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8 Attorneys for Plaintiff
9 Kim Embry

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **IN AND FOR THE COUNTY OF ALAMEDA**

13 KIM EMBRY, an individual,

14 Plaintiff,

15 v.

16 HAYDEN VALLEY FOODS, INC., an Ohio
corporation, SPROUTS FARMERS
17 MARKET, a Delaware corporation, DOES 1
through 100, inclusive,

18 Defendants.
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Case No.: RG20052449

[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 is entered into by and between Kim Embry (“Embry” or “Plaintiff”),
4 on the one hand, and Hayden Valley Foods, Inc. (“Hayden Valley Foods” or “Defendant”), on the other
5 hand, with Embry and Hayden Valley Foods each individually referred to as a “Party” and collectively
6 as the “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 chemicals and to improve human health by reducing
10 exposures to chemicals in consumer products.

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 Acrylamide is listed pursuant to Proposition 65 as a chemical that is known to the State of
17 California to cause cancer and birth defects and other reproductive harm. Embry alleges that Hayden
18 Valley Foods manufactures, imports, sells, and distributes for sale in the State of California roasted
19 almond products that are covered with various coatings, including, but not limited to, confectionary
20 coatings, such as chocolate, and non-confectionary coatings, such as salts and seasonings, some of
21 which are known to contain acrylamide, and roasted almond products that are uncoated (collectively
22 “Roasted Almond Products”). Embry further alleged that Hayden Valley Foods manufactures, imports,
23 sells, and distributes for sale in the State of California dark chocolate covered peanuts (“Dark Chocolate
24 Peanut Products”). Embry further alleged that the Roasted Almond Products and the Dark Chocolate
25 Peanut Products expose consumers in California to acrylamide without having first provided them a
26 clear and reasonable warning for the exposure as Plaintiff alleges is required by Proposition 65. Hayden
27 Valley Foods denies Embry’s allegations that any of its products require Proposition 65 warnings.

1 **1.5 Product Description**

2 The products covered by this Consent Judgment expressly include all Roasted Almond
3 Products that are manufactured and/or distributed for sale in California by Hayden Valley Foods,
4 Defendant Releasees and Downstream Defendant Releasees¹ (“Covered Products”) and all Dark
5 Chocolate Peanut Products that are manufactured and/or distributed for sale in California by Hayden
6 Valley Foods, Defendant Releasees and Downstream Defendant Releasees (“Additional Covered
7 Products”). The Covered Products and Additional Covered Products include Covered Products and
8 Additional Covered Products sold in Hayden Valley Foods’ own brand names, Covered Products and
9 Additional Covered Products sold under private label arrangements entered into with retailers or
10 others and Covered Products and Additional Covered Products sold to re-baggers, at all grocery,
11 retail, and other locations and sales channels.

12 **1.6 Notices of Violation**

13 On July 3, 2019, Embry served Hayden Valley Foods, Sprouts Farmers Market, Inc.
14 (“Sprouts”) and all requisite public enforcement agencies with a 60-Day Notice of Violation of
15 California Health & Safety Code section 25249.6 *et seq.* (“Dark Chocolate Almonds Notice”). The
16 Notice alleges that Hayden Valley Foods violated Proposition 65 by failing to sufficiently warn
17 consumers in California of the health hazards associated with exposures to acrylamide contained in
18 its “Hayden Valley Foods Dark Chocolate Almonds.”

19 On August 2, 2019 and August 14, 2019, Embry served Hayden Valley Foods, Sprouts and all
20 requisite public enforcement agencies with a 60-Day Notice of Violation of California Health &
21 Safety Code section 25249.6 *et seq.* (“Dark Chocolate Peanuts Notice”). The Notice alleges that
22 Hayden Valley Foods violated Proposition 65 by failing to sufficiently warn consumers in California
23 of the health hazards associated with exposures to acrylamide contained in its “Hayden Valley Foods
24 Dark Chocolate Peanuts.”

25 On May 15, 2020, Embry served Hayden Valley Foods, Sprouts and all requisite public
26 enforcement agencies with an Amended 60-Day Notice of Violation of California Health & Safety

27 _____
28 ¹ As the term “Defendant Releasees” and “Downstream Defendant Releasees” are defined in
this Consent Judgment.

1 Code section 25249.6 *et seq.* (“Operative Notice”). The Notice states that it amends the original
2 notice dated July 3, 2019, as discussed above, and that “[t]his amendment includes all Hayden Valley
3 Foods roasted almonds products.” The Notice alleges that Hayden Valley Foods violated Proposition
4 65 by failing to sufficiently warn consumers in California of the health hazards associated with
5 exposures to acrylamide contained in its “Hayden Valley Foods Roasted Almond Products.”

