

To: Superior Court of CA- County of Alameda Page 6 of 10 2019-05-31 21:03:19 (GMT)

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ALAMEDA COUNTY

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CLERK OF  
THE SUPERIOR COURT  
By Burt Moskaira, Deputy

CASE NUMBER:

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA****IN AND FOR THE COUNTY OF ALAMEDA**

KIM EMBRY, an individual

Plaintiff,

v.

FRITO LAY, INC., and DOES 1 through 100,  
inclusive,

Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

(Health &amp; Safety Code § 25249.6 et seq.)

COMPLAINT

**I.**  
**INTRODUCTION**

1  
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 almonds (“Products”).  
6 Defendants know and intend that customers will ingest Products containing Acrylamide.

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

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

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

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

**II.**  
**PARTIES**

22  
23  
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

7. Defendant Frito-Lay, Inc. (“Frito-Lay”), is a corporation organized and existing under the laws of California. 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. Frito-Lay, Inc. manufactures, imports, sells, or distributes Products in California and Alameda County, including, for example roasted almond products, including, but not limited to, Nut Harvest Almonds Lightly Roasted.

8. 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

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. Defendants conducted and continue to conduct business in this County as it relates to Products.

11. 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)**

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.

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

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

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

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

15           18. Defendants' actions in this regard were deliberate and not accidental.

16           19. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff issued a  
17 60-Day Notice of Violation ("Notice(s)") as required by and in compliance with Proposition 65.  
18 Plaintiff provided the Notice to the various required public enforcement agencies along with a certificate  
19 of merit. The Notices alleged that Defendants violated Proposition 65 by failing to sufficiently warn  
20 consumers in California of the health hazards associated with exposures to Acrylamide contained in the  
21 Products.

22           20. The appropriate public enforcement agencies provided with the Notices failed to  
23 commence and diligently prosecute a cause of action against Defendants.

24           21. Individuals exposed to Acrylamides contained in the Products through direct ingestion  
25 resulting from reasonably foreseeable use of the Products have suffered and continue to suffer  
26 irreparable harm. There is no other plain, speedy, or adequate remedy at law.  
27  
28

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

**PRAYER FOR RELIEF**

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

1. Civil penalties in the amount of \$2,500 per day for each violation;

2. A preliminary and permanent injunction against Defendants from manufacturing, importing, selling, and/or distributing Products in California without providing a clear and reasonable warning as required by Proposition 65 and related Regulations;

3. Reasonable attorney's fees and costs of suit; and

4. Such other and further relief as may be just and proper.

Respectfully submitted:

Dated: May 31, 2019

**GLICK LAW GROUP, PC**

By:



Noam Glick  
Attorney for Plaintiff