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14 Attorneys for Plaintiff
15 Kim Embry

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **IN AND FOR THE COUNTY OF ALAMEDA**

18 KIM EMBRY, an individual,
19
20 Plaintiff,

21 v.

22 THE HERSHEY COMPANY, and DOES 1
23 through 100, inclusive,
24 Defendants.

Case No. RG20054939

[PROPOSED] CONSENT JUDGMENT
AS TO THE HERSHEY COMPANY

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Kim Embry, (“Embry” or
4 “Plaintiff”) on the one hand, and The Hershey Company (“Hershey or “Defendant”) on the other
5 hand, with Embry and Hershey 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
9 public. She seeks to promote awareness of exposures to chemicals and to improve human health
10 by reducing exposures to chemicals in consumer products.

11 **1.3 Defendant**

12 Defendant employs ten or more persons and is a person in the course of doing business for
13 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 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 has alleged that
18 Hershey manufactures, sells, or distributes for sale to consumers in the State of California
19 chocolate products containing almonds, including under the Brookside brand name (“Chocolate
20 Almonds”), and/or other non-chocolate ingredients known to contain acrylamide (e.g., other nuts,
21 caramel, toffee, wafers, toasted rice, etc.) and that these products expose consumers in California
22 to acrylamide without having first provided them a clear and reasonable warning for the exposure
23 as she alleges is required by Proposition 65. Hershey denies Embry’s allegations that any of its
24 products require Proposition 65 warnings.

25 **1.5 Product Description**

26 The products covered by this Consent Judgment are all Chocolate Almonds (as defined in
27 Section 5.1 below) and other chocolate products that contain acrylamide-bearing ingredients that
28 are manufactured and/or distributed for authorized sale to consumers in California by Hershey

1 (“Covered Products”). The Covered Products include Covered Products sold in Hershey’s brand
2 names, including, but not limited to Brookside and barkThins, and Covered Products Hershey
3 manufactures and/or distributes for authorized sale in California under private label arrangements
4 entered into with retailers or others.¹

5 1.6 Notices of Violation

6 On or about July 12, 2019, Embry served Hershey and all requisite public enforcement
7 agencies with a “60-Day Notice of Violation” document that informed the recipients of Embry’s
8 allegations that Hershey violated Proposition 65 by failing to warn its customers and consumers
9 in California that certain exemplars of the Covered Products, specifically Dark Chocolate
10 Brookside Almonds, expose users to acrylamide.

11 1.7 Status of the Pleadings and Absence of Admissions

12 On or about February 19, 2020, Embry filed the instant action against Hershey
13 (“Complaint”) for the alleged violations of Health & Safety Code § 25249.6. Hershey
14 subsequently answered Embry’s Complaint, denying all of the legal and material factual
15 allegations asserted by Embry, pleading numerous affirmative defenses and maintaining that all
16 of the products it has manufactured or distributed for authorized sale in California, including the
17 Covered Products, have been, and are, in compliance with all laws, including Proposition 65.
18 Concurrently with the approval of this Consent Judgment, the Complaint shall be deemed to have
19 been amended to include claims by Embry concerning the alleged need for Proposition 65
20 warnings as to all of Defendant’s Covered Products as to which Notices were issued and Embry
21 shall upon the entry of this Consent Judgment be deemed to have dismissed with prejudice all
22 such claims while preserving the continuing jurisdiction of this Court over the terms and effect of
23 this Consent Judgment. Nothing in this Consent Judgment shall be construed as an admission by
24 Hershey of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall
25 compliance with this Consent Judgment constitute or be construed as an admission by Hershey of
26 any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically

27 ¹ Such retailers include, without limitation: CVS Pharmacy, Inc., Costco, Target, Kroger/Ralph’s, Von’s/Safeway,
28 and Wal-Mart (“Retailers”).

1 denied by Hershey. This section shall not, however, diminish or otherwise affect Hershey's
2 obligations, responsibilities, and duties under this Consent Judgment.

3 **1.8 Consent to Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in the
6 County of Alameda, California, and that this Court has jurisdiction to enter and oversee and
7 enforce the provisions of this Consent Judgment.

8 **1.9 Effective Date**

9 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date on
10 which Embry serves notice on Hershey that the Court has approved and entered this Consent
11 Judgment.

12 **2. CONTINUING INJUNCTION**

13 **2.1** Commencing within three (3) months from the Effective Date, and continuing
14 thereafter, Hershey shall only manufacture and package for distribution, or cause to manufacture
15 and package for distribution, in California, Covered Products, regardless of type, form, or
16 branding, that, as packaged, contain acrylamide concentrations of 0.225 parts per million ("ppm")
17 or less as an average of at least three (3) samples.²

18 **2.2** For Covered Products that contain acrylamide in a concentration exceeding the
19 ppm level set forth in Section 2.1 above, and which are manufactured and packaged for
20 distribution for authorized sale or use in California on or after three (3) months from the Effective
21 Date, Hershey shall provide one of the following Proposition 65 warnings:

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

24 or

25 _____
26 ² In the event an issue arises in the future with respect to compliance with the requirements set forth in Section 2.1,
27 such compliance may be demonstrated by Hershey using at least three (3) samples of the same Covered Product
(however branded) as raises the issue. Samples shall consist of portions of the Covered Products obtained at the
28 point of packaging from recent production and shall be measured by means of a test performed by an accredited
laboratory using either GC/MS (Gas Chromatograph/Mass Spectrometry), LC-MS (Liquid Chromatograph-Mass
Spectrometry), or any other testing method agreed upon by the Parties.

