

1 **GLICK LAW GROUP, PC**

2 Noam Glick (SBN 251582)  
3 225 Broadway, Suite 2100  
4 San Diego, California 92101  
5 Tel: (619) 382-3400  
6 Fax: (619) 393-0154

7 **NICHOLAS & TOMASEVIC, LLP**

8 Craig M. Nicholas (SBN 178444)  
9 Jake Schulte (SBN 293777)  
10 225 Broadway, Suite 1900  
11 San Diego, California 92101  
12 Tel: (619) 325-0492  
13 Fax: (619) 325-0496

14 Attorneys for Plaintiff  
15 Kim Embry

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

17 **IN AND FOR THE COUNTY OF ALAMEDA**

18 KIM EMBRY, an individual,

19 Plaintiff,

20 v.

21 SCONZA CANDY COMPANY, a California  
22 corporation, CVS PHARMACY INC., a  
23 Rhode Island corporation, and DOES 1  
24 through 100, inclusive,

25 Defendants.

Case No.: RG19046800

26 **AMENDED [PROPOSED] CONSENT  
27 JUDGMENT**

28 (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  
28

1 Releasees and Downstream Defendant Releasees<sup>1</sup> (“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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27 <sup>1</sup> As the term “Defendant Releasees” and “Downstream Defendant Releasees” are defined in  
28 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.

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CONSENT JUDGMENT



1           **1.8     No Admission**

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

10           **1.9     Consent to Jurisdiction**

11           For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that  
12 this Court has jurisdiction over Sconza as to the allegations in the First Amended Complaint,  
13 that venue is proper in the County of Alameda, and that the Court has jurisdiction to enter and  
14 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  
27  
28

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.

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

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

or

**WARNING: Cancer – [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food)**

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

2.4 In the event Plaintiff enters into an agreement or consent judgment with any other person supplying products substantially similar to Covered Products addressing alleged violations of Proposition 65 with respect to exposures to acrylamide that provides for less stringent standards than that set forth in Section 2.2 above; or if a judgment is entered in any Proposition 65 case with respect to exposures to acrylamide from products substantially similar to Covered Products that provides for less stringent requirements than that set forth in Section 2.2 above; or if the California Office of Health Hazard Assessment adopts a regulation or safe use determination, or issues an interpretative guideline that exempts Covered Products or products substantially similar to Covered Products from meeting the requirements of Proposition 65; or if Proposition 65 is determined to be preempted by federal law or a burden on First Amendment rights with respect to acrylamide in Covered Products or products 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 Judgement, 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  
P.O. Box 4010  
5 Sacramento, CA 95812-4010

6 or

7 For Non-United States Postal Service Delivery:

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

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

13 Provided that Plaintiff and her counsel have first provided Sconza with complete and executed  
14 2019 versions of IRS Form W-9s, Sconza shall pay Embry a total of \$50,000 for fees and costs incurred  
15 as a result of investigating, bringing this matter to Defendant's attention, and negotiating a settlement  
16 in the public interest. Defendant shall make \$25,000 of this payment by check payable to "Nicholas &  
17 Tomasevic, LLP" (EIN 46-3474065). Defendant shall make the other \$25,000 of this payment by  
18 check payable to "Glick Law Group" (EIN 47-1838518). The payments shall be made to the addresses  
19 listed in Section 9 below within twenty (20) business days following the Effective Date.

20 **5. LIABILITY RELEASES**

21 **5.1 Embry's Public Release of Proposition 65 Claims**

22 Embry, acting on her own behalf and in the public interest, releases Sconza and its affiliated  
23 entities (including, without limitation, parent companies, subsidiaries, corporate affiliates and  
24 similarly related companies), and all of its and their directors, officers, shareholders, employees,  
25 agents, shareholders, successors, assigns and attorneys (collectively, all of the foregoing shall be  
26 referred to as "Defendant Releasees"), and all entities to which Defendant Releasees directly or  
27 indirectly distribute or sell Covered Products, including, but not limited to, distributors, wholesalers,  
28 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.**  
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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.



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.



1     **14.     GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

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

6     *[Rest of page intentionally left blank]*

1 **15. 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

8 **AGREED TO:**

9  
10 Date: May 7, 2020

11   
12 By: \_\_\_\_\_  
13 KIM EMBRY

8 **AGREED TO:**

9  
10 Date: APRIL 6, 2020

11   
12 By: \_\_\_\_\_  
13 RONALD SCONZA  
14 President & CEO  
15 of Sconza Candy Company

16  
17 **IT IS SO ORDERED.**

18  
19 Date: \_\_\_\_\_

20 \_\_\_\_\_  
21 JUDGE OF THE SUPERIOR COURT

22  
23 4839-0458-5916, v. 1  
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