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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 TORN & GLASSER, INC., a California
corporation, and DOES 1 through 100,
17 inclusive,

18 Defendants.

Case No.:

[PROPOSED] CONSENT JUDGMENT AS
TO TORN & GLASSER, INC.

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 Torn & Glasser, Inc. (“Defendant” or “T&G”) 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 walnuts and dark chocolate almonds 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 Walnuts and Dark Chocolate Almonds that allegedly contain acrylamide and are
23 manufactured, imported, sold, or distributed for sale in California by Defendant and Releasees.

24 **1.6 Notices of Violation**

25 On July 1, 2019 Embry served Sprouts Farmers Market, Inc., the California Attorney General,
26 and all other required public enforcement agencies with 60-Day Notices of Violation (“Notice”) of
27 California Health and Safety Code section 25249.6 *et seq.* The Notice alleged that Defendant violated
28 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated

1 with exposures to acrylamide contained in its “Dark Chocolate Walnuts” and “Dark Chocolate
2 Almonds.” No public enforcer has commenced or is otherwise prosecuting an action to enforce the
3 violations alleged in the Notice.

4 On February 21, 2020 Embry served Defendant T&G, Barry Callebaut USA LLC, Bloomer
5 Chocolate Company, Sprouts Farmers Market, Inc., the California Attorney General, and all other
6 required public enforcement agencies with 60-Day Amended Notices of Violation (“Amended
7 Notices”) of California Health and Safety Code section 25249.6 *et seq.* The Amended Notices added
8 the manufacturer Torn & Glasser, Inc.

9 **1.7 Complaint**

10 On _____, Embry filed a Complaint against Defendant for the alleged violations of Health
11 and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

12 **1.8 No Admission**

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

22 **1.9 Jurisdiction**

23 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
24 Court has jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in
25 the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
26 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.
27
28

1 **1.10 Effective Date and Compliance Date**

2 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
3 Court grants the motion for approval of this Consent Judgment, as discussed in Section 5. The
4 Compliance Date is the date that is six (6) months after the Effective Date.

5 **2. INJUNCTIVE RELIEF**

6 **2.1 Reformulation of the Product**

7 Any Products that are manufactured by T&G on and after the Compliance Date that are
8 thereafter sold in California or distributed for sale in California shall not exceed 225 ppb on average
9 for Acrylamide, as set forth in this Section 2. As used in this Section 2.1, “distributed for sale in
10 California” means to directly ship a Product into California or to sell a Product to a distributor that
11 T&G knows will sell the Product in California.

12 **2.2 Testing**

13 (a) Compliance with the average level shall be determined using LC-MS/MS (Liquid
14 Chromatograph-Mass Spectrometry), GC/MS (Gas Chromatography/Mass Spectrometry), or any
15 other testing method agreed upon by the Parties. On the Compliance Date, and continuing thereafter,
16 T&G shall not manufacture any Product that will be sold or offered for sale in California that exceeds
17 the following concentration limits, such concentration to be determined by use of a test performed by
18 a laboratory accredited by the State of California, a federal agency, or a nationally recognized
19 organization.

20 (b) The Average Level is determined by randomly selection and testing, over no less than
21 a ten-day period, one sample from at least five batches (or from as many batches as are available, if
22 fewer than five) and a maximum of ten batches of Products produced at locations that supply such
23 Products in California (“Sampling Data”). The mean and standard deviation shall be calculated using
24 the Sampling Data. Any data points that are more than three standard deviations outside the mean shall
25 be discarded once, and the mean and standard deviation recalculated using the remaining data points.
26 The arithmetic mean determined in accordance with this procedure shall be deemed the “Average
27 Level.”
28

1 (c) For at least three consecutive years after the Compliance Date, T&G shall arrange for
2 testing under Section 2.2. The testing shall be at least once per year, with the first testing occurring
3 prior to the Compliance Date. No further testing shall be required unless T&G materially modifies the
4 ingredients or cooking process of a Product, at which point testing shall recommence on an annual
5 basis for at least three years.

6 **2.3 Sell-Through Period**

7 Notwithstanding anything else in this Consent Judgement, the Products that are manufactured
8 on or prior to the Compliance Date shall be subject to release of liability pursuant to this Consent
9 Judgement, without regard to when such products were, or are in the future, distributed or sold to
10 customers. As a result, the obligation of T&G, or any Releases (if applicable), do not apply to these
11 Products manufactured on or prior to the Compliance Date.

