

FILED
Clerk of the Superior Court

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By: R. Cersosimo, Clerk

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Attorneys for Plaintiff,
BRAD VAN PATTEN

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

BRAD VAN PATTEN, an individual,

Plaintiff,

v.

KELLOGG COMPANY, a Delaware
Corporation; and DOES 1 through 10

Defendants.

Case No. 37-2020-00008328-CU-MC-
CTL

AMENDED ~~PROPOSED~~ CONSENT
JUDGMENT AS TO KELLOGG
COMPANY

1. INTRODUCTION

1.1 The Parties. This Consent Judgment ("Consent Judgment") is entered into by and between Brad Van Patten ("Van Patten") and Kellogg Company ("Kellogg"). Together, Van Patten and Kellogg are collectively referred to as the "Parties." Van Patten is alleged to be an individual that resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Kellogg is alleged to be a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code § 25249.6, *et seq.* ("Proposition 65").

1.2 General Allegations. Van Patten alleges that acrylamide is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer. Van Patten alleges that Kellogg has exposed individuals to acrylamide from its sales of Austin

1 Toasty Crackers with Peanut Butter without first providing users and consumers of the
2 product with a clear and reasonable cancer warning as required pursuant to Proposition 65.

3 **1.3 Product Description.** The products covered by this Consent Judgment are
4 all Austin Toasty Crackers with Peanut Butter, including, without limitation, all varieties
5 and pack sizes of Austin Toasty Crackers with Peanut Butter (the “Products”) that have
6 been manufactured, imported, distributed, offered for sale, and/or sold in California by
7 Kellogg or its affiliates.

8 **1.4 Notice of Violation, Complaint, and Jurisdiction.** On September 16, 2019,
9 Van Patten served Kellogg and various public enforcement agencies with a document
10 entitled “Notice of Violation of California Health & Safety Code § 25249.6 et seq.” (the
11 “Notice”). The Notice provided Kellogg and such others, including public enforcers, with
12 notice that alleged that Kellogg was in violation of Proposition 65 for failing to warn
13 California consumers and customers that use of the Products will expose them to
14 acrylamide. No public enforcer has diligently prosecuted the allegations set forth in the
15 Notice. On February 14, 2020, based on the Notice and the absence of any authorized
16 public prosecutor of Proposition 65 having filed a suit based on the allegations contained
17 therein, Van Patten filed a complaint in the Superior Court of and for San Diego County
18 (the “Court”), Case No. 37-2020-00008328-CU-MC-CTL (the “Action”). For purposes of
19 this Consent Judgment, the Parties stipulate that the Court has jurisdiction over the
20 allegations in the Complaint and personal jurisdiction over Kellogg, that venue is proper
21 in the County of San Diego, and that the Court has jurisdiction to enter this Consent
22 Judgment as a full and final resolution of the claims and allegations which were or could
23 have been raised in the Action based on the facts alleged therein and/or in the Notice.

24 **1.5 No Admission.** This Consent Judgment resolves claims that are denied and
25 disputed. The Parties enter into this Consent Judgment as a full and final resolution of any
26 and all claims between the Parties for the purpose of avoiding prolonged litigation. Kellogg
27 denies each and every material allegations contained in the Notices and the Action and
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1 maintains that it has not violated Proposition 65 and/or is not subject to that law. Nothing
2 in this Consent Judgment shall be construed as an admission by Kellogg of any fact,
3 finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment
4 constitute or be construed as an admission by Kellogg of any fact, finding, conclusion,
5 issue of law, or violation of law, such being specifically denied by Kellogg. However, this
6 Section 1.5 shall not diminish or otherwise affect the obligations, responsibilities, and
7 duties of Kellogg under this Consent Judgment.

8 **1.6 Effective Date.** For purposes of this Consent Judgment, the term “Effective
9 Date” shall mean the date this Consent Judgment has been approved by the Court and Van
10 Patten has provided notice to Kellogg that it has been entered in the Court’s records as a
11 consent judgment.

12 **2. INJUNCTIVE RELIEF**

13 **2.1 Reformulation of Product**

14 Subject to Section 2.2, any Products that Kellogg elects to manufacture, import,
15 distribute, sell, or offer for sale in California manufactured after the Effective Date shall
16 not exceed 299 parts per billion (“ppb”) on average for acrylamide (“Reformulation
17 Level”), as set forth in Section 2.3. As used in this Section 2.1, “for sale in California”
18 means to directly ship a Product into California or to sell a Product to a distributor that
19 Kellogg knows will sell the Product in California.