6 On May 18, 2020, Embry withdrew the Dark Chocolate Peanuts Notice.

7 The Notices of Violation set forth in this Section 1.6 are collectively referred to hereinafter as
8 the “Notices.” No public enforcer has commenced or is otherwise prosecuting an action to enforce
9 the violations alleged in the Notices.

10 **1.7 Status of Pleadings**

11 On January 29, 2020, Embry filed a Complaint against Hayden Valley Foods and Sprouts for
12 the alleged violations of Health & Safety Code section 25249.6 that are the subject of the Dark
13 Chocolate Almonds Notice.

14 On _____, Embry filed a First Amended Complaint adding allegations against
15 Hayden Valley Foods and Sprouts for the alleged violations claimed in the Operative Notice (“First
16 Amended Complaint”).

17 **1.8 No Admission**

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

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment and the First Amended Complaint only, the Parties
3 stipulate that this Court has jurisdiction over Hayden Valley Foods as to the allegations in the First
4 Amended Complaint, that venue is proper in the County of Alameda, and that the Court has jurisdiction
5 to enter and enforce the provisions of this Consent Judgment.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on which
8 Embry serves notice on Hayden Valley Foods that the Court has approved and entered this Consent
9 Judgment.

10 **2. INJUNCTIVE RELIEF**

11 **2.1** For purposes of this Consent Judgment, the term “Compliance Date” is the date six (6)
12 months after the Effective Date.

13 **2.2** Commencing on the “Compliance Date”, and continuing thereafter, Hayden Valley
14 Foods shall only manufacture, supply and distribute, or cause to manufacture, supply and distribute, in
15 California, Covered Products, regardless of type, form, or branding, that, as packaged, contain
16 acrylamide concentrations of 0.225 parts per million (“ppm”) or less as an average of at least three (3)
17 samples. Such compliance may be demonstrated by Hayden Valley Foods using at least three (3)
18 samples of the same Covered Product (however branded). Samples shall be measured by means of a
19 test performed by an accredited laboratory using either GC/MS (Gas Chromatograph/Mass
20 Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), or any other testing method
21 agreed upon by the Parties.

22 **2.3** For Covered Products that contain acrylamide in a concentration exceeding the ppm
23 level set forth in Section 2.2 above, and which are manufactured, supplied and distributed for sale or
24 use in California on or after the Compliance Date, Hayden Valley Foods shall provide one of the
25 following Proposition 65 warnings:

26
27 **CA Prop 65 Warning:** Consuming this product can expose you to chemicals, including
28 acrylamide, which are known to the State of California to cause cancer. For more information
go to www.P65Warnings.ca.gov/food.

1 or

2 **WARNING: Cancer – www.P65Warnings.ca.gov/food**

3 When required, the above warning statements shall be placed on the product’s package in at least six
4 (6) point font and either set within a box or separated from other warning text by at least one line so
5 as to be able to be read and understood by an ordinary individual prior to purchase or use. If the
6 product’s package provides other health-related information in Spanish, the warning statement shall
7 also be provided in Spanish.

8 **2.4** In the event Plaintiff enters into an agreement or consent judgment with any other person
9 supplying products substantially similar to Covered Products addressing alleged violations of
10 Proposition 65 with respect to exposures to acrylamide that provides for less stringent standards than
11 that set forth in Section 2.2 above; or if a judgment is entered in any Proposition 65 case with respect
12 to exposures to acrylamide from products substantially similar to Covered Products that provides for
13 less stringent requirements than that set forth in Section 2.2 above; or if the California Office of Health
14 Hazard Assessment adopts a regulation or safe use determination, or issues an interpretative guideline
15 that exempts Covered Products or products substantially similar to Covered Products from meeting the
16 requirements of Proposition 65; or if Proposition 65 is determined to be preempted by federal law or a
17 burden on First Amendment rights with respect to acrylamide in Covered Products or products
18 substantially similar to Covered Products, then Hayden Valley Foods may seek a Court-approved
19 modification of this Consent Judgment, and without the objection of the Plaintiff, to conform or
20 eliminate the terms of this Section 2 accordingly. Any such modification shall have no effect on the
21 financial obligations set forth herein.

22 **2.5** Notwithstanding any other provision and requirement of this Consent Judgment,
23 Covered Products and Additional Covered Products that are manufactured, supplied and distributed, or
24 caused to be manufactured, supplied and distributed, prior to the Compliance Date shall be subject to
25 the release of liability pursuant to this Consent Judgment, without regard to when such products were,
26 or are in the future, distributed or sold to consumers.

