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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.

WONDERFUL PISTACHIOS & ALMONDS
LLC., a Delaware corporation, JET.COM, INC.,
a Delaware corporation, TRADER JOE'S
COMPANY, a California corporation, and
DOES 1 through 100, inclusive,

Defendants.

Case No.: RG19012133

[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”) and Wonderful
4 Pistachios & Almonds LLC (“WP&A”) with Embry and WP&A each individually referred to as a
5 “Party” and collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

7 Embry is a citizen in the State of California, acting in the interest of the general public. She
8 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 WP&A employs ten or more individuals 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 Code
13 section 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 Embry alleges that WP&A manufactures, imports, sells, and distributes for sale roasted
16 almonds that contain acrylamide. Embry further alleges that WP&A does so without providing a
17 sufficient health hazard warning as required by Proposition 65 and related regulations. Pursuant to
18 Proposition 65, acrylamide is listed as a chemical known by the State of California to cause cancer
19 and reproductive harm.

20 **1.5 Notice of Violation**

21 On April 5, 2018, Embry served WP&A, Jet.com, Inc., the California Attorney General, and
22 all other required public enforcement agencies with a 60-Day Notice of Violation of California
23 Health and Safety Code section 25249.6 et seq. (“WP&A Notice”). The Notice alleges that WP&A
24 and Jet.com violated Proposition 65 by failing to sufficiently warn consumers in California of the
25 health hazards associated with exposure to acrylamide contained in its “Wonderful Roasted & Salted
26 Almonds.”

27 On May 3, 2018, Embry served Trader Joe’s Company (“Trader Joe’s”), the California
28 Attorney General, and all other required public enforcement agencies with a 60-Day Notice of

1 Violation of California Health and Safety Code section 25249.6 et seq. (“Trader Joe’s Notice”). The
2 Notice alleges that Trader Joe’s violated Proposition 65 by failing to sufficiently warn consumers in
3 California of the health hazards associated with exposure to acrylamide contained in its “Trader Joe’s
4 Dry Roasted & Salted Almonds.”

5 On December 5, 2019, Embry amended the Trader Joe’s Notice to identify the manufacturer
6 as WP&A.

7 On May _____, 2020, Embry amended the WP&A Notice to include all roasted almond
8 products manufactured or processed by WP&A.

9 No public enforcer has filed a lawsuit to enforce the violations alleged in the WP&A Notice
10 or Trader Joe’s Notice.

11 **1.6 Product Description**

12 The products covered by this Consent Judgment are all roasted almonds manufactured or
13 processed by WP&A and that allegedly contain acrylamide and are imported, sold, shipped, delivered
14 or distributed for sale to consumers in California by Releasees (as defined in section 4.1) (the
15 “Products”), whether sold under the Wonderful Brand, any other brand, or some other private label,
16 at all grocery, retail, and other locations and sales channels, including on the Internet. The Consent
17 Judgment covers the Products to the extent that they are incorporated as an ingredient in any food
18 product made or sold by others.

19 **1.7 Complaint**

20 On May 1, 2019, Embry filed a Complaint against WP&A for the alleged violations of Health
21 and Safety Code section 25249.6 that are the subject of the WP&A Notice (“Complaint”). Plaintiff
22 amended the Complaint to add Jet.com and Trader Joe’s Company as defendants on January 29,
23 2020.

24 **1.8 No Admission**

25 WP&A denies the material, factual, and legal allegations in the WP&A Notice and
26 Complaint, and maintains that the Products it has manufactured or processed for sale, shipment,
27 delivery or distribution for sale in California have been and are in compliance with all laws. WP&A
28 further denies that the Products are harmful in any way to consumers and maintains that the Products

1 are healthy, safe, nutritious, and provide health benefits. Nothing in this Consent Judgment shall be
2 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law,
3 nor shall compliance with this Consent Judgment be construed as an admission of any fact, finding,
4 conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or
5 otherwise affect WP&A's obligations, responsibilities, and duties under this Consent Judgment.

