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March 2, 2018

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Glick Law Group
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San Diego, CA 92101

Craig Nicholas
Nicholas & Tomasevic, LLP
225 W. Broadway, Ste. 1900
San Diego, CA 92101

RE: *Embry v. Earthbound Farm*, Out-of-Court Proposition 65 Settlement
AGO No. 2017-01802

Dear Messieurs Glick and Nicholas:

We write to express our objection to the Settlement Agreement and General Release (“Settlement”) that purports to resolve Proposition 65 violations your client, private enforcer Kim Embry, alleged against Earthbound Farm, LLC (“Earthbound”) in a 60-day notice issued dated June 29, 2017. Because Embry entered into the Settlement before filing a complaint, it is an out-of-court settlement that is not subject to court review or approval. (Health & Saf. Code, § 25249.7, subd. (f).) Nevertheless, as a person settling a violation alleged in a 60-day notice, Embry was required to report the settlement to our office, which you did on her behalf on February 22, 2018.¹ We have reviewed the settlement and determined that it is contrary to the law and against public policy, and therefore that it is not enforceable in its current form.

The 60-day notice Embry sent Earthbound last June alleges that Earthbound failed to warn consumers that its Roasted Organic Red Potatoes expose consumers to acrylamide, a carcinogen, when prepared according to the package instructions. Under the settlement, Earthbound agrees to change the package instructions from preheating the pan over “medium or medium-low heat” and cooking the potatoes for “8-10 minutes,” to preheating over “low” heat and cooking “until the product reaches an internal temperature of 165°F. (¶ 4.3.) Earthbound also agrees to pay a \$3,000 civil penalty, and to make two payments, of \$27,000 and \$10,000, to Embry’s counsel for undisclosed purposes. The \$37,000 does not appear to be for attorneys’ fees, because under a separate provision, parties are to bear their own attorneys’ fees and costs. (¶ 5.) The \$10,000

¹ The settlement is dated February 1, 2018, but it was not reported to our office until February 22. Under the Attorney General’s regulations, settlements must be reported within five days after a written agreement has been signed by the parties. (Cal. Code Regs., tit. 11, § 3003, subd. (a).)

payment is deferred for 180 days, and is conditioned upon no other enforcer having filed a claim against Earthbound related to acrylamide in the Red Potatoes. (¶ 4.1(c).)

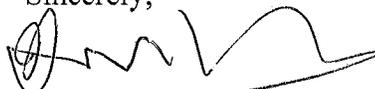
We object to the Settlement on three grounds. First, it allocates 33 percent of the \$3,000 civil penalty to Embry, which is more than the statute permits. Under Proposition, a private enforcer is entitled to keep 25 percent of a civil penalty. (Health & Saf. Code, § 25249.12, subd. (d).) The Settlement allocates \$1,000, or 33 percent, to Embry, and therefore must be modified.

Second, the injunctive relief is illusory, and is not likely to result in any benefit to the public. Earthbound does not agree to provide warnings where none were given, or to reduce the level of exposures to acrylamide. Rather, it agrees to make minor changes to the wording of its package instructions that may not have any effect on acrylamide exposures. Will instructing consumers to cook on *low heat to an internal temperature of 165 degrees* result in less acrylamide than cooking on *medium or medium-low heat for 8-10 minutes*? It is possible that following both sets of instructions will lead to equivalent levels of acrylamide. Further, how likely is it that people will monitor the internal temperature of the potatoes and know when to remove them from the heat? If the new instructions result in longer cook times, then they might actually lead to higher, not lower, acrylamide exposures. The illusory, and possibly counterproductive, nature of the injunctive relief deprives the settlement of a public benefit. (See Cal. Code Regs., tit. 11, § 3201, subds. (b)(1)-(2) [a settlement that does not result in warnings being given or reduced chemical levels does not confer a significant public benefit].)

Finally, we object to the \$37,000 in payments to Embry's counsel. Based on paragraph 5 of the agreement, which says the parties will each bear their own costs and fees, the payment is not for attorneys' fees, but the settlement does not specify what it is for. Embry has no authority to recover additional unspecified payments for enforcing Proposition 65. (See Cal. Code Regs., tit. 11, § 3204, subd. (a) [Additional Settlement Payments shall not be included in a Proposition 65 settlement that is not subject to court approval and oversight].)

For these reasons, we view the Settlement as contrary to the law, against public policy, and not enforceable. The parties should rescind the agreement immediately and notify our office of having done so. We request a response by March 9, 2018.

Sincerely,



HARRISON M. POLLAK
Deputy Attorney General

For XAVIER BECERRA
Attorney General