12 **3. MONETARY SETTLEMENT TERMS**

13 **3.1 Settlement Amount**

14 Defendant shall pay eighty-five thousand dollars (\$85,000.00) in settlement and total
15 satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment.
16 This includes civil penalties in the amount of eight thousand (\$8,000.00) pursuant to Health and Safety
17 Code section 25249.7(b) and attorney's fees and costs in the amount of seventy-seven thousand
18 (\$77,000.00) pursuant to Code of Civil Procedure section 1021.5 and Health and Safety Code section
19 25249 *et seq.*

20 **3.2 Civil Penalty**

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

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

26 Noam Glick
27 Glick Law Group
28 225 Broadway, Suite 2100
San Diego, CA 92101

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

3 For United States Postal Delivery:

4 Mike Gyuries
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 P.O Box 4010
8 Sacramento, CA 95812-4010

9 For Non-United States Postal Service Delivery:

10 Mike Gyuries
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 1001 I Street
14 Sacramento, CA 95814

15 T&G agrees to provide Embry's counsel with a copy of the check payable to OEHHA
16 simultaneous with its penalty payment to Embry.

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

- 19
- 20 • "Kim Embry" whose address and tax identification number shall be provided within
 - 21 five (5) days after this Consent Judgement is fully executed by the Parties
 - 22 • "Glick Law Group" (EIN: 47-1838518) at address provided in Section 3.2;
 - 23 • "Nicholas & Tomasevic" (EIN: 46-3474065) at address provided in Section 3.3; and
 - 24 • "Office of Environmental Health Hazard Assessment at 1001 I Street, Sacramento, CA
25 95814.

26 **3.3 Attorney's Fees and Costs**

27 The portion of the settlement attributable to attorneys' fees and costs shall be paid to Embry's
28 counsel, who are entitled to attorney's fees and costs incurred by her in this action, including but not

1 limited to investigating potential violations, bringing this matter to Defendant’s attention, as well as
2 litigating and negotiating a settlement in the public interest.

3 Defendant shall provide its payment to Embry’s counsel in two checks, divided equally,
4 payable to Glick Law Group, PC (\$38,500.00) and Nicholas & Tomasevic, LLP (\$38,500.00)
5 respectively. The addresses for these two entities are:

6 Noam Glick
7 Glick Law Group
8 225 Broadway, Suite 2100
9 San Diego, CA 92101

10 Crag Nicholas
11 Nicholas & Tomasevic, LLP
12 225 Broadway, 19th Floor
13 San Diego, CA 92101

14 **3.4 Timing**

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

16 **4. CLAIMS COVERED AND RELEASED**

17 **4.1 Embry’s Public Release of Proposition 65 Claims**

18 For any claim or violation arising under Proposition 65 alleging a failure to warn about
19 exposures to Acrylamide from Products or related products manufactured, imported, sold, or
20 distributed by Defendant prior to the Effective Date, Embry, acting on her own behalf and in the public
21 interest, releases Defendant and Releasees (discussed further below) of any and all liability. This
22 includes Defendant’s owners, parents, subsidiaries, affiliated entities under common ownership, its
23 directors, officers, agents, employees, attorneys, and each entity to whom Defendant directly or
24 indirectly distributes or sells the Products, including but not limited to, downstream distributors,
25 wholesalers, customers, retailers, franchisees, cooperative members and licensees, (collectively, the
26 “Releasees”). Releasees include defendant, its parent, and all subsidiaries and affiliates thereof and
27 their respective employees, agents, assigns and entities that sell Defendant’s Products, including
28 Sprouts Farmers Market, Inc. 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

1 could have been asserted against Defendant and/or Releasees for failure to provide warnings for
2 alleged exposures to acrylamide contained in Products.

3 **4.2 Embry's Individual Release of Claims**

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

10 **4.3 Defendant's Release of Embry**

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

16 **5. COURT APPROVAL**

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

20 **6. SEVERABILITY**

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

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the state of California
26 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
27 rendered inapplicable for reasons, including but not limited to changes in the law, then Defendant may
28 provide written notice to Embry of any asserted change, and shall have no further injunctive

1 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
2 so affected.

3 **8. NOTICE**

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

7 For Defendant:

8 Robert Niemann
9 Keller and Heckman, LLP
10 Three Embarcadero Center, STE 1420
San Francisco, CA 94111

For Embry:

Noam Glick
Glick Law Group, PC
225 Broadway, 21st Floor
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. In furtherance of obtaining such approval, the Parties agree to
22 mutually employ their best efforts, including those of their counsel, to support the entry of this
23 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
24 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for
25 approval, responding to any objection that any third-party may make, and appearing at the hearing
26 before the Court if so requested.

1 **11. MODIFICATION**

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

5 **12. 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 **13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

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

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1 **14. 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 or
6 otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.


7 **AGREED TO:**

8
9 Date: 6/12/2020

10
11 By: 
12 KIM EMBRY

AGREED TO BY (DEFENDANT)

Date: 6/10/2020

13
14
15 By: 
16 Greg Blaser [print name]

17 **IT IS SO ORDERED.**

18 Date: _____

JUDGE OF THE SUPERIOR COURT