6 **1.9 Jurisdiction**

7 The Parties stipulate that this Court has jurisdiction over WP&A as to the allegations in the
8 Complaint, that venue is proper in the County of Alameda, and that the Court has jurisdiction to enter
9 and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil
10 Procedure section 664.6.

11 **1.10 Effective Date & Compliance Date**

12 For purposes of this Consent Judgment, the term "Effective Date" means the date the Court
13 grants the motion for approval of this Consent Judgment, as discussed in Section 5. Due to the fact
14 that the Products are subject to other food safety regulatory requirements, and any reformulation must
15 ensure compliance with these other applicable regulatory requirements, the Compliance Date is six
16 (6) months after the Effective Date.

17 **2. INJUNCTIVE RELIEF**

18 **2.1 Reformulation of the Product**

19 For any Products that are manufactured or processed by WP&A on or after the Compliance
20 Date that are sold or offered for sale in California the average acrylamide concentration (the
21 "Average Level") shall not exceed 225 ppb by weight.

22 **2.2 Testing**

23 (a) Calculation of the Average Level shall be determined using LC-MS/MS (Liquid
24 Chromatograph-Mass Spectrometry), GC/MS (Gas Chromatography/Mass Spectrometry), or any
25 other testing method agreed upon by the Parties. On the Compliance Date, and continuing thereafter,
26 WP&A shall not manufacture or process any Product that will be sold or offered for sale in
27 California that exceeds 225 ppb, such concentration to be determined by use of a test performed by a
28

1 laboratory accredited by the State of California, a federal agency, or a nationally recognized
2 organization or a laboratory associated with a university that is so accredited.

3 (b) The Average Level is determined by random selection and testing, over no less than a
4 ten-day period, one sample from at least five batches (or from as many batches as are available, if
5 fewer than five) and a maximum of ten batches of Products produced at locations that supply such
6 Products in California (“Sampling Data”). The mean and standard deviation shall be calculated using
7 the Sampling Data. Any data points that are more than three standard deviations outside the mean
8 shall be discarded once, and the mean and standard deviation recalculated using the remaining data
9 points.

10 (c) For three consecutive years after the Compliance Date, WP&A shall arrange for
11 testing under Section 2.2. The testing shall be at least once per year.

12 (d) All test results of acrylamide concentrations shall remain confidential unless required
13 to be produced to the Attorney General or the Court.

14 **2.3 Sell-Through Period**

15 Notwithstanding anything else in this Consent Judgment, the Products that are manufactured
16 or processed prior to the Compliance Date shall be subject to release of liability pursuant to this
17 Consent Judgment, without regard to when such products were, or are in the future, shipped,
18 delivered, distributed or sold to customers. As a result, the obligation of Releasees do not apply to
19 the Products manufactured or processed prior to the Compliance Date.

20 **3. MONETARY SETTLEMENT TERMS**

21 **3.1 Settlement Amount**

22 WP&A shall pay one hundred thousand dollars (\$100,000.00) in settlement and total
23 satisfaction of all the claims referred to in the WP&A Notice, the Complaint, and this Consent
24 Judgment. This includes civil penalties in the amount of ten thousand dollars (\$10,000.00) pursuant
25 to Health and Safety Code section 25249.7(b) and attorney’s fees and costs in the amount of ninety
26 thousand dollars (\$90,000.00) pursuant to Code of Civil Procedure section 1021.5.
27
28

1 **3.2 Civil Penalty**

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

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

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

10 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA
11 (Memo Line “Prop 65 Penalties”) at the following addresses:

12 For United States Postal Service Delivery:

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

16 For Non-United States Postal Service Delivery:

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

20 WP&A agrees to provide Embry’s counsel with a copy of the check payable to OEHHA,
21 simultaneous with its penalty payment to Embry.

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

- 24
- 25 • “Kim Embry” whose address and tax identification number shall be provided within five
 - 26 (5) days after this Consent Judgement is fully executed by the Parties;
 - 27 • “Glick Law Group” (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 28

- 1 • “Nicholas & Tomasevic” (EIN: 46-3474065) at the address provided in Section 3.2(a)(i);
- 2 and
- 3 • “Office of Environmental Health Hazard Assessment” at 1001 I Street, Sacramento, CA
- 4 95814.

