\$8,000.00) pursuant to Health and
8 Safety Code section 25249.7(b) and attorney's fees and costs in the amount of sixty-seven thousand
9 dollars (\$67,000.00) pursuant to Code of Civil Procedure section 1021.5.

10 **3.2 Civil Penalty**

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

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

16
17 Noam Glick
18 Glick Law Group
19 225 Broadway, Suite 2100
20 San Diego, CA 92101

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

22 For United States Postal Service Delivery:

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

28 For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street

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

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

- 6 • "Kim Embry" whose address and tax identification number shall be provided within five
7 (5) days after this Consent Judgment is fully executed by the Parties;
- 8 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2;
- 9 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.3; and
- 10 • "Office of Environmental Health Hazard Assessment" at 1001 I Street, Sacramento, CA
11 95814.

12 **3.3 Attorney's Fees and Costs**

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

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

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

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

28 **3.4 Timing**

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

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 manufactured, imported, sold, or distributed by Sanfilippo
5 prior to the Compliance Date, Embry, acting on her own behalf and in the public interest, releases
6 Sanfilippo of any and all liability. This includes parents, subsidiaries, affiliated entities under common
7 ownership, its directors, officers, principals, agents, employees, attorneys, insurers, accountants,
8 predecessors, successors, and assigns, and each entity to whom Sanfilippo directly or indirectly
9 distributes, ships, or sells the Products, including but not limited to, downstream distributors,
10 wholesalers, customers, retailers (including, but not limited to, Target and Rite Aid), franchisees,
11 cooperative members, and licensees, and their owners, directors, officers, agents, principals,
12 employees, attorneys, insurers, accountants, representatives, predecessors, successors, and assigns
13 (collectively, the "Releasees") of all claims that have been or could have been asserted under
14 Proposition 65 for any exposures to acrylamide from the Products manufactured, purchased,
15 distributed, or sold by Sanfilippo before the Compliance Date. Compliance with the terms of this
16 Consent Judgment constitutes compliance with Proposition 65 with respect to any exposures to
17 acrylamide from Products manufactured, imported, sold, or distributed by Sanfilippo after the
18 Compliance Date. This Consent Judgment is a full, final and binding resolution of all claims that
19 were or could have been asserted against Sanfilippo and/or Releasees for failure to provide warnings
20 for alleged exposures to acrylamide contained in Products.

21 **4.2 Embry's Individual Release of Claims**

22 Embry, in her individual capacity, also waives all rights to institute or participate in, directly or
23 indirectly, any form of legal action, and discharges and releases all claims, actions, causes of action
24 (in law or in equity), suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses,
25 expenses, and fees (including, but not limited to, investigation fees, expert fees, and attorney's fees),
26 and expenses (collectively, "Claims") as to all Releasees, under Proposition 65 or any statutory or
27 common law from the alleged failure to provide warnings for any exposures to acrylamide, or for
28 causing any exposures to acrylamide, in the Products. The release in this Section 4.2 is effective as a

1 which shall be a full and final accord and satisfaction of as well as a bar to all actions, causes of
2 action, obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands
3 by Embry of any nature, character, or kind, whether known or unknown, or suspected or unsuspected,
4 arising out of alleged or actual exposures to acrylamide in Products manufactured, imported, sold, or
5 distributed by Sanfilippo before the Compliance Date.

6 **4.3 Sanfilippo's Release of Embry**

7 Sanfilippo, on its own behalf as well as its past and current agents, representatives, attorneys,
8 successors, and assignees, hereby waives any and all claims against Embry and her attorneys and other
9 representatives, for any and all actions taken or statements made by Embry and her attorneys and other
10 representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition
11 65 against it, in this matter or with respect to the Products.

