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Kim Embry

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

KIM EMBRY, an individual

Plaintiff,

v.

JO'S CANDIES LLC, a Delaware corporation,
SPROUTS FARMERS MARKET, INC., an
Arizona corporation; and DOES 1 through 100,
inclusive,

Defendants.

Case No.: RG20053311

[PROPOSED] CONSENT JUDGMENT AS
TO JO'S CANDIES LLC.

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 Jo’s Candies, LLC (“Defendant” or “Jo’s Candies”) on the other hand, with Embry and Defendant
5 individually referred to as a “Party” and collectively 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 Defendant 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 Defendant manufactures, imports, sells, and distributes for sale in
16 California, dark chocolate covered honey graham crackers that contain acrylamide. Embry further
17 alleges that Defendant does so without providing a sufficient health hazard warning as required by
18 Proposition 65 and related regulations. Pursuant to Proposition 65, acrylamide is listed as a chemical
19 known to cause cancer and reproductive harm.

20 **1.5 Product Description**

21 For purposes of this Consent Judgment, the “Product” or “Products” are defined as dark
22 chocolate covered honey graham crackers that allegedly contain acrylamide and are manufactured,
23 imported, sold, or distributed for sale in California by Defendant and Releasees.

24 **1.6 Notices of Violation**

25 On July 25, 2019 Embry served Defendant Jo’s Candies, Sprouts Farmers Market, Inc., the
26 California Attorney General, and all other required public enforcement agencies with a 60-Day Notice
27 of Violation (“Notice”) of California Health and Safety Code section 25249.6 *et seq.* The Notice
28 alleged that Defendant violated Proposition 65 by failing to sufficiently warn consumers in California

1 of the health hazards associated with exposures to acrylamide contained in Defendant's dark chocolate
2 covered honey graham crackers. No public enforcer has commenced or is otherwise prosecuting an
3 action to enforce the violations alleged in the Notice.

4 **1.7 Complaint**

5 On February 4, 2020, Embry filed a Complaint against Defendant for the alleged violations of
6 Health and Safety Code section 25249.6 that are the subject of the Notice ("Complaint").

7 **1.8 No Admission**

8 Defendant denies the material, factual, and legal allegations in the Notices and Complaint, and
9 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in
10 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
11 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
12 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an admission
13 of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not,
14 however, diminish or otherwise affect Defendant's obligations, responsibilities, and duties under this
15 Consent Judgment, subject to subsequent modifications thereof or Court orders regarding any such
16 obligation, responsibility, and/or duty.

17 **1.9 Jurisdiction**

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

22 **1.10 Effective Date and Compliance Date**

23 The "Effective Date" means the date on which the Court grants the motion for approval of this
24 Consent Judgment, as discussed in Section 5. The Compliance Date is the date that is six (6) months
25 after the Effective Date.
26
27
28

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation of the Product**

3 Any Products that are manufactured by Jo’s Candies on and after the Compliance Date that are
4 thereafter sold in California or distributed for sale in California shall not exceed 280 parts per billion
5 (“ppb”) average acrylamide concentration by weight (“Average Level”). As used in this Section 2.1,
6 “distributed for sale in California” means to directly ship a Product into California or to sell a Product
7 to a distributor that Defendant and Releasees know will sell the Product in California.

8 **2.2 Testing**

9 The Average Level shall be determined: (a) by randomly selecting and testing at least one
10 sample each from five different lots of the tested product (or the maximum number of lots available
11 for testing if less than five) that were produced on dates spread out over a period of at least 60 days;
12 and (b) using tests performed by a laboratory accredited by the State of California, a federal agency,
13 or a nationally recognized accrediting organization, using LC-MS/MS (Liquid Chromatograph-Mass
14 Spectrometry).

15 For at least three consecutive years after the Compliance Date, Jo’s Candies shall arrange for
16 testing under Section 2.2. The testing shall be at least once per year, with the first testing occurring
17 prior to the Compliance Date. No further testing shall be required unless Jo’s Candies materially
18 modifies the ingredients or cooking process of a Product, at which point testing shall recommence on
19 an annual basis for at least three years.

20 **2.3 Sell-Through Period**

21 Notwithstanding anything else in this Consent Judgement, the Products that are manufactured
22 on or prior to the Compliance Date shall be subject to release of liability pursuant to this Consent
23 Judgement, without regard to when such products were, or are in the future, distributed or sold to
24 customers. As a result, the obligation of Jo’s Candies, or any Releases (if applicable), do not apply to
25 these Products manufactured on or prior to the Compliance Date.