5 **3.3 Attorney’s Fees and Costs**

6 The portion of the settlement attributable to attorney’s fees and costs shall be paid to Embry’s
7 counsel, who are entitled to attorney’s fees and costs incurred by them in this action, including but
8 not limited to investigating potential violations, bringing this matter to WP&A’s attention, as well as
9 litigating and negotiating a settlement in the public interest.

10 WP&A shall provide its payment to Embry’s counsel in two checks, divided equally, payable
11 to Glick Law Group, PC (\$45,000.00) and Nicholas & Tomasevic, LLP (\$45,000.00) respectively.

12 The addresses for these two entities are:

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

15 Craig Nicholas
16 Nicholas & Tomasevic, LLP
225 Broadway, Suite 1900
17 San Diego, CA 92101

18 **3.4 Timing**

19 The above-mentioned checks will be issued within twenty-one (21) days of the Effective
20 Date.

21 **4. CLAIMS COVERED AND RELEASED**

22 **4.1 Embry’s Public Release of Proposition 65 Claims**

23 Embry, acting on her own behalf and in the public interest, hereby releases and forever
24 discharges WP&A and each of its respective past, present and future owners, parents, subsidiaries,
25 affiliates, partners, managers, members, representatives, directors, officers, shareholders, agents,
26 employees, attorneys, insurers, trustees, administrators, executors, predecessors in interest,
27 successors in interest, heirs and assigns, and all other persons, firms or corporations with whom any
28 of the former have been, are now, or may hereafter be affiliated or related (which shall expressly

1 include, among all other applicable entities, Wonderful Almond Cooperative and Cal Pure Produce
2 Inc.) (collectively, “WP&A Releasees”) as well as each entity to whom WP&A directly or
3 indirectly ship, deliver, distribute or sell the Products, including, but not limited to, downstream
4 distributors (which shall expressly include, among all other downstream distributors, Jet.com and
5 Trader Joe’s Company), wholesalers, customers, individuals, retailers, franchisees and licensees
6 (collectively with WP&A Releasees, the “Releasees”), from any and all claims, charges, demands,
7 obligations, losses, damages, and liabilities of any nature whatsoever, including, but not limited to,
8 any claim or violation arising under Proposition 65 alleging a failure to warn about exposures to
9 acrylamide from Products or related products manufactured, processed, imported, sold, shipped,
10 delivered or distributed by Releasees prior to the Effective Date, and all costs, expenses and
11 attorney’s fees related thereto, whether based on tort, contract, statute, ordinance or regulation, or
12 any other theory of recovery in law or equity, whether for compensatory, punitive or civil damages,
13 equitable relief of otherwise, whether or not relating to or otherwise arising out of this dispute, from
14 the beginning of time through the Effective Date. Compliance with the terms of this Consent
15 Judgment constitutes compliance with Proposition 65 with respect to the alleged or actual failure to
16 warn about exposures to acrylamide from Products manufactured, processed, imported, sold,
17 shipped, delivered or distributed by Releasees on and after the Effective Date. This Consent
18 Judgment is a full, final and binding resolution of all claims that were or could have been asserted
19 against Releasees for failure to provide warnings for alleged exposures to acrylamide contained in
20 Products.

21 **4.2 Embry’s Individual Release of Claims**

22 Embry, in her individual capacity, also provides a release to Releasees, which shall be a full
23 and final accord and satisfaction of as well as a bar to all claims, charges, actions, causes of action,
24 obligations, costs, expenses, attorney’s fees, damages, losses, liabilities, and demands by Embry of
25 any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out of
26 alleged or actual exposures to acrylamide in Products manufactured, processed, imported, sold, or
27 distributed by Releasees before the Effective Date.
28

