To: Page 2 of 10 2019-07-31 23:42:04 (GMT) 16193301866 From: Craig Craig

1 2 3 4 5 6 7 8 9 10 11 12	NICHOLAS & TOMASEVIC, LLP Craig M. Nicholas (SBN 178444) Shaun Markley (SBN 391785) Jake W. Schulte (SBN 293777) 225 Broadway, 19th Floor San Diego, California 92101 Tel: (619) 325-0492 Fax: (619) 325-0496 Email: cnicholas@nicholaslaw.org Email: smarkley@nicholaslaw.org Email: jschulte@nicholaslaw.org GLICK LAW GROUP, PC Noam Glick (SBN 251582) 225 Broadway, Suite 2100 San Diego, California 92101 Tel: (619) 382-3400 Fax: (619) 615-2193 Email: noam@glicklawgroup.com Attorneys for Plaintiff Kim Embry	FILED BY FAX ALAMEDA COUNTY August 01, 2019 CLERK OF THE SUPERIOR COURT By Shabra Iyamu, Deputy CASE NUMBER: RG19029536	
13 14	SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA		
15	KIM EMBRY, an individual	County of Alameda Case No.:	
15 16	Plaintiff,	COMPLAINT FOR CIVIL PENALTIES	
17	V.	AND INJUNCTIVE RELIEF	
18	KELLOGG SALES COMPANY, a Delaware corporation; RALPHS GROCERY COMPANY, an Ohio corporation, and DOES	(Health & Safety Code § 25249.6 et seq.)	
19	I through 100, inclusive,		
20	Defendants.		
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	COMPLAINT		

I. INTRODUCTION

- 1. This Complaint is a representative action brought by Plaintiff in the public interest of the citizens of the State of California ("the People"). Plaintiff seeks to remedy Defendants' failure to inform the People of exposure to Acrylamide, a known carcinogen. Defendants expose consumers to Acrylamide by manufacturing, importing, selling, and/or distributing Pop-Tarts Frosted S'mores ("Product" or "Pop-Tarts"). Defendants know and intend that customers will ingest Products containing Acrylamide.
- 2. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code, section 25249.6 et seq. ("Proposition 65"), "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual. . . ." (Health & Safety Code, § 25249.6.)
- 3. California identified and listed Acrylamide as a chemical known to cause cancer as early as January 1, 1990, and as a chemical known to cause developmental/reproductive toxicity in February of 2011.
- 4. Defendants failed to sufficiently warn consumers and individuals in California about potential exposure to Acrylamide in connection with Defendants' manufacture, import, sale, or distribution of Products. This is a violation of Proposition 65.
- 5. Plaintiff seeks injunctive relief compelling Defendants to sufficiently warn consumers in California before exposing them to Acrylamide in Products. (Health & Safety Code, § 25249.7(a).) Plaintiff also seeks civil penalties against Defendants for their violations of Proposition 65 along with attorney's fees and costs. (Health & Safety Code, § 25249.7(b).)

II. PARTIES

6. Plaintiff KIM EMBRY is a citizen of the State of California dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposure from consumer products. She brings this action in the public interest pursuant to Health and Safety Code, section 25249.7.

- 7. Defendant KELLOGG SALES COMPANY ("Kellogg"), is a corporation organized and existing under the laws of the State of Delaware. Defendant is registered to do business in California, and does business in the County of Alameda, within the meaning of Health and Safety Code, section 25249.11. Kellogg manufactures, imports, sells, or distributes Products in California and Alameda County, including, for example Pop-Tarts.
- 8. Defendant RALPHS GROCERY COMPANY ("Ralphs") is a corporation organized and existing under the laws of the State of Ohio. Ralphs does business in California and Alameda County, within the meaning of Cal. Health & Safety Code § 25249.11. Ralphs manufactures, imports, sells, or distributes Products in California and Alameda County. Kellogg and Kroger are collectively referred to as "Defendants."
- 9. The true names of Defendants DOES 1 through 100, inclusive, are unknown to Plaintiff. Plaintiff sues these Defendants by fictitious names. Plaintiff is informed and believes, and on that basis alleges, that each fictitiously named defendant is responsible for the acts and occurrences herein alleged. When ascertained, their true names shall be reflected in an amended complaint.

III. VENUE AND JURISDICTION

- 10. California Constitution Article VI, Section 10 grants the Superior Court original jurisdiction in all cases except those given by statute to other trial courts. The Health and Safety Code statute upon which this action is based does not give jurisdiction to any other court. As such, this Court has jurisdiction.
- 11. Venue is proper in Alameda County Superior Court pursuant to Code of Civil Procedure, sections 394, 395, and 395.5. Wrongful conduct occurred and continues to occur in this County. Defendants conducted and continue to conduct business in this County as it relates to Products.
- 12. Defendants have sufficient minimum contacts in the State of California or otherwise purposefully avail themselves of the California market. Exercising jurisdiction over Defendants would be consistent with traditional notions of fair play and substantial justice.

IV. CAUSES OF ACTION

FIRST CAUSE OF ACTION (Violation of Proposition 65 – Against all Defendants)

- 13. Plaintiff incorporates by reference each and every allegation contained above.
- 14. Proposition 65 mandates that citizens be informed about exposures to chemicals that cause cancer, birth defects, and other reproductive harm.
- 15. Defendants manufactured, imported, sold, and/or distributed Products containing Acrylamide in violation of Health and Safety Code, section 25249.6 et seq. Plaintiff is informed and believes such violations have continued after receipt of the Notices (defined *infra*) and will continue to occur into the future.
- 16. In manufacturing, importing, selling, and/or distributing Products, Defendants failed to provide a clear and reasonable warning to consumers and individuals in California who may be exposed to Acrylamide through reasonably foreseeable use of the Products.
- 17. Products expose individuals to Acrylamide through direct ingestion. This exposure is a natural and foreseeable consequence of Defendants placing Products into the stream of commerce. As such, Defendants intend that consumers will ingest Products, exposing them to Acrylamide.
- 18. Defendants knew or should have known that the Products contained Acrylamide and exposed individuals to Acrylamide in the ways provided above. The Notice informed Defendants of the presence of Acrylamide in the Products. Likewise, media coverage concerning Acrylamide and related chemicals in consumer products provided constructive notice to Defendants.
 - 19. Defendants' actions in this regard were deliberate and not accidental.
- 20. On June 20, 2018, Plaintiff issued a 60-Day Notice of Violation ("Notice(s)") as required by and in compliance with Proposition 65. Plaintiff provided the Notice to the various required public enforcement agencies along with a certificate of merit. The Notices alleged that Defendants violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated with exposures to Acrylamide contained in the Products.
- 21. The appropriate public enforcement agencies provided with the Notices failed to commence and diligently prosecute a cause of action against Defendants.