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Settlement Amount**

3 Defendant shall pay sixty thousand dollars (\$60,000.00) in settlement and total satisfaction of
4 all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil
5 penalties in the amount of six thousand (\$6,000.00) pursuant to Health and Safety Code section
6 25249.7(b) and attorney’s fees and costs in the amount of fifty-four thousand (\$54,000) pursuant to
7 Code of Civil Procedure section 1021.5 and Health and Safety Code section 25249 *et seq.*

8 **3.2 Civil Penalty**

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

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

14
15 Noam Glick
16 Glick Law Group
17 225 Broadway, Suite 2100
18 San Diego, CA 92101

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

21 For United States Postal Delivery:

22
23 Mike Gyuries
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 Gyuries
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

Jo's Candies agrees to provide Embry's counsel with a copy of the check payable to OEHHA 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.

3.3 Attorney's Fees and Costs

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

Defendant shall provide its payment to Embry's counsel in two checks, divided equally, payable to Glick Law Group, PC (\$27,000) and Nicholas & Tomasevic, LLP (\$27,000) respectively. The addresses for these two entities are:

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

3.4 Timing

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

4. CLAIMS COVERED AND RELEASED

4.1 Embry's Public Release of Proposition 65 Claims

For any claim or violation arising under Proposition 65 alleging a failure to warn about exposures to Acrylamide from Products or related products manufactured, imported, sold, or distributed by Defendant prior to the Effective Date, Embry, acting on her own behalf and in the public interest, releases Defendant of any and all liability. This includes Defendant's owners, parents, subsidiaries, affiliated entities under common ownership, its directors, officers, agents, employees, co-packers, manufacturing partners, attorneys, and each entity to whom Defendant directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees, (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. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide from Products manufactured, imported, sold, or distributed by Defendant after the Effective Date. This Consent Judgment is a full, final and binding resolution of all claims that were or could have been asserted against Defendant and/or Releasees for failure to provide warnings for alleged exposures to acrylamide contained in Products.

4.2 Embry's Individual Release of Claims

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

1 **4.3 Defendant's Release of Embry**

2 Defendant, on its own behalf, and its past and current agents, representatives, attorneys,
3 successors, and assignees, hereby waives any and all claims against Embry and her attorneys and other
4 representatives, for any and all actions taken or statements made by Embry and her attorneys and other
5 representatives, whether in the course of investigating claims, otherwise seeking to enforce
6 Proposition 65 against it, in this matter or with respect to the Products.

7 **5. COURT APPROVAL**

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

11 **6. SEVERABILITY**

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

15 **7. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the state of California
17 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
18 rendered inapplicable for reasons, including but not limited to changes in the law, then Defendant may
19 provide written notice to Embry of any asserted change, and shall have no further injunctive
20 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
21 so affected.

22 **8. NOTICE**

23 Unless specified herein, all correspondence and notice required by this Consent Judgment shall
24 be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail, return
25 receipt requested; or (iii) a recognized overnight courier to the following addresses:
26
27
28

1 For Defendant:

2 Robert S. Niemann
3 Keller and Heckman, LLP
4 Three Embarcadero Center, STE 1420
5 San Francisco, CA 94111

6 For Embry:

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

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

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

17 **10. POST EXECUTION ACTIVITIES**

18 Embry agrees to comply with the reporting form requirements referenced in Health and Safety
19 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
20 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
21 motion Embry shall draft and file. The Parties agree to mutually employ their best efforts, including
22 those of their counsel, to support the entry of this agreement as judgment, and not to unreasonably
23 oppose or delay court approval. For purposes of this Section, “best efforts” shall include, at a
24 minimum, supporting the motion for approval, responding to any objection that any third-party may
25 make, and appearing at the hearing before the Court if so requested.

26 **11. MODIFICATION**

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

30 **12. AUTHORIZATION**

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

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


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

6 **14. ENTIRE AGREEMENT**

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

12 **AGREED TO:**

13
14 Date: 03/20/2020

15
16 By: 
17 KIM EMBRY

AGREED TO BY (DEFENDANT)

18 Date: 3-20-20

19 By:



20 David Choe [print name]

21 **IT IS SO ORDERED.**

22 Date: _____

23
24 JUDGE OF THE SUPERIOR COURT

25 4843-2353-4263, v. 1