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Attorneys for Plaintiff
Kim Embry

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

KIM EMBRY, an individual,

Plaintiff,

v.

BARCEL USA, LLC, and DOES 1 through
100, inclusive,

Defendants.

Case No. RG-20049708

[PROPOSED] CONSENT JUDGMENT

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 Barcel USA, LLC (“Barcel or “Defendant”) on the other hand,
5 with Embry and Barcel 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
8 public. She seeks to promote awareness of exposures to chemicals and to improve human health
9 by reducing exposures to chemicals in consumer products.

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Acrylamide is listed pursuant to Proposition 65 as a chemical that is known to the State of
16 California to cause cancer and birth defects and other reproductive harm. Embry has alleged that
17 Barcel manufactures, sells, or distributes for sale to consumers in the State of California roasted
18 peanuts, including Barcel Crunchy Coasted Peanuts, and that these products expose consumers in
19 California to acrylamide without having first provided them a clear and reasonable warning for
20 the exposure as she alleges is required by Proposition 65. Barcel denies Embry’s allegations that
21 any of its products require Proposition 65 warnings.

22 **1.5 Product Description**

23 The products covered by this Consent Judgment are all roasted peanuts that are
24 manufactured and/or distributed for authorized sale to consumers in California by Barcel
25 (“Covered Products”).¹ The Covered Products include Covered Products sold in Barcel’s brand
26

27 _____
28 ¹ The Covered Products include, without limitation, Barcel’s Crunchy Coasted (Japanese) Peanuts, Barcel’s Hot (Fuego) Nuts, and Barcel’s Chili Pepper & Lime Nuts.

1 names and Covered Products Barcel may manufacture and/or distribute for authorized sale in
2 California under private label arrangements.

3 **1.6 Notices of Violation and Complaint**

4 On or about August 1, 2019, Embry served Barcel and all requisite public enforcement
5 agencies with a “60-Day Notice of Violation” document that informed the recipients of Embry’s
6 allegations that Barcel violated Proposition 65 by failing to warn its customers and consumers in
7 California that certain exemplars of the Covered Products, specifically Crunchy Coated Peanuts,
8 expose users to acrylamide. On or about January 9, 2020, Embry filed the instant action against
9 Barcel (“Complaint”) for the alleged violations of Health & Safety Code § 25249.6.

10 **1.7 Status of the Pleadings and Absence of Admissions**

11 Nothing in this Consent Judgment shall be construed as an admission by Barcel of any
12 fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this
13 Consent Judgment constitute or be construed as an admission by Barcel of any fact, finding,
14 conclusion of law, issue of law, or violation of law, the same being specifically denied by Barcel.
15 This section shall not, however, diminish or otherwise affect Barcel’s obligations, responsibilities,
16 and duties under this Consent Judgment.

17 **1.8 Consent to Jurisdiction**

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

22 **1.9 Effective Date**

23 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on
24 which Embry serves notice on Barcel that the Court has approved and entered this Consent
25 Judgment.

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1 **2. CONTINUING INJUNCTION**

2 2.1 Commencing within three (3) months from the Effective Date, and continuing
3 thereafter, Barcel shall only manufacture and package for distribution, or cause to manufacture
4 and package for distribution, in California, Covered Products, regardless of type, form, or
5 branding, that, as packaged, contain acrylamide concentrations on average of 0.140 parts per
6 million ("ppm") or less.²

7 2.2 For Covered Products that contain acrylamide in a concentration exceeding the
8 ppm level set forth in Section 2.1 above, and which are manufactured and packaged for
9 distribution for authorized sale or use in California on or after three (3) months from the Effective
10 Date, Barcel shall provide the following Proposition 65 warning:

11 **CA Prop 65 Warning:** This product may expose you to chemicals, including
12 acrylamide, known to the State of California to cause cancer.

13 When required to warn for a Covered Product, Barcel may elect to provide any or all of the
14 following additional information in conjunction with or separately from the preceding warning:

15 Acrylamide is a natural by-product of cooking and is not added to our products.
16 The FDA has not advised people to stop eating any foods that contain acrylamide.
17 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.

18 When required, the above warning statement shall be placed on the product's package in at least
19 six (6) point font and either set within a box or separated from other warning text by at least one
20 line so as to be able to be read and understood by an ordinary individual prior to purchase or use.