20 **2.2 Reformulation Level and Changes in Proposition 65**

21 (a) Nothing in this Consent Judgment shall be interpreted to mean that the
22 Reformulation Level is the lowest feasible level for acrylamide in the Products or that it is
23 even a feasible level for the Products.

24 (b) Nothing in this Consent Judgment shall prejudice Kellogg from, at its option,
25 establishing that an alternative acrylamide concentration level is more appropriate based
26 on the criteria set forth under Proposition 65 and its implementing regulations.

27 (c) If (i) Proposition 65 or its implementing regulations are changed from their
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terms as they exist on the date the Parties stipulated to this Consent Judgment with respect to levels of acrylamide that trigger Proposition 65's warning obligations; or (ii) a California agency in charge of overseeing Proposition 65 (e.g., the California Office of Environmental Health Hazard Assessment) takes some other final regulatory action concerning acrylamide and products similar to the Products, including but not limited to establishing whether and when there is any exposure to acrylamide from products similar to the Products and/or that alternative acrylamide levels trigger warning requirements for products similar to the Products, then: Kellogg, at its sole and absolute discretion, shall be entitled to comply with such law, regulation, or action or the requirements of this Consent Judgment.

2.3 Testing

(a) Kellogg may establish compliance with the requirement set forth in this Consent Judgment by averaging acrylamide concentration level test results derived from multiple samples of the Products, or one or more composited samples drawn randomly from the Products. However, no single sample shall exceed an acrylamide level of 325 ppb. Compliance with the Reformulation Level shall be determined using:

- i. GC/MS (Gas Chromatograph/Mass Spectrometry),
- ii. LC-MS/MS (Liquid Chromatograph-Mass Spectrometry), or
- iii. any other testing method agreed upon by the Parties.

Any testing for purposes of this Consent Judgment shall be performed by Eurofins, Silliker, KPrime, or any laboratory accredited by the State of California, a federal agency, or a nationally recognized organization.

3. CONSENT JUDGMENT PAYMENTS

3.1 Civil Penalties

Kellogg shall pay \$6,500 as a civil penalty, allocated in accordance with Cal. Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the penalty to be remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the Penalty remitted to Van Patten no later than ten (10) business days

1 following the Effective Date. More specifically, Kellogg shall issue two separate checks
2 for the civil penalty payment to (a) "Office of Environmental Health Hazard Assessment"
3 in the amount of \$4,875 (75%); and to (b) "Law Offices of George Rikos in Trust for Brad
4 Van Patten" in the amount of \$1,625 (25%). Within ten (10) business days of the Effective
5 Date, Kellogg shall deliver these payments as follows:

6 (i) The penalty payment owed to Van Patten shall be delivered to the
7 following address:

8 George Rikos
9 Law Offices of George Rikos
10 555 West Beech, Suite 500
11 San Diego, CA 92101

12 (ii) The penalty payment owed to OEHHHA (EIN: 68-0284486) shall be
13 delivered directly to OEHHHA (Memo Line "Prop 65 Penalties") at the following
14 address:

15 Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 Attn. Prop 65 Penalties -- Van Patten v. Kellogg Consent Judgment
19 1001 I Street
20 Sacramento, CA 95814

21 Kellogg shall provide Van Patten's counsel with a copy of the check it sends to OEHHHA
22 with its penalty payment to Van Patten. Kellogg's payment obligations shall be tolled until
23 it receives an IRS W-9 form for each payee. In association with the issuance of the
24 payments under this Consent Judgment, Kellogg will issue IRS 1099 forms as appropriate
25 given the payees.

26 **3.2 Attorneys' Fees and Litigation Costs**

27 Within ten (10) business days of the Effective Date, Kellogg shall reimburse Van
28 Patten's counsel \$82,000 for fees and costs incurred as a result of investigating and
bringing this matter to Kellogg's attention, negotiating a Consent Judgment in the public
interest, and obtaining the Court's approval and entry of this Consent Judgment. Kellogg

1 shall issue a check for this amount payable to "Law Offices of George Rikos" and deliver
2 it to the address identified in Section 3.1 above. Kellogg's payment obligations shall be
3 tolled until it receives an IRS W-9 form for this payee.

