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 ALAMEDA COUNTY
 August 01, 2019
 CLERK OF
 THE SUPERIOR COURT
 By Shabra Iyamu, Deputy
 CASE NUMBER:
RG19029536

20 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

22 KIM EMBRY, an individual
 23
 24 Plaintiff,
 25
 26 v.
 27
 28 KELLOGG SALES COMPANY, a Delaware
 corporation; RALPHS GROCERY
 COMPANY, an Ohio corporation, and DOES
 I through 100, inclusive,
 Defendants.

Case No.:
**COMPLAINT FOR CIVIL PENALTIES
 AND INJUNCTIVE RELIEF**
 (Health & Safety Code § 25249.6 et seq.)

1 **I. INTRODUCTION**

2 1. This Complaint is a representative action brought by Plaintiff in the public interest of
3 the citizens of the State of California (“the People”). Plaintiff seeks to remedy Defendants’ failure to
4 inform the People of exposure to Acrylamide, a known carcinogen. Defendants expose consumers to
5 Acrylamide by manufacturing, importing, selling, and/or distributing Pop-Tarts Frosted S’mores
6 (“Product” or “Pop-Tarts”). Defendants know and intend that customers will ingest Products containing
7 Acrylamide.

8 2. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986, California
9 Health and Safety Code, section 25249.6 et seq. (“Proposition 65”), “[n]o person in the course of doing
10 business shall knowingly and intentionally expose any individual to a chemical known to the state to
11 cause cancer or reproductive toxicity without first giving clear and reasonable warning to such
12 individual. . . .” (Health & Safety Code, § 25249.6.)

13 3. California identified and listed Acrylamide as a chemical known to cause cancer as early
14 as January 1, 1990, and as a chemical known to cause developmental/reproductive toxicity in February
15 of 2011.

16 4. Defendants failed to sufficiently warn consumers and individuals in California about
17 potential exposure to Acrylamide in connection with Defendants’ manufacture, import, sale, or
18 distribution of Products. This is a violation of Proposition 65.

19 5. Plaintiff seeks injunctive relief compelling Defendants to sufficiently warn consumers
20 in California before exposing them to Acrylamide in Products. (Health & Safety Code, § 25249.7(a).)
21 Plaintiff also seeks civil penalties against Defendants for their violations of Proposition 65 along with
22 attorney’s fees and costs. (Health & Safety Code, § 25249.7(b).)

23 **II. PARTIES**

24 6. Plaintiff KIM EMBRY is a citizen of the State of California dedicated to protecting the
25 health of California citizens through the elimination or reduction of toxic exposure from consumer
26 products. She brings this action in the public interest pursuant to Health and Safety Code, section
27 25249.7.
28

1 7. Defendant KELLOGG SALES COMPANY (“Kellogg”), is a corporation organized and
2 existing under the laws of the State of Delaware. Defendant is registered to do business in California,
3 and does business in the County of Alameda, within the meaning of Health and Safety Code, section
4 25249.11. Kellogg manufactures, imports, sells, or distributes Products in California and Alameda
5 County, including, for example Pop-Tarts.

6 8. Defendant RALPHS GROCERY COMPANY (“Ralphs”) is a corporation organized and
7 existing under the laws of the State of Ohio. Ralphs does business in California and Alameda County,
8 within the meaning of Cal. Health & Safety Code § 25249.11. Ralphs manufactures, imports, sells, or
9 distributes Products in California and Alameda County. Kellogg and Kroger are collectively referred
10 to as “Defendants.”

11 9. The true names of Defendants DOES 1 through 100, inclusive, are unknown to Plaintiff.
12 Plaintiff sues these Defendants by fictitious names. Plaintiff is informed and believes, and on that basis
13 alleges, that each fictitiously named defendant is responsible for the acts and occurrences herein alleged.
14 When ascertained, their true names shall be reflected in an amended complaint.

15 **III. VENUE AND JURISDICTION**

16 10. California Constitution Article VI, Section 10 grants the Superior Court original
17 jurisdiction in all cases except those given by statute to other trial courts. The Health and Safety Code
18 statute upon which this action is based does not give jurisdiction to any other court. As such, this Court
19 has jurisdiction.