21 If the product's package provides other health-related information in Spanish, the warning
22 statement shall also be provided in Spanish.

23 2.3 In the event Plaintiff enters into an agreement or consent judgment with any other
24 person manufacturing Covered Products addressing alleged violations of Proposition 65 with

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 Barcel using at least three (3) samples of the same Covered Product
28 (however branded) as raises the issue. Samples shall consist of portions of the Covered Products obtained at the
point of packaging from then-current 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/MS (Liquid
Chromatograph-Mass Spectrometry), or any other testing method agreed upon by the Parties.

1 respect to exposures to acrylamide that provides for less stringent standards than that set forth in
2 Paragraph 2.1 above or a different commitment than that set forth in Paragraph 2.2 above
3 (including no such commitment); or if a judgment is entered in any Proposition 65 case with
4 respect to exposures to acrylamide from Covered Products that provides for less stringent
5 requirements than those set forth in this Section 2; or if the California Office of Environmental
6 Health Hazard Assessment adopts a regulation or safe use determination, or issues an
7 interpretative guideline that exempts or, has the effect of increasing the levels set forth in Section
8 2.1 or otherwise has the effect of allowing Covered Products from meeting Proposition 65's
9 requirements as to acrylamide at a level less stringent than that provided in Paragraph 2.1; or if
10 Proposition 65 is determined to be preempted by federal law or a burden on First Amendment
11 rights with respect to acrylamide in Covered Products, then this Consent Judgment shall be
12 subject to modification at the option of Barcel, and without the objection of the Plaintiff, to
13 conform or eliminate the terms of this Section 2 accordingly. Otherwise, modification of the
14 injunctive relief provisions set forth in this Section 2 due to changed circumstances shall be
15 subject to Section 13 below.

16 **3. STATUTORY PENALTY PAYMENTS**

17 3.1 **Civil Penalty** Defendant shall pay \$5,000 in civil penalties pursuant to California
18 Health & Safety Code § 25249.7(b) in accordance with this Section. This penalty payment shall
19 be allocated in accordance with California Health & Safety Code § 25249.12(c)(l) and (d), with
20 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment
21 ("OEHHA") and the remaining 25% of the penalty remitted to Embry. More specifically, within
22 twenty (20) business days following the Effective Date, Barcel shall issue two separate company
23 checks for the civil penalty payment to (a) "OEHHA" in the amount of \$3,750 and with the memo
24 line on the check indicating "Prop 65 Penalties—Embry v. Barcel" (Barcel may reference
25 OEHHA's Tax Identification Number of 68-0284486 for this check); and (b) "Kim Embry" in the
26 amount of \$1,250 (for which Embry shall provide Defendant a completed IRS Form W-9 with a
27 tax identification number within two days following the Effective Date, if not beforehand). These
28 checks shall be delivered to the addresses listed in Section 3.3 below.



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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

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 provided Barcel with complete and executed 2019 versions of IRS Form W-9 on or before the Effective Date, Barcel shall pay Embry \$45,000 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 two company checks of \$22,500 each payable to "Nicholas & Tomasevic, LLP" (EIN 46-3474065) and the "Glick Law Group" (EIN 47-1838518) respectively and shall deliver payment to the address 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 Barcel 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,

1 employees, and attorneys, as well as its licensors (collectively, all of the foregoing shall be
2 referred to as "Defendant Releasees"), and each entity to whom they directly or indirectly
3 distribute or sell Covered Products, including, but not limited to, distributors, wholesalers,
4 dealers, retailers (including, without limitation, Food 4 Less), and, cooperative members
5 (collectively, "Downstream Defendant Releasees"), from all claims for violations of
6 Proposition 65 based on exposures to acrylamide from Covered Products that are or have been
7 marketed by Barcel, Defendant Releasees, or Downstream Defendant Releasees and were
8 manufactured and packaged by Defendant prior to the Effective Date. Following the Effective
9 Date, compliance with the terms of this Consent Judgment shall be deemed compliance with
10 Proposition 65 with respect to exposures to acrylamide from Covered Products.