4 **4. MATTERS COVERED BY THIS CONSENT JUDGMENT**

5 **4.1 Release of Kellogg and Downstream Customers and Entities.** This
6 Consent Judgment is a full, final and binding resolution between Van Patten, acting on his
7 own behalf and in the public interest, and Kellogg of any violation of Proposition 65 that
8 was or could have been asserted by Van Patten or on behalf of his past and current agents,
9 representatives, attorneys, predecessors, successors, and/or assigns (collectively,
10 "Releasers") for failure to provide warnings for alleged exposures to acrylamide contained
11 in the Products, and Releasers hereby release any such claims against Kellogg and its
12 parents, shareholders, members, directors, officers, managers, employees, representatives,
13 agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and
14 affiliates, and their predecessors, successors, and assigns (collectively, "Kellogg
15 Releasees"), and each entity to whom Kellogg directly or indirectly distributes or sells the
16 Products, including but not limited to, downstream distributors, wholesalers, customers,
17 and retailers, and their respective subsidiaries, affiliates and parents, franchisees,
18 cooperative members, and licensees (collectively, "Downstream Releasees"), from all
19 claims for violations of Proposition 65 with respect to any Products manufactured,
20 distributed, and/or sold by Kellogg prior to the Effective Date based on failure to warn of
21 alleged exposure to the chemical acrylamide from the Products.

22 In further consideration of the promises and agreements herein contained, and for
23 the payments to be made pursuant to Section 3 above, Van Patten, on behalf of himself, his
24 past and current agents, representatives, attorneys, successors, and/or assignees, hereby
25 covenants not to sue and waives any right to institute or participate in, directly or indirectly,
26 any form of legal action and releases all claims that he may have, including without
27 limitation, all actions and causes of action in law and in equity, all obligations, expenses
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1 (including without limitation all attorneys' fees, expert fees, and investigation fees, and
2 costs), damages, losses, liabilities and demands against any of the Kellogg Releasees and/or
3 Downstream Releasees of any nature, character, or kind, whether known or unknown,
4 suspected or unsuspected, limited to and arising out of the alleged or actual exposure to
5 chemicals contained in Kellogg's crackers.

6 **4.2 Kellogg's Release of Van Patten.** Kellogg, on behalf of itself, its past and
7 current agents, representatives, attorneys, successors, and/or assignees, hereby waives any
8 and all claims against Van Patten, his attorneys, and other representatives, for any and all
9 actions taken or statements made by Van Patten and/or his attorneys and other
10 representatives, whether in the course of investigating claims or otherwise seeking to
11 enforce Proposition 65 against it in this matter.

12 **4.3 California Civil Code Section 1542.** It is possible that other claims not
13 known to the Parties arising out of the facts alleged in the Notice and relating to the
14 Products will develop or be discovered. Van Patten on behalf of himself only, on one hand,
15 and Kellogg, on the other hand, acknowledge that this Consent Judgment is expressly
16 intended to cover and include all such claims up through the Effective Date, including all
17 rights of action therefor. The Parties acknowledge that the claims released in Sections 4.1
18 and 4.2, above, may include unknown claims, and nevertheless waive California Civil
19 Code Section 1542 as to any such unknown claims. California Civil Code Section 1542
20 reads as follows:

21 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT**
22 **THE CREDITOR OR RELEASING PARTY DOES NOT KNOW**
23 **OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME**
24 **OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY**
25 **HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS**
26 **OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED**
27 **PARTY.**
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1 Van Patten and Kellogg each acknowledge and understand the significance and
2 consequences of this specific waiver of California Civil Code Section 1542.

3 **4.4 Deemed Compliance with Proposition 65.** Compliance by Kellogg with
4 this Consent Judgment constitutes compliance with Proposition 65 with respect to exposure
5 to acrylamide from the Products. Products distributed by Kellogg prior to the Effective
6 Date may be sold through as previously manufactured and labeled.

7 **5. ENTRY OF CONSENT JUDGMENT**

8 The Parties hereby request that the Court promptly adopt and enter this Consent
9 Judgment as one of the Court's, based on the motion for approval Van Patten will be
10 making pursuant to Section 10 below. Upon entry of the Consent Judgment as a consent
11 judgment, Van Patten and Kellogg waive their respective rights to a hearing or trial on the
12 allegations contained in the Complaint.

13 **6. SEVERABILITY**

14 If, subsequent to the execution of this Consent Judgment, any of the provisions of
15 this Consent Judgment are deemed by a court to be unenforceable, the validity of the
16 enforceable provisions remaining shall not be adversely affected but only to the extent the
17 deletion of the provision deemed unenforceable does not materially affect, or otherwise
18 result in the effect of the Consent Judgment being contrary to, the intent of the Parties in
19 entering into this Consent Judgment.

