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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 SCONZA CANDY COMPANY, a California
corporation, CVS PHARMACY INC., a
17 Rhode Island corporation, and DOES 1
through 100, inclusive,

18 Defendants.
19

Case No.: RG19046800

[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” or “Plaintiff”),
4 on the one hand, and Sconza Candy Company (“Sconza” or “Defendant”), on the other hand, with
5 Embry and Sconza each 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 chemicals and to improve human health by reducing
9 exposures to chemicals in consumer products.

10 **1.3 Defendant**

11 Sconza 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 & Safety Code
13 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 alleges that Sconza
17 manufactures, imports, sells, and distributes for sale in the State of California roasted almond products
18 that are covered with various coatings, including, but not limited to, confectionary coatings, such as
19 chocolate, and non-confectionary coatings, such as salts and seasonings, some of which are known to
20 contain acrylamide, and roasted almond products that are uncoated (collectively “Roasted Almond
21 Products”). Embry further alleges that the Roasted Almond Products expose consumers in California
22 to acrylamide without having first provided them a clear and reasonable warning for the exposure as
23 Plaintiff alleges is required by Proposition 65. Sconza denies Embry’s allegations that any of its
24 products require Proposition 65 warnings.

25 **1.5 Product Description**

26 The products covered by this Consent Judgment expressly include all Roasted Almond
27 Products that are manufactured and/or distributed for sale in California by Sconza, Defendant
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1 Releasees and Downstream Defendant Releasees¹ (“Covered Products”). The Covered Products
2 include Covered Products sold in Sconza’s own brand names, Covered Products sold under private
3 label arrangements entered into with retailers or others and Covered Products sold to re-baggers, at
4 all grocery, retail, and other locations and sales channels.

5 **1.6 Notices of Violation**

6 On April 29, 2019, Embry served Torn & Glasser, Inc. (“Torn & Glasser”), Vons and all
7 requisite public enforcement agencies with a 60-Day Notice of Violation of California Health &
8 Safety Code section 25249.6 *et seq.* The Notice alleges that Torn & Glasser violated Proposition 65
9 by failing to sufficiently warn consumers in California of the health hazards associated with
10 exposures to acrylamide contained in its “No Sugar Added Dark Chocolate Almonds.”

11 On July 12, 2019, Embry served Flagstone Foods, Inc. (“Flagstone Foods”), CVS Pharmacy,
12 Inc. (“CVS”) and all requisite public enforcement agencies with a 60-Day Notice of Violation of
13 California Health & Safety Code section 25249.6 *et seq.* The Notice alleges that Flagstone Foods
14 violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards
15 associated with exposures to acrylamide contained in its “Goodfields Dark Chocolate Covered
16 Almonds.”

17 On July 29, 2019, Embry served Sconza, Costco Wholesale Corporation (“Costco”) and all
18 requisite public enforcement agencies with a 60-Day Notice of Violation of California Health &
19 Safety Code section 25249.6 *et seq.* (“Lemoncello Notice”). The Notice alleges that Sconza violated
20 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards
21 associated with exposures to acrylamide contained in its “Sconza Lemoncello Chocolate Almonds.”

22 On October 18, 2019, Embry served Sconza, CVS and all requisite public enforcement
23 agencies with an Amended 60-Day Notice of Violation of California Health & Safety Code
24 section 25249.6 *et seq.* (“Goodfields Notice”). The Notice states that it amends the original notice
25 dated July 12, 2019, as discussed above, and that “[t]his amendment corrects the manufacturer to
26 Sconza Candy Company.” The Notice alleges that Sconza violated Proposition 65 by failing to

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28 ¹ As the term “Defendant Releasees” and “Downstream Defendant Releasees” are defined in
this Consent Judgment.

1 sufficiently warn consumers in California of the health hazards associated with exposures to
2 acrylamide contained in its “Goodfields Dark Chocolate Covered Almonds.”

3 On March 27, 2020, Embry served Sconza, Costco and all requisite public enforcement
4 agencies with an Amended 60-Day Notice of Violation of California Health & Safety Code
5 section 25249.6 *et seq.* (“Operative Notice”). The Notice states that it amends the original notice
6 dated July 29, 2019, as discussed above, and that “[t]his amendment includes all Sconza roasted
7 almonds products.” The Notice alleges that Sconza violated Proposition 65 by failing to sufficiently
8 warn consumers in California of the health hazards associated with exposures to acrylamide
9 contained in “Sconza Roasted Almond Products.”