11 **5.2 Embry's Private Releases of Claims**

12 Embry, in her individual capacity only, and on behalf of herself and her successors, heirs,
13 assigns, agents, and attorneys, and not in her representative capacity, also provides a release and
14 waiver of Proposition 65 claims as to all chemicals in all of the Covered Products and Barcel's
15 other food products ("Additional Barcel Foods"). In addition, beyond Proposition 65, Embry, in
16 her individual capacity only, and on behalf of herself and her successors, heirs, assigns, agents,
17 and attorneys, , and not in her representative capacity, also provides a release herein to Defendant
18 Releasees and Downstream Defendant Releasees which shall be effective as a full and final
19 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
20 attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character, or kind,
21 whether known or unknown, suspected or unsuspected, with respect to any other issue concerning
22 the Covered Products or Additional Barcel Foods. In this regard, Embry hereby acknowledges
23 that she is familiar with Section 1542 of the California Civil Code, which provides as follows:

24 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE**
25 **CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT**
26 **TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING**
27 **THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD**
28

1 **HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH**
2 **THE DEBTOR OR RELEASED PARTY.**

3 **5.3 Defendant's Release of Embry**

4 Barcel, on its own behalf and on behalf of its past and current agents, representatives,
5 attorneys, successors, and assignees, hereby waives any and all claims that it may have against
6 Embry and her attorneys for any and all actions taken or statements made (or those that could
7 have been taken or made) by Embry and her attorneys, whether in the course of investigating
8 claims, otherwise seeking to enforce Proposition 65 against Barcel in this matter prior to the
9 Effective Date.

10 **6. COURT APPROVAL**

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

15 **7. SEVERABILITY**

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

19 **8. GOVERNING LAW**

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

26 **9. NOTICES**

27 Unless specified herein, all correspondence and notices required to be provided pursuant
28 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class

1 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
2 Party by the other Party to the following addresses:

3 For Defendant:

4 General Counsel
5 Barcel USA, LLC
6 255 Business Center Drive
7 Horsham, PA 19044

7 *With a copy to:*

8 Robert Falk
9 Robin Stafford
10 Morrison & Foerster LLP
11 425 Market Street, 32nd Floor
12 San Francisco, CA 94105

11 For Embry:

12 Noam Glick
13 Glick Law Group
14 225 Broadway, Suite 2100
15 San Diego, CA 92101

15 *And:*

16 Craig Nicholas
17 Nicholas & Tomasevic, LLP
18 225 Broadway, 19th Floor
19 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
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1 manifested in this Consent Judgment. In furtherance of obtaining such approval, Embry shall file
2 and serve a noticed motion for approval of this Consent Judgment within sixty (60) days of its
3 execution by all Parties and assure that the Office of the California Attorney General is served
4 with said motion and all supporting papers at least forty-five (45) days prior to the scheduled
5 hearing thereon. Defendant agrees to support the entry of this Consent Judgment once such
6 motion has been filed. Unless otherwise separately agreed to in a mutual writing, Embry agrees
7 that neither she, nor anyone acting on her behalf (including but not limited to her attorneys), will
8 issue a press release or otherwise make statements to the media or in social media, concerning the
9 matters covered by this Consent Judgment or with respect to the health or safety aspects of the
10 Covered Products or Additional Barcel Foods.

11 12. **ENFORCEMENT**

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

16 13. **MODIFICATION**

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

24 14. **AUTHORIZATION**

25 The undersigned are authorized to execute this Consent Judgment on behalf of their
26 respective Parties and have read, understood and agreed to all of the terms and conditions of this
27 Consent Judgment.
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APPROVED AS TO FORM AND CONTENT: Date: <u>1/17/20</u> By: <u>Noam Glick</u> Noam Glick On behalf of counsel to Kim Embry	APPROVED AS TO FORM AND CONTENT: Date: <u>1/14/20</u> By: <u>Robin Stafford</u> Robin Stafford Morrison & Foerster LLP Counsel for Barcel USA, LLC
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AGREED TO: Date: <u>01/17/20</u> By: <u>Kim Embry</u> Kim Embry	AGREED TO: Date: <u>1/16/2020</u> By: <u>[Signature]</u> Title: <u>EVP</u> for Barcel USA, LLC
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IT IS SO ORDERED:
Dated: _____

Judge of the Superior Court