1 **4.3 WPA’s Release of Embry**

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

7 **4.4 Release of Known or Unknown Claims**

8 For the purpose of implementing a full and complete release, Embry, on behalf of herself and
9 her agents, attorneys, representatives, successors, and assigns, expressly acknowledges that the
10 release, which shall be effective as a full and final accord and satisfaction, as a bar to all claims of
11 any nature, character or kind, known or unknown, suspected or unsuspected, arising out of alleged
12 violations, she gives in this Consent Judgment is intended to include in its effect, without limitation,
13 the release of all claims against the other party of any nature whatsoever relating to alleged violations
14 of Proposition 65 with respect to the Products, and Embry’s alleged or actual exposure to acrylamide
15 in the Products. Embry acknowledges that she is familiar with California Civil Code section 1542,
16 which provides:

17 A general release does not extend to claims that the creditor or
18 releasing party does not know or suspect to exist in his or her favor at
19 the time of executing the release and that, if known by him or her,
 would have materially affected his or her settlement with the debtor or
 released party.

20 **4.5 Dismissal of the Complaint**

21 Jet.com was the retailer of the Wonderful Brand roasted and salted almonds described in the
22 WP&A Notice. WP&A manufactured the dry roasted and salted almonds described in the Trader
23 Joe’s Notice. Wonderful Brand roasted and salted almonds and Trader Joe’s dry roasted and salted
24 almonds are included within the definition of Products in Section 1.6. Accordingly, within three (3)
25 court days after Effective Date of this Consent Judgment, Embry shall dismiss the Complaint with
26 prejudice and waive all attorneys’ fees and costs as to Jet.com and Trader Joe’s Company.
27
28

1 **5. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved by the Court. The Consent
3 Judgment shall be null and void if it is not approved by the Court within one year after it has been
4 fully executed by the Parties, or by such additional time as the Parties may agree to in writing. This
5 Consent Judgment shall also be null and void if Embry withdraws the notice issued on May ____,
6 2020 or the Court rules that the notice or this Consent Judgment does not include all WP&A’s
7 Products (as defined herein) that are manufactured, processed, imported, sold, shipped, delivered, or
8 distributed by Releasees.

9 **6. SEVERABILITY**

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

13 **7. GOVERNING LAW**

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

20 **8. NOTICE**

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

24 For WP&A:

25 Kristina Diaz, Esq.
26 Courtney Vaudreuil, Esq.
27 Roll Law Group, P.C.
11444 W Olympic Blvd
Los Angeles, CA 90064-1557

For Embry:

Noam Glick, Esq.
Glick Law Group, PC
225 Broadway, 21st Floor
San Diego, CA 92101

28 Any Party may, from time to time, specify in writing to the other, a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 This Consent Judgment may be executed in counterparts and by electronic means, including,
4 but not limited to, DocuSign or facsimile signature, each of which shall be deemed an original, and
5 all of which, when taken together, shall constitute one and the same document.

6 **10. POST EXECUTION ACTIVITIES**

7 Embry agrees to comply with the reporting form requirements referenced in Health and Safety
8 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
9 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
10 motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to
11 mutually employ their best efforts, including those of their counsel, to support the entry of this
12 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
13 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for
14 approval, responding to any objection that any third-party may make, and appearing at the hearing
15 before the Court if so requested.

16 **11. MODIFICATION**

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

20 **12. AUTHORIZATION**

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

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

24 If a dispute arises with respect to either Party’s compliance with the terms of this Consent
25 Judgment entered by the Court, the Parties shall meet and confer in person, by telephone, or in
26 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed
27 in the absence of such a good faith attempt to resolve the dispute beforehand.
28

1 **14. ENTIRE AGREEMENT**


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


8 **AGREED TO:**

**AGREED TO BY WONDERFUL
PISTACHIOS & ALMONDS LLC**

9
10 Date: May 7, 2020

Date: May 7, 2020

11
12
13 
14 By: _____
15 **KIM EMBRY**

16
17
18
19 **DocuSigned by:**

20 By: _____
21 **CRAIG B. COOPER**
22 **Senior Vice President**

23 **IT IS SO ORDERED.**

24
25
26
27
28 Date: _____

JUDGE OF THE SUPERIOR COURT