20 11. Venue is proper in Alameda County Superior Court pursuant to Code of Civil
21 Procedure, sections 394, 395, and 395.5. Wrongful conduct occurred and continues to occur in this
22 County. Defendants conducted and continue to conduct business in this County as it relates to Products.

23 12. Defendants have sufficient minimum contacts in the State of California or otherwise
24 purposefully avail themselves of the California market. Exercising jurisdiction over Defendants would
25 be consistent with traditional notions of fair play and substantial justice.

1 **IV. CAUSES OF ACTION**

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

4 13. Plaintiff incorporates by reference each and every allegation contained above.

5 14. Proposition 65 mandates that citizens be informed about exposures to chemicals that
6 cause cancer, birth defects, and other reproductive harm.

7 15. Defendants manufactured, imported, sold, and/or distributed Products containing
8 Acrylamide in violation of Health and Safety Code, section 25249.6 et seq. Plaintiff is informed and
9 believes such violations have continued after receipt of the Notices (defined *infra*) and will continue to
10 occur into the future.

11 16. In manufacturing, importing, selling, and/or distributing Products, Defendants failed to
12 provide a clear and reasonable warning to consumers and individuals in California who may be exposed
13 to Acrylamide through reasonably foreseeable use of the Products.

14 17. Products expose individuals to Acrylamide through direct ingestion. This exposure is a
15 natural and foreseeable consequence of Defendants placing Products into the stream of commerce. As
16 such, Defendants intend that consumers will ingest Products, exposing them to Acrylamide.

17 18. Defendants knew or should have known that the Products contained Acrylamide and
18 exposed individuals to Acrylamide in the ways provided above. The Notice informed Defendants of
19 the presence of Acrylamide in the Products. Likewise, media coverage concerning Acrylamide and
20 related chemicals in consumer products provided constructive notice to Defendants.

21 19. Defendants' actions in this regard were deliberate and not accidental.

22 20. On June 20, 2018, Plaintiff issued a 60-Day Notice of Violation ("Notice(s)") as
23 required by and in compliance with Proposition 65. Plaintiff provided the Notice to the various required
24 public enforcement agencies along with a certificate of merit. The Notices alleged that Defendants
25 violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards
26 associated with exposures to Acrylamide contained in the Products.

27 21. The appropriate public enforcement agencies provided with the Notices failed to
28 commence and diligently prosecute a cause of action against Defendants.

1 22. Individuals exposed to Acrylamides contained in the Products through direct ingestion
2 resulting from reasonably foreseeable use of the Products have suffered and continue to suffer
3 irreparable harm. There is no other plain, speedy, or adequate remedy at law.

4 23. Defendants are liable for a maximum civil penalty of \$2,500 per day for each violation
5 of Proposition 65 pursuant to Health and Safety Code, section 252497(b). Injunctive relief is also
6 appropriate pursuant to Health and Safety Code, section 25249.7(a).

7 **PRAYER FOR RELIEF**

8 Wherefore, Plaintiff prays for judgment against Defendants, and each of them, as follows:

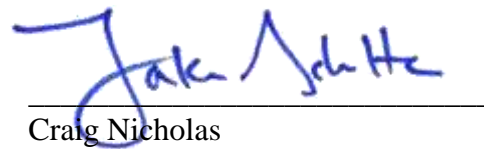
- 9 1. Civil penalties in the amount of \$2,500 per day for each violation;
10 2. A preliminary and permanent injunction against Defendants from manufacturing,
11 importing, selling, and/or distributing Products in California without providing a clear and reasonable
12 warning as required by Proposition 65 and related Regulations;
13 3. Reasonable attorney's fees and costs of suit; and
14 4. Such other and further relief as may be just and proper.

15
16 Respectfully submitted:

17 Dated: July 31, 2019

NICHOLAS & TOMASEVIC, LLP

18
19
20 By:



Craig Nicholas
Shaun Markley
Jake Schulte

Attorney for Plaintiff