10 On April 3, 2020, Embry served Sconza, Vons and all requisite public enforcement agencies
11 with an Amended 60-Day Notice of Violation of California Health & Safety Code section 25249.6 *et*
12 *seq.* (“No Sugar Added Dark Chocolate Almonds Notice”). The Notice states that it amends the
13 original notice dated April 29, 2019, as discussed above, and that “[t]his amendment corrects the
14 manufacturer to Sconza Candy Company.” The Notice alleges that Sconza violated Proposition 65 by
15 failing to sufficiently warn consumers in California of the health hazards associated with exposures to
16 acrylamide contained in its “No Sugar Added Dark Chocolate Almonds.”

17 The Notices of Violation set forth in this Section 1.6 are collectively referred to hereinafter as
18 the “Notices.” No public enforcer has commenced or is otherwise prosecuting an action to enforce
19 the violations alleged in the Notices.

20 **1.7 Status of Pleadings**

21 On December 13, 2019, Embry filed a Complaint against Sconza for the alleged violations of
22 Health & Safety Code section 25249.6 that are the subject of the Lemoncello Notice and against Sconza
23 and CVS for the alleged violations that are the subject of the Goodfields Notice.

24 On _____, Embry filed a First Amended Complaint adding allegations against
25 Sconza for the violations claimed in the Operative Notice and for the violations claimed in the No
26 Sugar Added Dark Chocolate Almonds Notice (“First Amended Complaint”).
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1 **1.8 No Admission**

2 Sconza denies the material, factual, and legal allegations in the Notices and First Amended
3 Complaint, and maintains that all of the products it has manufactured, imported, sold, and/or distributed
4 for sale in California, including the Covered Products, have been, and are, in compliance with all laws.
5 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion
6 of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment be construed
7 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section
8 shall not, however, diminish or otherwise affect Sconza’s obligations, responsibilities, and duties under
9 this Consent Judgment.

10 **1.9 Consent to Jurisdiction**

11 For purposes of this Consent Judgment and the First Amended Complaint only, the Parties
12 stipulate that this Court has jurisdiction over Sconza as to the allegations in the First Amended
13 Complaint, that venue is proper in the County of Alameda, and that the Court has jurisdiction to enter
14 and enforce the provisions of this Consent Judgment.

15 **1.10 Effective Date**

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

18 **2. INJUNCTIVE RELIEF**

19 2.1 For purposes of this Consent Judgment, the term “Compliance Date” is the date six (6)
20 months after the Effective Date.

21 2.2 Commencing on the “Compliance Date”, and continuing thereafter, Sconza shall only
22 manufacture, supply and distribute, or cause to manufacture, supply and distribute, in California,
23 Covered Products, regardless of type, form, or branding, that, as packaged, contain acrylamide
24 concentrations of 0.225 parts per million (“ppm”) or less as an average of at least three (3) samples.
25 Such compliance may be demonstrated by Sconza using at least three (3) samples of the same Covered
26 Product (however branded). Samples shall be measured by means of a test performed by an accredited
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1 laboratory using either GC/MS (Gas Chromatograph/Mass Spectrometry), LC-MS/MS (Liquid
2 Chromatograph-Mass Spectrometry), or any other testing method agreed upon by the Parties.

3 2.3 For Covered Products that contain acrylamide in a concentration exceeding the ppm
4 level set forth in Section 2.2 above, and which are manufactured, supplied and distributed for sale or
5 use in California on or after the Compliance Date, Sconza shall provide one of the following
6 Proposition 65 warnings:

7
8 **CA Prop 65 Warning:** Consuming this product can expose you to chemicals, including
9 acrylamide, which are known to the State of California to cause cancer. For more information
10 go to www.P65Warnings.ca.gov/food.

11 or

12 **WARNING: Cancer – www.P65Warnings.ca.gov/food**

13 When required, the above warning statements shall be placed on the product's package in at least six
14 (6) point font and either set within a box or separated from other warning text by at least one line so
15 as to be able to be read and understood by an ordinary individual prior to purchase or use. If the
16 product's package provides other health-related information in Spanish, the warning statement shall
17 also be provided in Spanish.

