

1 J. Noah Hagey, Esq. (SBN: 262331)
hagey@braunhagey.com
2 Matthew Borden, Esq. (SBN: 214323)
borden@braunhagey.com
3 Forrest A. Hainline III, Esq. (SBN 64166)
hainline@braunhagey.com
4 David H. Kwasniewski, Esq. (SBN: 281985)
kwasniewski@braunhagey.com
5 Robert Petraglia, Esq. (SBN: 264849)
petraglia@braunhagey.com
6 BRAUNHAGEY & BORDEN LLP
351 California Street, 10th Floor
7 San Francisco, CA 94104
Telephone: (415) 599-0210
8 Facsimile: (415) 599-0210

9
10 ATTORNEYS FOR PLAINTIFF
B&G FOODS NORTH AMERICA, INC.

11
12 **UNITED STATES DISTRICT COURT**
13
14 **EASTERN DISTRICT OF CALIFORNIA**

15
16 B&G FOODS NORTH AMERICA, INC.,
17 Plaintiff,
18
19 v.
20 KIM EMBRY and ENVIRONMENTAL
HEALTH ADVOCATES, INC., acting as
21 enforcement representatives under California
Proposition 65 on behalf of the State of
22 California,
23 Defendants.

Case No. 2:20-cv-00526-KJM-DB
SECOND AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

1 Plaintiff B&G Foods North America, Inc. (“Plaintiff” or “B&G Foods”) brings this action
2 for injunctive relief, damages, and declaratory relief under 42 U.S.C. § 1983 and the First and
3 Fourteenth Amendment of the U.S. Constitution against supposed Proposition 65 enforcement
4 representatives of the State of California, and alleges as follows:

5 **PRELIMINARY STATEMENT**

6 1. B&G Foods brings this action to remedy sham litigation filed against it by Kim
7 Embry and Environmental Health Advocates (collectively, “Defendants”). Defendants sued B&G
8 Foods to force it to falsely label Snackwell’s Devil’s Food Cookie Cakes and Chocolate Crème
9 Sandwich Cookies (collectively, the “Cookies”) as causing cancer. The basis for Defendants’
10 lawsuits is that the Cookies contain acrylamide, a chemical naturally present in many foods,
11 including all cookies and baked goods. Defendants claim acrylamide is known to the State of
12 California to cause cancer; but acrylamide does not cause cancer. The State of California knows
13 this, and so do Defendants. Defendants’ lawsuits are not protected petitioning activity but a sham
14 intended to enrich themselves and their lawyers.

15 2. As the Ninth Circuit held in this case, Defendants’ lawsuits may be a sham if they
16 “made no effort to investigate their claims and filed without regard to the merits;” or if “Defendants
17 threatened and filed suit because they wanted to improperly pressure B&G into settling, not
18 because they believed that they could achieve their objective based on the merits” or their lawsuits
19 are predicated on “fraud upon, or intentional misrepresentations to[] the court.” *B&G Foods N.*
20 *Am., Inc. v. Embry*, 29 F.4th 527, 538, 541–42 (9th Cir. 2022). In accordance with the Ninth
21 Circuit’s ruling, B&G Foods in this complaint sets forth detailed allegations showing that
22 Defendants’ lawsuits are a sham for at least the following reasons:

23 a. Defendants intentionally and willfully spoliated the evidence of the testing
24 that supposedly shows the Cookies contain acrylamide,

25 b. Defendants’ lawsuits are based on false and/or fraudulent certificates of
26 merit;

27
28

1 c. Defendants failed to adequately investigate their claims before filing suit,
2 including by falsely stating they conducted expert analysis to support their claims when discovery
3 in the underlying lawsuits revealed that to be untrue;

4 d. Defendants made false statements to the courts in their complaints;

5 e. Defendants know that the Cookies do not cause cancer and that there would
6 be no public benefit in requiring the Cookies to carry a false cancer warning;

7 f. Defendants' lawsuits are part of a pattern of sham Proposition 65 lawsuits
8 manufactured by Defendants' lawyers and which are filed and settled without regard to the public
9 interest, including by bringing claims based on bogus test results obtained from out-of-state labs
10 that Defendants know use improper testing procedures and destroy products after testing to prevent
11 challenges to their testing methodology or accuracy; and

12 g. Defendants knew or reasonably should have known that their lawsuits
13 violated the First Amendment to the United States Constitution, as this Court held in *California*
14 *Chamber of Commerce v. Becerra*, 529 F. Supp. 3d 1099 (E.D. Cal. 2021), *aff'd* 29 F.4th 468 (9th
15 Cir. 2022), *pet. for r'hg denied*, 51 F.4th 1182 (2022) ("*Calchamber*"); and

16 h. Defendants' lawsuits in fact violated the First Amendment to the United
17 States Constitution; and

18 i. Defendants' lawsuits also violated the California Constitution.

