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8 Attorneys for Plaintiff Kim Embry

9  
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

12 KIM EMBRY, an individual,

13 Plaintiff,

14 v.

15 ZACHARY CONFECTIONS, INC., An  
Indiana corporation and DOES 1 through 100,  
16 inclusive

17 Defendants.  
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Case No. \_\_\_\_\_

**[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  
4 ZACHARY CONFECTIONS, INC. (“Zachary”) with Embry and Zachary each individually referred  
5 to as a “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 reducing  
9 or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 Zachary 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 Zachary manufactures, packages, labels and sells wholesale Market Pantry  
16 Dark Chocolate Covered Almonds to Target Corporation (“Target”), which then sells the product to  
17 the public in California. Embry alleges that Market Pantry Dark Chocolate Covered Almonds contain  
18 acrylamide. Embry further alleges that Zachary does so without providing a sufficient health hazard  
19 warning as required by Proposition 65 and related Regulations. Pursuant to Proposition 65, acrylamide  
20 is listed as a chemical known to cause cancer and reproductive harm.

21 **1.5 Notice of Violation**

22 On June 18, 2019, Embry served Target, the California Attorney General, and all other required  
23 public enforcement agencies with a 60-Day Notice of Violation of California Health and Safety Code  
24 section 25249.6 *et seq.* (“Notice”). On April \_\_, 2020, Embry amended the Notice to name Zachary  
25 as the manufacturer of Market Pantry Dark Chocolate Covered Almonds. The Amended Notice alleges  
26 that Zachary violated Proposition 65 by failing to sufficiently warn consumers in California of the  
27 health hazards associated with exposures to acrylamide contained in its “Market Pantry Dark Chocolate  
28 Covered Almonds”.

1 No public enforcer has commenced or is otherwise prosecuting an action to enforce the  
2 violations alleged in the Notice.

### 3 4 **1.6 Product Description**

5 For purposes of this Consent Judgment, “Product” or “Products” are defined as Market Pantry  
6 Dark Chocolate Covered Almonds, including the roasted almonds therein, that allegedly contain  
7 acrylamide and are manufactured, imported, sold, or distributed for sale in California by Zachary and  
8 Releasees, defined *infra*.

### 9 **1.7 Other Releasees**

10 This Consent Judgment expressly encompasses all of the subject Products, whether sold under  
11 Target’s own brand name, or some other private label, at all grocery, retail, and other locations and  
12 sales channels in California.

### 13 **1.8 Complaint**

14 On \_\_\_\_\_, Embry filed a Complaint against Zachary for the alleged violations of Health  
15 and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

### 16 **1.9 No Admission**

17 Zachary and Releasees deny the material, factual, and legal allegations in the Notice and  
18 Complaint, and maintain that all of the products they have manufactured, imported, sold, and/or  
19 distributed for sale in California, including the Products, have been, and are, in compliance with all  
20 laws. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,  
21 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment  
22 be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law  
23 by Zachary and/or Releasees. This Section shall not, however, diminish or otherwise affect Zachary’s  
24 and Releasees’ obligations, responsibilities, and duties under this Consent Judgment.

### 25 **1.10 Jurisdiction**

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

3 **1.11 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the  
5 Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

6 **2. INJUNCTIVE RELIEF**

7 **2.1 Reformulation of the Product**

8 Commencing on the Effective Date, and continuing thereafter, Zachary shall not manufacture  
9 any Product that will be sold or offered for sale in California that exceeds the following acrylamide  
10 concentration limits, such concentration to be determined by use of a test performed by an laboratory  
11 accredited by the State of California, a federal agency, or a nationally recognized accrediting  
12 organization, using LC-MS/MS (Liquid Chromatograph-Mass Spectrometry): the average acrylamide  
13 concentration shall not exceed 225 ppb by weight (the “Average Level”) for the Products. The Average  
14 Level is determined by randomly selecting and testing at least one sample each from five different lots  
15 of the Products (or the maximum number of lots available for testing if less than five) during a testing  
16 period of at least 60 days.

17 **2.2 Sell-Through Period**

18 Notwithstanding anything else in this Consent Judgment, the Products that were manufactured  
19 prior to the Effective Date and six (6) months thereafter shall be subject to the release of liability  
20 pursuant to this Consent Judgment, without regard to when such Products were, or are in the future,  
21 distributed or sold to customers. As a result, the obligations of Zachary, do not apply to these Products  
22 manufactured prior to the Effective Date plus six (6) months thereafter (“the Sell-Through Period”).