18 2.4 In the event Plaintiff enters into an agreement or consent judgment with any other person
19 supplying products substantially similar to Covered Products addressing alleged violations of
20 Proposition 65 with respect to exposures to acrylamide that provides for less stringent standards than
21 that set forth in Section 2.2 above; or if a judgment is entered in any Proposition 65 case with respect
22 to exposures to acrylamide from products substantially similar to Covered Products that provides for
23 less stringent requirements than that set forth in Section 2.2 above; or if the California Office of Health
24 Hazard Assessment adopts a regulation or safe use determination, or issues an interpretative guideline
25 that exempts Covered Products or products substantially similar to Covered Products from meeting the
26 requirements of Proposition 65; or if Proposition 65 is determined to be preempted by federal law or a
27 burden on First Amendment rights with respect to acrylamide in Covered Products or products
28 substantially similar to Covered Products, then Sconza may seek a Court-approved modification of this
Consent Judgment, and without the objection of the Plaintiff, to conform or eliminate the terms of this

1 Section 2 accordingly. Any such modification shall have no effect on the financial obligations set forth
2 herein.

3 2.5 Notwithstanding any other provision and requirement of this Consent Judgment,
4 Covered Products that are manufactured, supplied and distributed, or caused to be manufactured,
5 supplied and distributed, prior to the Compliance Date shall be subject to the release of liability
6 pursuant to this Consent Judgment, without regard to when such products were, or are in the future,
7 distributed or sold to consumers.

8 **3. STATUTORY PENALTY PAYMENTS**

9 **3.1 Civil Penalty**

10 Sconza shall pay \$5,000 in civil penalties pursuant to California Health & Safety Code section
11 25249.7(b) in accordance with this Section. This penalty payment shall be allocated in accordance
12 with California Health & Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%)
13 of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”)
14 and the remaining twenty-five percent (25%) of the penalty remitted to Embry. More specifically,
15 within twenty (20) business days following the Effective Date, Sconza shall issue two separate
16 company checks for the civil penalty payment to (a) “OEHHA” in the amount of \$3,750 and with the
17 memo line on the check indicating “Prop 65 Penalties – Embry v. Sconza” (Sconza may reference
18 OEHHA’s Tax Identification Number of 68-0284486 for this check); and (b) “Kim Embry” in the
19 amount of \$1,250 (for which Embry shall provide Defendant a completed IRS Form W-9 with a tax
20 identification number within two days following the Effective Date, if not beforehand). These checks
21 shall be delivered to the addresses listed in Section 3.3 below.

22 **3.2 Payment Delivery**

23 (a) Payment to Embry shall be delivered to the following address:

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

28 (b) Payment to OEHHA shall be delivered to one of the following addresses:

1 For United States Postal Service Delivery:

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

7 or

8 For Non-United States Postal Service Delivery:

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

14 **4. REIMBURSEMENT OF FEES AND COSTS**

15 Provided that Plaintiff and her counsel have first provided Sconza with complete and executed
16 2019 versions of IRS Form W-9s, Sconza shall pay Embry a total of \$50,000 for fees and costs incurred
17 as a result of investigating, bringing this matter to Defendant’s attention, and negotiating a settlement
18 in the public interest. Defendant shall make \$25,000 of this payment by check payable to “Nicholas &
19 Tomasevic, LLP” (EIN 46-3474065). Defendant shall make the other \$25,000 of this payment by
20 check payable to “Glick Law Group” (EIN 47-1838518). The payments shall be made to the addresses
21 listed in Section 9 below within twenty (20) business days following the Effective Date.

22 **5. LIABILITY RELEASES**

23 **5.1 Embry’s Public Release of Proposition 65 Claims**

24 Embry, acting on her own behalf and in the public interest, releases Sconza and its affiliated
25 entities (including, without limitation, parent companies, subsidiaries, corporate affiliates and
26 similarly related companies), and all of its and their directors, officers, shareholders, employees,
27 agents, shareholders, successors, assigns and attorneys (collectively, all of the foregoing shall be
28 referred to as “Defendant Releasees”), and all entities to which Defendant Releasees directly or
indirectly distribute or sell Covered Products, including, but not limited to, distributors, wholesalers,
customers, franchisees, dealers, licensors, licensees, retailers (including, without limitation, Costco,
CVS, Vons, Flagstone Foods, Bay Valley Foods), re-baggers (including, without limitation, Torn &

1 Glasser), and, cooperative members (collectively, “Downstream Defendant Releasees”), from all
2 claims for violations of Proposition 65 based on exposures to acrylamide from Covered Products that
3 are or have been marketed, manufactured, supplied or distributed by Sconza, Defendant Releasees,
4 or Downstream Defendant Releasees prior to the Compliance Date. Compliance with the terms of
5 this Consent Judgment by Defendant shall constitute compliance with Proposition 65 by Defendant,
6 its Defendant Releasees and its Downstream Defendant Releasees with respect to any alleged failure
7 to warn about acrylamide contained in Covered Products. This Consent Judgment is a full, final and
8 binding resolution of all claims that were or could have been asserted against Sconza, Defendant
9 Releasees and Downstream Defendant Releasees for failure to provide warnings for alleged exposures
10 to acrylamide contained in Covered Products.