WARNING: Cancer --- www.P65Warnings.ca.gov/food

When required to warn for a Covered Product, Hershey may elect to provide any or all of the following additional information in conjunction with one of the preceding warnings:

Acrylamide is a by-product of cooking and is not added to our products. The FDA has not advised people to stop eating any foods that contain acrylamide. For more information regarding the FDA's views, visit www.fda.gov. For more information about acrylamide and Proposition 65, please visit www.oehha.ca.gov/prop65/acrylamide.html.

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

2.3 In the event Plaintiff enters into an agreement or consent judgment with any other person manufacturing Covered Products addressing alleged violations of Proposition 65 with respect to exposures to acrylamide that provides for less stringent standards than that set forth in Paragraph 2.1 above or a different commitment than that set forth in Paragraph 2.2 above (including no such commitment); or if a judgment is entered in any Proposition 65 case with respect to exposures to acrylamide from Covered Products that provides for less stringent requirements than those set forth in this Section 2; or if the California Office of Environmental Health Hazard Assessment adopts a regulation or safe use determination, or issues an interpretative guideline that exempts or, has the effect of increasing the levels set forth in Section 2.1 or otherwise has the effect of allowing Covered Products from meeting Proposition 65's requirements as to acrylamide at a level less stringent than that provided in Paragraph 2.1; or if Proposition 65 is determined to be preempted by federal law or a burden on First Amendment rights with respect to acrylamide in Covered Products, then this Consent Judgment shall be subject to modification at the option of Hershey, and without the objection of the Plaintiff, to conform or eliminate the terms of this Section 2 accordingly. Otherwise, modification of the

injunctive relief provisions set forth in this Section 2 due to changed circumstances shall be subject to Section 13 below.

3. STATUTORY PENALTY PAYMENTS

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

3.2 Payment Delivery

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

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

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

For United States Postal Service Delivery:

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

1 or

2 For Non-United States Postal Service Delivery:

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

7 **4. REIMBURSEMENT OF FEES AND COSTS**

8 Provided that Plaintiff and her counsel have provided Hershey with complete and
9 executed 2019 versions of IRS Form W-9 on or before the Effective Date, Hershey shall pay
10 Embry \$46,000 for fees and costs incurred as a result of investigating, bringing this matter to
11 Defendant's attention, and negotiating a settlement in the public interest. Defendant shall make
12 two company checks of \$23,000 each payable to "Nicholas & Tomasevic, LLP" (EIN 46-
13 3474065) and the "Glick Law Group" (EIN 47-1838518) respectively and shall deliver payment
14 to the address listed in Section 9 below within twenty (20) business days following the Effective
15 Date.

16 **5. LIABILITY RELEASES**

17 **5.1 Embry's Public Release of Proposition 65 Claims**

18 Embry, acting on her own behalf and in the public interest, releases Hershey and its
19 affiliated entities (including, without limitation, parent companies, subsidiaries, corporate
20 affiliates and similarly related companies), and all of its and their directors, officers, shareholders,
21 employees, and attorneys, as well as its licensors (collectively, all of the foregoing shall be
22 referred to as "Defendant Releasees"), and each entity to whom they directly or indirectly
23 distribute or sell Covered Products, including, but not limited to, distributors, wholesalers,
24 dealers, retailers (including, without limitation, CVS, Target, Kroger, Wal-Mart, and
25 Vons/Safeway), and, cooperative members (collectively, "Downstream Defendant Releasees"),
26 from all claims for violations of Proposition 65 based on exposures to acrylamide from Covered
27 Products that are or have been marketed by Hershey, Defendant Releasees, or Downstream
28 Defendant Releasees as chocolate covered and/or with almonds (collectively, "Chocolate
Almonds") and were manufactured and packaged by Defendant prior to the Effective Date.

1 Following the Effective Date, compliance with the terms of this Consent Judgment shall be
2 deemed compliance with Proposition 65 with respect to exposures to acrylamide from Covered
3 Products.