19 3. Defendants lawsuits are no ordinary state-court claims, or even typical of
20 Proposition 65 litigation. They are sham suits manufactured by Defendants' lawyers to extort
21 businesses, predicated on the destruction of evidence, misrepresentations to the court, and junk
22 science. These facts, and the facts alleged below, establish that Defendants' lawsuits are a sham.
23 Because Defendants' lawsuits are shams, B&G Foods has a remedy under Title 42, Section 1983 of
24 the United States Code for damages, injunctive, and declaratory relief. *B&G Foods N. Am., Inc.*, 29
25 F.4th 527, 538, 541–42 (9th Cir. 2022) (reversing this Court for dismissing B&G Foods's prior
26 complaint without leave to amend when there were additional factual allegations which could be
27 added to show Defendants' lawsuits are a sham).

28

PARTIES

1
2 4. Plaintiff B&G Foods North America, Inc. dates back to 1889, when two immigrant
3 families, the Blochs and Guggenheimers, started a business selling pickles in Manhattan.

4 5. Today, Plaintiff carries on their legacy by selling a variety of high-quality frozen
5 and shelf-stable foods throughout the country, including the Cookie Cakes and Sandwich Cookies
6 sold under the SNACKWELL'S® brand.

7 6. Plaintiff is a Delaware corporation with its headquarters in Parsippany, New Jersey.

8 7. Plaintiff B&G Foods sold and distributed devil's food cookie cakes (the "Cookie
9 Cakes") and chocolate crème sandwich cookies ("Sandwich Cookies") around the country.

10 8. Plaintiff's Cookie Cakes were reduced fat chocolate cookies with marshmallow and
11 fudge coating, and its Sandwich Cookies were reduced fat chocolate crème sandwiches made with
12 two chocolate cookies. They were sold nationwide and in California and included products sold
13 under the SNACKWELL'S® brand:



20 9. The interior cookie portion of the Cookie Cakes and the exterior chocolate cookies
21 of the Sandwich Cookies were baked, just like any other cookie. Otherwise, they would have been
22 an unpalatable mess of sugar, flour, and chocolate. Baked foods like cookies, cakes, and crackers
23 contain trace amounts of a substance called acrylamide, which inevitably forms during the baking
24 process.

25 10. California's Office of Environmental Health Hazard Assessment ("OEHHA") added
26 acrylamide to its list of "known" carcinogens subject to regulation under California's Proposition
27 65 in 1990. The initial Proposition 65 listing was premised on potential exposures to acrylamide in
28

1 industrial settings. At that time, it was not known that acrylamide was present in cooked foods. In
2 fact, acrylamide was not detected in foods until 2002.

3 11. The state has acknowledged that acrylamide in food does not cause cancer, or any
4 other harm. Defendants still, however, seek to compel companies like B&G Foods to label their
5 baked goods with a bold disclaimer that they “contain a chemical known to the State of California
6 to cause cancer” due to the presence of this naturally occurring acrylamide:

7 WARNING: Consuming this product can expose you to
8 [Acrylamide], which is known to the State of California to cause
cancer. For more information, go to www.P65Warnings.ca.gov/food.

9 27 Cal. Code Regs § 25607.2(a)(2).

10 12. Defendant Kim Embry seeks to act on behalf of the State of California in suing and
11 threatening to sue dozens of businesses based on the alleged presence of acrylamide in their
12 products.

13 13. Embry purports to bring these suits in the “interest of the general public” of the
14 State of California.

15 14. On information and belief, Ms. Embry is a citizen of California who directly and
16 indirectly consults with the State and its representatives to initiate Proposition 65 actions, including
17 against Plaintiff.

18 15. Embry has been represented by the same attorney—Noam Glick—in each of the
19 hundreds of Proposition 65 lawsuits she has filed.

20 16. Embry has previously testified that she does not purchase, consume, or have any
21 knowledge of the products on which her lawsuits are based, is unfamiliar with the scientific
22 evidence regarding acrylamide’s health effects, and functions as nothing more than a shell for her
23 lawyer to file Proposition 65 lawsuits.

24 17. Defendant EHA is, upon information and belief, a California Corporation created by
25 Noam Glick so that he may file even more Proposition 65 lawsuits.

26 18. Like Defendant Embry, Defendant EHA seeks to act on behalf of the State of
27 California in suing and threatening to sue dozens of businesses based on the alleged presence of
28 acrylamide in their products.

1 19. EHA has also admitted it does not conduct a reasonable pre-suit investigation prior
2 to bringing Proposition 65 actions.

3 20. Ms. Embry and EHA have admitted to destroying evidence.

4 21. Ms. Embry and EHA share a business model. They bring serial, meritless, “shake-
5 down” actions in the hopes that some small percentage will settle for fees and penalties they share
6 with the State.

7 22. Both Ms. Embry and EHA have filed hundreds of notices of Proposition 65
8 violations (“NOV”), but only a small percentage of these NOV’s result in any form of settlement or
9 judgment.

10 23. In all of these actions, Ms. Embry and EHA were simply shells used by their
11 attorney, Noam Glick.¹

12 24. Defendants Embry and EHA have extracted millions of dollars in penalties and fines
13 from food companies through frivolous acrylamide suits.