23 **3. MONETARY SETTLEMENT TERMS**

24 **3.1 Settlement Amount**

25 Zachary, on behalf of itself and the Releasees shall cause to be paid Sixty Thousand dollars  
26 (\$60,000.00) in settlement and total satisfaction of all the claims referred to in the Notice and the  
27 Amended Notice, the Complaint, and this Consent Judgment (hereinafter, the “Settlement Amount”).  
28 This includes civil penalties in the amount of Six Thousand Dollars (\$6,000) pursuant to Health and

1 Safety Code section 25249.7(b) (hereinafter, the “Proposed Penalties”) and attorney’s fees and costs in  
2 the amount of Fifty-Four Thousand Dollars (\$54,000) pursuant to Code of Civil Procedure section  
3 1021.5 (hereinafter, the “Proposed Attorney Fees”).

### 4 **3.2 Civil Penalty**

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

9 All payments owed to Embry shall be made payable to the Glick Law Group Client Trust  
10 Account, and shall be delivered to the following address:

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

15 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA  
16 (Memo Line "Prop 65 Penalties") at the following addresses:

17 For United States Postal Service Delivery:

18 Mike Gyurics  
19 Fiscal Operations Branch Chief  
20 Office of Environmental Health Hazard Assessment  
21 P.O. Box 4010  
22 Sacramento, CA 95812-4010

23 For Non-United States Postal Service Delivery:

24 Mike Gyurics  
25 Fiscal Operations Branch Chief  
26 Office of Environmental Health Hazard Assessment  
27 1001 I Street  
28 Sacramento, CA 95814

Zachary agrees to provide Embry’s counsel with a copy of the check payable to OEHHA,  
simultaneous with its penalty payments to Embry.

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

- “Glick Law Group” (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);

- 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 Parties acknowledge that Embry and her counsel offered to resolve this dispute by Consent  
7 Judgment without reaching terms on the amount of fees and costs to be reimbursed to them, thereby  
8 leaving this fee issue to be resolved after the material terms of the Consent Judgment had been agreed  
9 to. The Parties then attempted to (and did) reach an accord on the compensation due to Embry and the  
10 Proposed Attorney Fees due to her counsel under general contract principles and the private attorney  
11 general doctrine codified at California Code of Civil Procedure section 1021.5, for all work performed  
12 in this matter. Under these legal principles, the portion of the Consent Judgment attributable to the  
13 Proposed Attorney fees shall be paid to Embry’s counsel, who are entitled to the Proposed Attorney  
14 Fees incurred by them in this action, including but not limited to investigating potential violations,  
15 bringing this matter to Zachary’s attention, as well as negotiating this Consent Judgment in the public  
16 interest.

17 Zachary shall cause to be paid the Proposed Attorney Fees to Embry’s counsel in two checks,  
18 divided equally, payable to Glick Law Group, PC (\$27,000) and Nicholas & Tomasevic, LLP (\$27,000)  
19 respectively. The addresses for these two entities are:

20 Noam Glick  
21 Glick Law Group  
22 225 Broadway, Suite 2100  
23 San Diego, CA 92101

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

### 28 **3.4 Timing**

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

## 4. **CLAIMS COVERED AND RELEASED**

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

1 For any claim or violation arising under Proposition 65 alleging a failure to warn about  
2 exposures to acrylamide from Products manufactured, imported, sold, or distributed by Zachary  
3 and/or Releasees prior to the end of the Sell-Through Period, Embry, acting on her own behalf and in  
4 the public interest, releases Zachary of any and all liability. This release includes Zachary's upstream  
5 suppliers of the ingredients of the Products, including but not limited to the supplier of the roasted  
6 almonds in the Products, and Zachary's parents, subsidiaries, affiliated entities under common  
7 ownership, its directors, officers, principals, agents, employees, attorneys, insurers, accountants,  
8 predecessors, successors, and assigns, and each entity to whom Zachary directly or indirectly  
9 distributes, ships, or sells the Products, including but not limited to Target, downstream distributors,  
10 wholesalers, customers, other retailers, franchisees, cooperative members, and licensees (collectively,  
11 the "Releasees"). Compliance with the terms of this Consent Judgment constitutes compliance with  
12 Proposition 65 with respect to the alleged or actual failure to warn about exposures to acrylamide  
13 from the Products manufactured, imported, sold, or distributed by Zachary after the Effective Date  
14 and the Sell-Through Date. This Consent Judgment is a full, final and binding resolution of all claims  
15 that were or could have been asserted against Zachary and/or Releasees for failure to provide warnings  
16 for alleged exposures to acrylamide contained in the Products.