4 5.2 **Embry's Private Releases of Claims**

5 Embry, in her individual capacity only, and on behalf of herself and her successors, heirs,
6 assigns, agents, and attorneys, also provides a release herein to Defendant Releasees and
7 Downstream Defendant Releasees as to all chemicals currently listed under Proposition 65,
8 including but not limited to acrylamide and furfuryl alcohol in all of Defendant's Covered
9 Products and in foods made by Hershey or with Hershey ingredients ("Additional Hershey
10 Foods").³ In addition, Embry, in her individual capacity only, and on behalf of herself and her
11 successors, heirs, assigns, agents, and attorneys, also provides a release herein to Defendant
12 Releasees and Downstream Defendant Releasees which shall be effective as a full and final
13 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
14 attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character, or kind,
15 whether known or unknown, suspected or unsuspected, with respect to any other issue concerning
16 the Covered Products or Additional Hershey Foods. In this regard, Embry hereby acknowledges
17 that she is familiar with Section 1542 of the California Civil Code, which provides as follows:

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

24 5.3 **Defendant's Release of Embry**

25 Hershey, on its own behalf and on behalf of its past and current agents, representatives,
26 attorneys, successors, and assignees, hereby waives any and all claims that it may have against
27 _____

28 ³ "Additional Hershey Foods" include, but are not limited to, baked goods made with Hershey-branded cocoa powder, chocolate syrup, chocolate kisses, or chocolate chips.

1 Embry and her attorneys for any and all actions taken or statements made (or those that could
2 have been taken or made) by Embry and her attorneys, whether in the course of investigating
3 claims, otherwise seeking to enforce Proposition 65 against Hershey in this matter prior to the
4 Effective Date.

5 **6. COURT APPROVAL**

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

10 **7. SEVERABILITY**

11 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
12 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not
13 be adversely affected.

14 **8. GOVERNING LAW**

15 The terms of this Consent Judgment shall be governed by the laws of the State of
16 California and apply within the State of California. In the event that Proposition 65 is repealed or
17 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Hershey
18 may provide written notice to Embry of any asserted change in the law and have no further
19 obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the Products
20 are so affected.

21 **9. NOTICES**

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

26 For Defendant:

27 General Counsel
28 The Hershey Company
19 East Chocolate Avenue

1 Hershey, PA 17033

2 *With a copy to:*

3 Robert Falk
4 Robin Stafford
5 Morrison & Foerster LLP
6 425 Market Street, 32nd Floor
7 San Francisco, CA 94105

8 For Embry:

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

13 *And:*

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

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

20 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

24 **11. POST EXECUTION ACTIVITIES**

25 Embry agrees to comply with the reporting form requirements referenced in Health &
26 Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety
27 Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement
28 manifested in this Consent Judgment. In furtherance of obtaining such approval, Embry shall file
and serve a noticed motion for approval of this Consent Judgment within sixty (60) days of its
execution by all Parties and assure that the Office of the California Attorney General is served
with said motion and all supporting papers at least forty-five (45) days prior to the scheduled
hearing thereon. The Parties agree to mutually employ reasonably good faith efforts, including

1 through their counsel, to support the Court's approval and entry of this agreement as judgment.
2 For purposes of this Section, such reasonable good faith efforts shall include working
3 cooperatively to respond to any objection that the California Attorney General's Office raises to
4 the proposed Consent Judgment, appearing at the hearing before the Court if a favorable tentative
5 ruling on a motion for approval and entry is not issued or is contested, and/or providing any
6 additional supporting evidence or materials requested by the Court with respect to said motion in
7 a timely fashion. Unless otherwise separately agreed to in a mutual writing, Embry agrees that
8 neither she, nor anyone acting on her behalf (including but not limited to her attorneys), will issue
9 a press release or otherwise make statements to the media or in social media, concerning the
10 matters covered by this Consent Judgment or with respect to the health or safety aspects of the
11 Covered Products or Additional Hershey Foods.

12 **12. ENFORCEMENT**

13 Any Party may, after providing sixty (60) days written notice and meeting and conferring
14 within a reasonable time thereafter to attempt to resolve any issues, by motion or application for
15 an order to show cause before this Court, enforce the terms and conditions contained in this
16 Consent Judgment.

17 **13. MODIFICATION**

18 This Consent Judgment may be modified only by: (i) a written agreement of the Parties
19 and upon entry, following at least twenty-one (21) days' notice to the Office of the Attorney
20 General, of a modified consent judgment by the Court thereon; and (ii) upon a successful motion
21 or application of any Party, which shall also be served on the Office of the California Attorney
22 General with at least twenty-one (21) days' notice, and the entry of a modified consent judgment
23 by the Court. Any Party seeking to modify this Consent Judgment shall attempt in good faith to
24 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.
25
26
27
28

14. **AUTHORIZATION**

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agreed to all of the terms and conditions of this Consent Judgment.

APPROVED AS TO FORM AND CONTENT:

Date: 02/28/2020

By: Noam Glick
Noam Glick
On behalf of counsel for
Kim Embry

APPROVED AS TO FORM AND CONTENT:

Date: 03/03/2020

By: Robert L. Falk
Robert Falk
Counsel for
The Hershey Company

AGREED TO:

Date: 02/28/2020

By: Kim Embry
Kim Embry

AGREED TO:

Date: 3/13/2020

By: S. James Turoff
S. James Turoff
VP & Deputy General Counsel
for The Hershey Company

IT IS SO ORDERED:

Dated: _____

Judge of the Superior Court