11 **5.2 Embry’s Individual Release of Claims**

12 Embry, in her individual capacity only, and on behalf of herself and her successors, heirs,
13 assigns, agents, and attorneys, also provides a release herein to Defendant, Defendant Releasees and
14 Downstream Defendant Releasees as to all chemicals currently listed under Proposition 65 in all of the
15 Covered Products. In addition, Embry, in her individual capacity only, and on behalf of herself and
16 her successors, heirs, assigns, agents, and attorneys, also provides a release herein to Defendant,
17 Defendant Releasees and Downstream Defendant Releasees which shall be effective as a full and final
18 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorney’s
19 fees, damages, losses, claims, liabilities and demands of any nature, character, or kind, whether known
20 or unknown, suspected or unsuspected, with respect to any other issue concerning the Covered
21 Products. In this regard, Embry hereby acknowledges that she is familiar with Section 1542 of the
22 California Civil Code, which provides as follows:

23 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR**
24 **OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR**
25 **HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF**
26 **KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR**
27 **HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.**

1 **5.3 Sconza’s Release of Embry**

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

8 **6. COURT APPROVAL**

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

13 **7. SEVERABILITY**

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

16 **8. GOVERNING LAW**

17 The terms of this Consent Judgment shall be governed by the laws of the State of California
18 and apply within the State of California. In the event that Proposition 65 is repealed, or is otherwise
19 rendered inapplicable by reasons, including but not limited to changes in the law, or if the State of
20 California’s No Significant Risk Level (pursuant to California Health & Safety Code section 25703)
21 for acrylamide is increased by the Office of Environmental Health Hazard Assessment or through other
22 legal process to a level greater than or equal to 1.0 micrograms/day, then Defendant may provide
23 written notice to Embry of any asserted change in the law and have no further injunctive obligations
24 pursuant to this Consent Judgment, with respect to, and to the extent that, the Covered Products are so
25 affected.

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1 **9. NOTICE**

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

6 For Sconza:

7 Sconza Candy Company
8 Deborah McConnell
9 One Sconza Candy Lane
10 Oakdale, CA 95361

11 With a copy to:

12 Rohit Sabnis
13 Burnham Brown
14 A Professional Law Corporation
15 1901 Harrison Street, 14th Floor
16 Oakland, CA 94612
17 rsabnis@burnhambrown.com

18 For Embry:

19 Noam Glick
20 Glick Law Group
21 225 Broadway, 21st Floor
22 San Diego, CA 92101

23 and

24 Craig Nicholas
25 Nicholas & Tomasevic, LLP
26 225 Broadway, 19th Floor
27 San Diego, CA 92101

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

30 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

31 This Consent Judgment may be executed in counterparts and by facsimile signature or portable
32 document form (PDF) signature, each of which shall be deemed an original, and all of which, when
33 taken together, shall constitute one and the same document.
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1 **11. POST EXECUTION ACTIVITIES**

2 Embry agrees to comply with the reporting form requirements referenced in Health & Safety
3 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code
4 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement set forth
5 in this Consent Judgment. In furtherance of obtaining such approval, Embry shall file and serve a
6 noticed motion for approval of this Consent Judgment and assure that the Office of the California
7 Attorney General is served with said motion and all supporting papers at least forty-five (45) days prior
8 to the scheduled hearing thereon. The parties agree to mutually employ reasonably good faith efforts,
9 including through their counsel, to support the Court's approval and entry of this agreement as
10 judgment. For purposes of this Section, "good faith efforts" shall include, at a minimum, supporting
11 the motion for approval, responding to any objection that any third-party may make, and appearing at
12 the hearing before the Court if so requested. If this Consent Judgment is not entered by the Court, it
13 shall be of no force or effect and shall not be introduced into evidence or otherwise used in any
14 proceeding for any purpose.

15 In addition, Embry agrees to execute and file with the Court a dismissal with prejudice of CVS
16 within five (5) business days of receipt and clearance of the payments set forth above in Sections 3 and
17 4.

18 To the extent not already done so, Embry further agrees to withdraw the April 29, 2019 Notice
19 of Violation served to Torn & Glasser and Vons, as well as the July 12, 2019 Notice of Violation served
20 to Flagstone Foods and CVS, within ten (10) business days of the full execution of this Consent
21 Judgment by the Parties.

22 **12. MODIFICATION**

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

26 **13. AUTHORIZATION**

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

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14. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES

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

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15. ENTIRE AGREEMENT

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

AGREED TO:

AGREED TO:

Date: May 7, 2020

Date: APRIL 6, 2020

By: 

By: 

KIM EMBRY

RONALD SCONZA
President & CEO
of Sconza Candy Company

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

4839-0458-5916, v. 1