12 **4.4 Mutual Release of Known and Unknown Claims**

13 Embry, on behalf of herself and her agents, attorneys, representatives, successors, and assigns,
14 in her respective individual capacity only and not in her representative capacity, and Sanfilippo, each
15 provide a general release of the other including the Releasees herein which shall be effective as a full
16 and final accord and satisfaction, as a bar to all claims of any nature, character or kind, known or
17 unknown, suspected or unsuspected, arising out of alleged violations of Proposition 65 with respect
18 to the Products. Embry and Sanfilippo each acknowledge that they are each familiar with Section
19 1542 of the California Civil Code, which provides as follows:

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

26 Embry and Sanfilippo understand and acknowledge the significance and consequence of this waiver
27 of California Civil Code section 1542.
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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 one year after it has been fully
4 executed 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 held
7 by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

8 **7. GOVERNING LAW**

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

11 **8. NOTICE**

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

15 For Sanfilippo:

16 Steven Siros
17 Jenner & Block LLP
18 353 N. Clark St.
Chicago, IL 60654-3456

For Embry:

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

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

21 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

22 This Consent Judgment may be executed in counterparts and by signature through facsimile or
23 portable document format (PDF), each of which shall be deemed an original, and all of which, when
24 taken together, shall constitute one and the same document.

25 **10. POST EXECUTION ACTIVITIES**

26 Embry agrees to comply with the reporting form requirements referenced in Health and Safety
27 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
28 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which

1 motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to
2 mutually employ their best efforts, including those of their counsel, to support the entry of this
3 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
4 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for approval,
5 responding to any objection that any third-party may make, and appearing at the hearing before the
6 Court if so requested.

7 **11. ENFORCEMENT**

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

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

18 19 **12. MODIFICATION**

20 **12.1 Modification.** This Consent Judgment may be modified only by: (i) a written agreement
21 of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a successful motion
22 or application of any Party, and the entry of a modified consent judgment thereon by the Court.

23 **12.2 Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
24 attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the
25 Consent Judgment.

26 **12.3 Change in Proposition 65.** If Proposition 65 or its implementing regulations
27 (including but not limited to the published “no significant risk level” for acrylamide set forth at Cal.
28 Code Regs., tit. 27, section 25705, subdivision (c)(2) or any “alternative risk level” adopted by

1 regulation or court decision) are changed from their terms as they exist on the date of entry of this
2 Consent Judgment, or if OEHHA takes some other final regulatory action that determines that
3 warnings for acrylamide are not required or modifies the standard for warnings for acrylamide, then
4 Sanfilippo may seek to modify this Consent Judgment.

5 **12.4 Other Court Decisions.** If a final decision of a court determines that warnings for
6 acrylamide exposures or that enforcement of Proposition 65 claims for acrylamide exposures are
7 preempted or otherwise unlawful or unconstitutional, then Sanfilippo may move to modify this
8 Consent Judgment to conform to such ruling in order to avoid unfair, inconsistent, or anti-competitive
9 results.

10 **12.5. Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
11 agency of the federal government, including, but not limited to, the U.S. Food and Drug
12 Administration, states through any guidance, regulation or legally binding act that federal law has
13 preemptive effect on any of the requirements of this Consent Judgment, then this Consent Judgment
14 may be modified in accordance with the procedure for noticed motions set forth in Section 8 to bring
15 it into compliance with or avoid conflict with federal law.

16 **12.6 Scientific Studies.** If an agency of the federal government, including, but not limited
17 to the U.S. Food and Drug Administration, states through any guidance, regulation, or other legally
18 binding act, following a review of scientific studies and following public notice and comment, a
19 cancer potency estimate for acrylamide that equates to a no significant risk level higher than 0.2
20 micrograms per day, then Sanfilippo shall be entitled to seek a modification of this Consent
21 Judgment.

22 **12.7** Before filing any motion to modify the Consent Judgment, Sanfilippo shall provide
23 written notice to Embry to initiate the meet and confer procedure in Section 12.2. If the Parties do
24 not agree on the proposed modification during informal meet and confer efforts, Sanfilippo may file a
25 motion to modify the Consent Judgment within sixty (60) days of the date of the written notice that
26 Sanfilippo provides to Embry under this Section 12.

1 **13. RETENTION OF JURISDICTION**

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

5 **14. AUTHORIZATION**

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

8
9 **AGREED TO:**

10 Date: July 8, 2019

11
12 By 
13 KIM EMBRY

AGREED TO:

14 Date: 7/9/19

15 By: 

16 Michael J. Valenti, CFO
17 John B. Sanfilippo & Son, Inc.