#### 17 **4.2 Embry's Individual Release of Claims**

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

#### 24 **4.3 Zachary's Release of Embry**

25 Zachary, on its own behalf and on behalf of Releasees, as well as its past and current agents,  
26 representatives, attorneys, successors, and assignees, hereby waives any and all claims against Embry  
27 and her attorneys and other representatives, for any and all actions taken or statements made by Embry  
28

1 and her attorneys and other representatives, whether in the course of investigating claims, otherwise  
2 seeking to enforce Proposition 65 against it, in this matter or with respect to the Products.

3 **4.4 Mutual Release of Known and Unknown Claims**

4 Embry, on behalf of herself and her agents, attorneys, representatives, successors, and assigns,  
5 in her respective individual capacity only and not in its representative capacity, and Zachary, each  
6 provide a general release of the other including the Releasees herein which shall be effective as a full  
7 and final accord and satisfaction, as a bar to all claims of any nature, character or kind, known or  
8 unknown, suspected or unsuspected, arising out of alleged violations of Proposition 65 with respect  
9 to the Products. Embry and Zachary each acknowledge that they are each familiar with Section 1542  
10 of the California Civil Code, which provides as follows:

11 **"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT  
12 THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR  
13 SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF  
14 EXECUTING THE RELEASE, AND THAT, IF KNOWN BY HIM OR  
15 HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER  
16 SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY."**

17 The Parties expressly waive and relinquish any and all rights and benefits that they may have  
18 under, or which may be conferred on them by the provisions of Section 1542 of the California Civil  
19 Code as well as under any other state or federal statute or common law principle of similar effect, to  
20 the fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters.  
21 In furtherance of such intention, the release hereby given shall be and remain in effect as a full and  
22 complete release notwithstanding the discovery or existence of any such additional or different claims  
23 or facts arising out of the released matters. This Section 4 release shall not release any obligations  
24 created by this Agreement.

25 **5. COURT APPROVAL**

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



1     **6. SEVERABILITY**

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

4     **7. GOVERNING LAW**

5             The terms of this Consent Judgment shall be governed by the laws of the state of California and  
6 apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise  
7 rendered inapplicable for reasons, including but not limited to changes in the law, or if the state of  
8 California's No Significant Risk Level (NSRL) for acrylamide is increased by OEHHA or through  
9 other legal process to a level greater than or equal to 1.0 mcg/day, then Zachary may provide written  
10 notice to Embry of any asserted change, and shall have no further injunctive obligations pursuant to  
11 this Consent Judgment with respect to, and to the extent that, the Products are so affected.

12     **8. NOTICE**

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

16     For Zachary:

17     David C. Allen  
18     Barnes & Thornburg LLP  
19     2029 Century Park East; Suite 300  
20     Los Angeles, CA 90067-2904

21     For Embry:

22     Noam Glick  
23     Glick Law Group, PC  
24     225 Broadway, 21st Floor  
25     San Diego, CA 92101

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

28     **9. COUNTERPARTS; FACSIMILE SIGNATURES**

           This Consent Judgment may be executed in counterparts and by signature through facsimile or  
portable document format (PDF), each of which shall be deemed an original, and all of which, when  
taken together, shall constitute one and the same document.

**10. POST EXECUTION ACTIVITIES**

           Embry agrees to comply with the reporting form requirements referenced in Health and Safety  
Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code

1 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which  
2 motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to  
3 mutually employ their best efforts, including those of their counsel, to support the entry of this  
4 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For  
5 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for approval,  
6 responding to any objection that any third-party may make, and appearing at the hearing before the  
7 Court if so requested. Defendant agrees to cooperate with efforts of Plaintiff’s counsel to seek court  
8 approval of this Consent Judgment, provide materials requested by the Court in a timely fashion, and  
9 refrain from opposing or delaying court approval in any manner.

10 **11. MODIFICATION**

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

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22 **12. AUTHORIZATION**

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

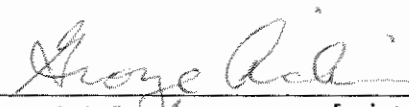
1 **AGREED TO:**

**AGREED TO:**

2 Date: 4/23/20

Date: 4/23/2020

3  
4 By:   
5 Kim Embry

By:   
GEORGE ANICHINI [print name]  
Zachary Confections, Inc.

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