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16193741930 From: Noam Glick

1 2 3 4 5 6 7 8 9	NICHOLAS & TOMASEVIC, LLP Craig M. Nicholas (SBN 178444) Shaun Markley (SBN 391785) Jake Schulte (SBN 293777) 225 Broadway, 19 <sup>th</sup> 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  SUPERIOR COURT OF	FILED BY FAX ALAMEDA COUNTY July 19, 2019 CLERK OF THE SUPERIOR COURT By Cheryl Clark, Deputy CASE NUMBER: HG19027819  THE STATE OF CALIFORNIA						
13	IN AND FOR THE COUNTY OF ALAMEDA							
14	KIM EMBRY, an individual	Case No.:						
15 16	Plaintiff, v.	COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF						
117 118 119 20 21 22 23 24 25 26 27 28	THE KROGER COMPANY, an Ohio corporation, and DOES I through 100, inclusive,  Defendant.	(Health & Safety Code § 25249.6 et seq.)						

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#### 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 Defendant's failure to inform the People of exposure to Furfuryl Alcohol, a known carcinogen. Defendant exposed consumers to Furfuryl Alcohol by manufacturing, importing, selling, and/or distributing Kroger Mini Twist Pretzels and Van de Kamp's Hamburger Enriched Buns ("Products"). Defendant knew and intended that customers would ingest the Products containing Furfuryl Alcohol.
- 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 Furfuryl Alcohol as a chemical known to cause cancer as early as September 20, 2016.
- 4. Defendant failed to sufficiently warn consumers and individuals in California about potential exposure to Furfuryl Alcohol in connection with Defendant's manufacture, import, sale, or distribution of the Products. This is a violation of Proposition 65.
- 5. Plaintiff seeks injunctive relief compelling Defendant to sufficiently warn consumers in California before exposing them to Furfuryl Alcohol in the Products. (Health & Safety Code, § 25249.7(a).) Plaintiff also seeks civil penalties against Defendant 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	THE 1	KROGER	COMPANY,	an	Ohio	corporation	("Kroger"),	is a
corp	oration or	ganized and	existing	g under the	laws of Ohio.	De	fendan	t is registered	d to do busin	ness ir
Calif	fornia, and	d does busine	ess in tl	he County	of San Diego,	wit	hin the	meaning of	Health and	Safety
Code	e, section	25249.11. Kı	roger m	anufacture	s, imports, sell	ls, oı	distrib	outes product	s in Californ	ia and
San ]	Diego Cou	ınty, includir	ng, for e	xample Kr	oger Mini Twi	st Pr	etzels a	nd Van De K	Kamp's Haml	burgei
Enri	ched Buns	i.								

8. The true names of Defendants DOES 1 through 100, inclusive, are unknown to Plaintiff. Plaintiff sues this Defendant by fictitious names. Plaintiff is informed and believes, and on that basis alleges, that the 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

- 9. 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.
- 10. 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. Defendant conducted and continue to conduct business in this County as it relates to the Products.
- 11. Defendant has sufficient minimum contacts in the State of California or otherwise purposefully avail themselves of the California market. Exercising jurisdiction over Defendant 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)

12. Plaintiff incorporates by reference each and every allegation contained above.

- 13. Proposition 65 mandates that citizens be informed about exposures to chemicals that cause cancer, birth defects, and other reproductive harm.
- 14. Defendant manufactured, imported, sold, and/or distributed Products containing Furfuryl Alcohol 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.
- 15. In manufacturing, importing, selling, and/or distributing Products, Defendant failed to provide a clear and reasonable warning to consumers and individuals in California who may be exposed to Furfuryl Alcohol through reasonably foreseeable use of the Products.
- 16. Products expose individuals to Furfuryl Alcohol through direct ingestion. This exposure is a natural and foreseeable consequence of Defendant placing Products into the stream of commerce. As such, Defendant intended that consumers will ingest Products, exposing them to Furfuryl Alcohol.
- 17. Defendant knew or should have known that the Products contained Furfuryl Alcohol and exposed individuals to Furfuryl Alcohol in the ways provided above. The Notice informed Defendant of the presence of Furfuryl Alcohol in the Products. Likewise, media coverage concerning Furfuryl Alcohol and related chemicals in consumer products provided constructive notice to Defendant.
  - 18. Defendant's actions in this regard were deliberate and not accidental.
- 19. More than sixty days prior to naming the Defendant in this lawsuit, 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 Defendant violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated with exposures to Furfuryl Alcohol contained in the Products.
- 20. The appropriate public enforcement agencies provided with the Notices failed to commence and diligently prosecute a cause of action against Defendant.