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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
28

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 acrylamide
13 concentration shall not exceed 225 ppb by weight (the “Reformulation Level”) for the Products.

14 **2.2 Sell-Through Period**

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

21 **3. MONETARY SETTLEMENT TERMS**

22 **3.1 Settlement Amount**

23 Zachary, on behalf of itself and the Releasees shall cause to be paid Sixty Thousand dollars
24 (\$60,000.00) in settlement and total satisfaction of all the claims referred to in the Notice and the
25 Amended Notice, the Complaint, and this Consent Judgment (hereinafter, the “Settlement Amount”).
26 This includes civil penalties in the amount of Six Thousand Dollars (\$6,000) pursuant to Health and
27 Safety Code section 25249.7(b) (hereinafter, the “Proposed Penalties”) and attorney’s fees and costs
28 in the amount of Fifty-Four Thousand Dollars (\$54,000) pursuant to Code of Civil Procedure section

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

5 **3.2 Civil Penalty**

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

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

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

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

18 For United States Postal Service Delivery:

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

24 For Non-United States Postal Service Delivery:

25 Mike Gyurics
26 Fiscal Operations Branch Chief
27 Office of Environmental Health Hazard Assessment
28 1001 I Street
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:

- 1 • “Glick Law Group” (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 2 • “Nicholas & Tomasevic” (EIN: 46-3474065) at the address provided in Section 3.2(a)(i);
- 3 and
- 4 • “Office of Environmental Health Hazard Assessment” at 1001 I Street, Sacramento, CA
- 5 95814.

6 **3.3 Attorney’s Fees and Costs**

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

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

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

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

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1 **3.4 Timing**

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

34. **CLAIMS COVERED AND RELEASED**

4 **4.1 Embry’s Public Release of Proposition 65 Claims**

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

21
22 **4.2 Embry’s Individual Release of Claims**

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

1 **4.3 Zachary’s Release of Embry**

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

7 **4.4 Mutual Release of Known and Unknown Claims**

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

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

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

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1 **5. COURT APPROVAL**

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

5 **6. SEVERABILITY**

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

8 **7. GOVERNING LAW**

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

16 **8. NOTICE**

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

20 For Zachary:

21 David C. Allen
22 Barnes & Thornburg LLP
23 2029 Century Park East; Suite 300
24 Los Angeles, CA 90067-2904

For Embry:

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

25 Any Party may, from time to time, specify in writing to the other, a change of address to which
26 all notices and other communications shall be sent.
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1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

5 **10. POST EXECUTION ACTIVITIES**

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

17 **11. MODIFICATION**

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

21 **12. AUTHORIZATION**

22 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
23 have read, understand, and agree to all of the terms and conditions contained herein.
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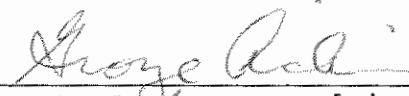
1 **AGREED TO:**

2 Date: 4/23/20

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4 By: 
5 Kim Embry

AGREED TO:

Date: 4/23/2020

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

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