1 **3. STATUTORY PENALTY PAYMENTS**

2 **3.1 Civil Penalty**

3 Hayden Valley Foods shall pay \$5,000 in civil penalties pursuant to California Health & Safety
4 Code section 25249.7(b) in accordance with this Section. This penalty payment shall be allocated in
5 accordance with California Health & Safety Code section 25249.12(c)(1) and (d), with seventy-five
6 percent (75%) of the funds remitted to the California Office of Environmental Health Hazard
7 Assessment (“OEHHA”) and the remaining twenty-five percent (25%) of the penalty remitted to
8 Embry. More specifically, within twenty (20) business days following the Effective Date, Hayden
9 Valley Foods shall issue two separate company checks for the civil penalty payment to (a) “OEHHA”
10 in the amount of \$3,750 and with the memo line on the check indicating “Prop 65 Penalties – Embry
11 v. Hayden Valley Foods” (Hayden Valley Foods may reference OEHHA’s Tax Identification Number
12 of 68-0284486 for this check); and (b) “Kim Embry” in the amount of \$1,250 (for which Embry shall
13 provide Defendant a completed IRS Form W-9 with a tax identification number within two days
14 following the Effective Date, if not beforehand). These checks shall be delivered to the addresses listed
15 in Section 3.3 below.

16 **3.2 Payment Delivery**

17 (a) Payment to Embry shall be delivered to the following address:

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

22 (b) Payment to OEHHA shall be delivered to one of the following addresses:

23 For United States Postal Service Delivery:

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

or

For Non-United States Postal Service Delivery:

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

4. REIMBURSEMENT OF FEES AND COSTS

Provided that Plaintiff and her counsel have first provided Hayden Valley Foods with complete and executed 2019 versions of IRS Form W-9s, Hayden Valley Foods shall pay Embry a total of \$50,000 for fees and costs incurred as a result of investigating, bringing this matter to Defendant's attention, and negotiating a settlement in the public interest. Defendant shall make \$25,000 of this payment by check payable to "Nicholas & Tomasevic, LLP" (EIN 46-3474065). Defendant shall make the other \$25,000 of this payment by check payable to "Glick Law Group" (EIN 47-1838518). The payments shall be made to the addresses listed in Section 9 below within twenty (20) business days following the Effective Date.

5. LIABILITY RELEASES

5.1 Embry's Public Release of Proposition 65 Claims

Embry, acting on her own behalf and in the public interest, releases Hayden Valley Foods and its affiliated entities (including, without limitation, parent companies, subsidiaries, corporate affiliates and similarly related companies), and all of its and their directors, officers, shareholders, employees, agents, shareholders, successors, assigns and attorneys (collectively, all of the foregoing shall be referred to as "Defendant Releasees"), and all entities to which Defendant Releasees directly or indirectly distribute or sell Covered Products, including, but not limited to, distributors, wholesalers, customers, franchisees, dealers, licensors, licensees, retailers (including, without limitation, Sprouts), re-baggers, and, cooperative members (collectively, "Downstream Defendant Releasees"), from all claims for violations of Proposition 65 based on exposures to acrylamide from Covered Products that are or have been marketed, manufactured, supplied or distributed by Hayden Valley Foods, Defendant Releasees, or Downstream Defendant Releasees prior to the Compliance Date. Compliance with the terms of this Consent Judgment by Defendant shall constitute compliance with Proposition 65 by Defendant, its Defendant Releasees and its Downstream Defendant Releasees with respect to any

1 alleged failure to warn about acrylamide contained in Covered Products. This Consent Judgment is
2 a full, final and binding resolution of all claims that were or could have been asserted against Hayden
3 Valley Foods, Defendant Releasees and Downstream Defendant Releasees for failure to provide
4 warnings for alleged exposures to acrylamide contained in Covered Products.

5 **5.2 Embry's Individual Release of Claims**

6 Embry, in her individual capacity only, and on behalf of herself and her successors, heirs,
7 assigns, agents, and attorneys, also provides a release herein to Defendant, Defendant Releasees and
8 Downstream Defendant Releasees as to all chemicals currently listed under Proposition 65 in all of the
9 Covered Products and all of the Additional Covered Products. In addition, Embry, in her individual
10 capacity only, and on behalf of herself and her successors, heirs, assigns, agents, and attorneys, also
11 provides a release herein to Defendant, Defendant Releasees and Downstream Defendant Releasees
12 which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of
13 action, obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities and demands of
14 any nature, character, or kind, whether known or unknown, suspected or unsuspected, with respect to
15 any other issue concerning the Covered Products and the Additional Covered Products. In this regard,
16 Embry hereby acknowledges that she is familiar with Section 1542 of the California Civil Code, which
17 provides as follows:

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

23 **5.3 Hayden Valley Foods' Release of Embry**

24 Hayden Valley Foods, on its own behalf, and on behalf of Defendant Releasees and
25 Downstream Defendant Releasees as well as its past and current agents, representatives, attorneys,
26 successors, and assignees, hereby waives any and all claims against Embry and her attorneys and other
27 representatives, for any and all actions taken or statements made by Embry and her attorneys and other
28 representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition

1 65 against it, in this matter or with respect to the Covered Products and the Additional Covered
2 Products.