20 **7. GOVERNING LAW/ENFORCEMENT**

21 The terms of this Consent Judgment shall be governed by the law of the State of
22 California and apply within the State of California. The rights to enforce the terms of this
23 Consent Judgment are exclusively conferred on the Parties hereto. Any Party may, after
24 providing sixty (60) days' written notice and meeting and conferring within a reasonable
25 time thereafter to attempt to resolve any issues, by motion or application for an order to
26 show cause before this Court, enforce the terms and conditions contained in this Consent
27 Judgment. In the event that Proposition 65 or its regulations applicable to the Products are
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1 repealed, or are otherwise rendered inapplicable or invalid, including but not limited to by
2 reason of law generally, due to federal preemption, or the First Amendment commercial
3 speech rights of the U.S. Constitution, as determined by a court of competent jurisdiction
4 of an agency of the federal government, then Kellogg shall provide written notice to Van
5 Patten of any asserted repeal or determination. Upon Kellogg's written notice, Kellogg
6 shall have no further obligations pursuant to this Consent Judgment to the extent such
7 repeal or determination affects Kellogg's obligations with respect to the Product.

8 **8. NOTICES**

9 Unless specified herein, all correspondence and notices required to be provided
10 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by:
11 (i) first-class (registered or certified mail) return receipt requested; or (ii) overnight or two-
12 day courier on any Party by the other Party to the following addresses:

13 For Kellogg:

14 Kenneth Odza
15 Corporate Counsel, Food Safety
16 Kellogg Company
17 One Kellogg Square
18 Battle Creek, MI 49017

19 With a copy to:

20 Bao M. Vu
21 Stoel Rives, LLP
22 Three Embarcadero Center, Suite 1120
23 San Francisco, CA 94111

24 For Van Patten:

25 George Rikos, Esq.
26 Law Offices of George Rikos
27 555 West Beech, Suite 500
28 San Diego, CA 92101

Either Party, from time to time, may specify in writing to the other Party a change of
address to which all notices and other communications shall be sent.

1 **9. COUNTERPARTS: SIGNATURES**

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

5 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

6 Van Patten agrees to comply with the reporting requirements referenced in Health
7 & Safety Code Section 25249.7(f) and to seek, by formal and properly noticed motion
8 (including with service to the Office of the California Attorney General being fully
9 effectuated at least forty-five (45) days prior to a requested hearing thereon), approval of
10 this Consent Judgment's terms pursuant to Proposition 65 and its associated entry as a
11 consent judgment by the Court.

12 **11. MODIFICATION**

13 Unless otherwise provided for herein, this Consent Judgment may be modified only
14 by a written agreement of the Parties and the approval of the Court or upon a duly noticed
15 motion of either Party for good cause shown. A showing of technical infeasibility or
16 commercial unreasonableness in meeting the requirements of Section 2 with respect to the
17 Products shall be deemed to constitute good cause for a modification to substitute an
18 alternative no significant risk level on the basis of 27 Cal. Code Regs. § 25703(b) in place
19 of the cancer risk level and presumptive ppb average concentration threshold set forth in
20 Sections 2.1 and 2.2, and such a modification shall not be opposed by Van Patten. Any
21 proposed modification shall be sent to the Office of the California Attorney General in
22 advance of its submission to the Court such that the Attorney General has a reasonable
23 opportunity to review and comment thereon.

24 **12. ENTIRE AGREEMENT**

25 This Consent Judgment contains the sole and entire agreement of the Parties and
26 any and all prior negotiations and understandings related hereto shall be deemed to have
27 been merged within it. No representations or terms of agreement other than those contained
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herein exist or have been made by any Party with respect to the other Party or the subject matter hereof. This Consent Judgment shall have no effect if it is not approved by the Court and entered as a consent judgment.

13. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment and have read, understood and agree to all of the terms and conditions contained in this Consent Judgment.

APPROVED AS TO FORM: Date: 10/16/2020 By: <u>George Rikos</u> George Rikos Counsel to Brad Van Patten	APPROVED AS TO FORM: Date: 9/18/2020 By: <u>Bao M. Vu</u> Bao M. Vu Counsel for Kellogg Company
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AGREED TO: Date: <u>09/18/2020</u> By: <u>Brad Van Patten</u> Brad Van Patten	AGREED TO: Date: <u>9/18/2020</u> By: <u>[Signature]</u> Kellogg Company
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IT IS SO ORDERED, ADJUDGED AND DECREED THAT WHAT IS SET FORTH ABOVE SHALL PROMPTLY BE ENTERED AS A CONSENT JUDGMENT BY THIS COURT:

DATED: 12-9-20

[Signature]
JUDGE OF THE SUPERIOR COURT
RICHARD S. WHITNEY