3 **6. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and shall
5 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
6 has been fully executed by the Parties unless the Parties mutually agree to extend that time period due
7 to what they mutually agree are reasonably unforeseen circumstances.

8 **7. SEVERABILITY**

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

11 **8. GOVERNING LAW**

12 The terms of this Consent Judgment shall be governed by the laws of the State of California
13 and apply within the State of California. In the event that Proposition 65 is repealed, or is otherwise
14 rendered inapplicable by reasons, including but not limited to changes in the law, or if the State of
15 California's No Significant Risk Level (pursuant to California Health & Safety Code section 25703)
16 for acrylamide is increased by the Office of Environmental Health Hazard Assessment or through other
17 legal process to a level greater than or equal to 1.0 micrograms/day, then Defendant may provide
18 written notice to Embry of any asserted change in the law and have no further injunctive obligations
19 pursuant to this Consent Judgment, with respect to, and to the extent that, the Covered Products are so
20 affected.

21 **9. NOTICE**

22 Unless specified herein, all correspondence and notice required to be provided by this Consent
23 Judgment shall be in writing and sent by: (i) personal delivery; or (ii) first-class, registered, or certified
24 mail, return receipt requested; or (iii) a recognized overnight or two-day courier on any Party by the
25 other Party to the following addresses:

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1 For Hayden Valley Foods:

2 Hayden Valley Foods
3 Alicia LeHota-Bruno
4 3510 Urbancrest Industrial Drive
5 Urbancrest, OH 43123

6 With a copy to:

7 Rohit Sabnis
8 Burnham Brown
9 A Professional Law Corporation
10 1901 Harrison Street, 14th Floor
11 Oakland, CA 94612
12 rsabnis@burnhambrown.com

13 For Embry:

14 Noam Glick
15 Glick Law Group
16 225 Broadway, 21st Floor
17 San Diego, CA 92101

18 and

19 Craig Nicholas
20 Nicholas & Tomasevic, LLP
21 225 Broadway, 19th Floor
22 San Diego, CA 92101

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

25 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

26 This Consent Judgment may be executed in counterparts and by facsimile signature or portable
27 document form (PDF) signature, each of which shall be deemed an original, and all of which, when
28 taken together, shall constitute one and the same document.

29 **11. POST EXECUTION ACTIVITIES**

30 Embry agrees to comply with the reporting form requirements referenced in Health & Safety
31 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code
32 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement set forth
33 in this Consent Judgment. In furtherance of obtaining such approval, Embry shall file and serve a
34 noticed motion for approval of this Consent Judgment and assure that the Office of the California
35 Attorney General is served with said motion and all supporting papers at least forty-five (45) days prior

1 to the scheduled hearing thereon. The parties agree to mutually employ reasonably good faith efforts,
2 including through their counsel, to support the Court’s approval and entry of this agreement as
3 judgment. For purposes of this Section, “good faith efforts” shall include, at a minimum, supporting
4 the motion for approval, responding to any objection that any third-party may make, and appearing at
5 the hearing before the Court if so requested. If this Consent Judgment is not entered by the Court, it
6 shall be of no force or effect and shall not be introduced into evidence or otherwise used in any
7 proceeding for any purpose.

8 In addition, Embry agrees to execute and file with the Court a dismissal with prejudice of
9 Sprouts within five (5) business days of receipt and clearance of the payments set forth above in
10 Sections 3 and 4.

11 **12. 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 **13. 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 **14. 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 *[Rest of page intentionally left blank]*

1 **15. ENTIRE AGREEMENT**

2 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
3 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,
4 commitments, and understandings related hereto. No representations, oral or otherwise, express or
5 implied, other than those contained herein have been made by any Party. No other agreements, oral
6 or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.
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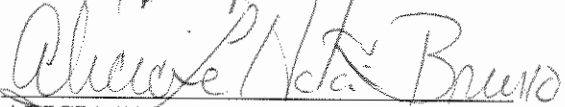
8 **AGREED TO:**

AGREED TO:

9
10 Date: 5/29/20

Date: 5/27/20

11
12 By: 
13 KIM EMBRY

By: 
ALICIA LEHOTA- BRUNO
President
of Hayden Valley Foods

14
15
16 **IT IS SO ORDERED.**

17
18
19 Date: _____

JUDGE OF THE SUPERIOR COURT

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