14 25. Defendants have continued to prosecute lawsuits against B&G Foods even though
15 this Court held in *California Chamber of Commerce v. Becerra*, 529 F. Supp. 3d 1099 (E.D. Cal.
16 2021), *aff’d* 29 4th 468 (9th Cir. 2022) (“*Calchamber*”), Defendants’ allegations are false and
17 unconstitutional, and that the state does not, in fact “know” acrylamide causes cancer.

18 26. Both Ms. Embry and EHA acknowledge that the final injunction that will be entered
19 in *Calchamber* will be dispositive of their cases, and consequently both requested that their cases
20 be stayed.

21 27. Defendants’ business model is pernicious and operates through the regulation,
22 encouragement, and self-interest of the State. After testing products, Defendants are enabled by the
23 State to threaten to file suit unless the products’ manufacturer or retailer pays a massive penalty or
24

25 _____
26 ¹ Mr. Glick was dismissed from this case with prejudice by the Court on October 7, 2020; however,
27 the Ninth Circuit reversed that portion of the opinion dismissing the Complaint without leave to
28 amend. See *B&G Foods N. Am., Inc. v. Embry*, 29 F.4th 527, 542 (9th Cir. 2022). Mr. Glick has
not been named in the amended complaint and has been dismissed from this action without
prejudice.

1 agrees to change its label to warn consumers that the product contains substances “known” to cause
2 cancer.

3 28. The State permits Defendants to file suit against products containing modest, trace
4 amounts of substances even if they pose no possible health effect. This includes substances like
5 acrylamide that arise naturally when starches are baked, as in breads and cookies.

6 29. The resulting penalties and fines collected by Defendants Embry and EHA and the
7 State do nothing to improve public safety. They serve only to enrich lawyers and their
8 accomplices. Still, the State continues to allow and encourage its representatives—including Ms.
9 Embry and EHA—to threaten food companies with unconstitutional speech requirements lest they
10 not pay a sizable penalty to the enforcer and the State.

11 **JURISDICTION AND VENUE**

12 30. This Court has federal question subject matter jurisdiction under Title 28, Section
13 1331 of the United States Code, which confers original jurisdiction on the federal district courts
14 over actions arising under the Constitutions or laws of the United States. Federal courts, including
15 this judicial district, have assumed jurisdiction over similar federal constitutional challenges to the
16 enforcement of Proposition 65. *See, e.g., Nat’l Ass’n of Wheat Growers v. Zeise*, 309 F. Supp. 3d
17 842 (E.D. Cal. 2018).

18 31. Alternatively, should Defendants somehow be deemed non-state actors, then subject
19 matter jurisdiction exists under Title 28, Section 1332 of the United States Code, which confers
20 original jurisdiction on federal district courts over actions between private citizens of different
21 states where the amount in controversy exceeds \$75,000.

22 32. Venue is proper under Title 28, Section 1391(b)(b)(2) because a substantial part of
23 the events giving rise to Plaintiff’s claims occurred in this district.

24 **FACTS**

25 **I. ACRYLAMIDE IN B&G FOODS’S PRODUCTS DOES NOT CAUSE CANCER**

26 33. Plaintiff’s Cookies have never caused cancer in people and Defendants have no
27 evidence to the contrary. Nor is the alleged amount of acrylamide in Plaintiff’s Cookies known to
28 cause cancer in humans. The State of California has admitted it does not know that acrylamide

1 causes cancer. Because Defendants’ lawsuits are all predicated on the false notion that Plaintiff’s
2 Cookies cause cancer, they are a sham and violate B&G Foods’s First Amendment rights.

3 **A. Acrylamide Is Naturally Created During The Baking Process.**

4 34. Plaintiff has never added acrylamide to its products, which according to the FDA
5 has likely “always been present in cooked foods.” Virtually every cookie or bread product on
6 Earth that is baked has acrylamide in it.

7 35. Acrylamide forms during a chemical reaction, known as the Maillard reaction and
8 arises when food is baked, roasted, grilled or fried.

9 36. Acrylamide is created when sugars such as glucose or fructose react with a naturally
10 occurring free amino acid, asparagine.

11 37. Acrylamide also naturally forms in uncooked foods such as nuts. *See* OEHHA,
12 *Acrylamide Fact Sheet* (Feb. 2019), [https://www.p65warnings.ca.gov/sites/default/files/downloads/
13 factsheets/acrylamide_fact_sheet.pdf](https://www.p65warnings.ca.gov/sites/default/files/downloads/factsheets/acrylamide_fact_sheet.pdf).

14 38. Acrylamide is created when cooking at home, whether in the oven, on the grill or in
15 the skillet. *See, e.g.*, Letter from Lester M. Crawford, DVM, Ph.D, Deputy Commissioner, FDA,
16 to Joan E. Denton, M.S., Ph.D, Director, OEHHA (July 13, 2003).

17 39. The State recognizes that the substance is widespread in ordinary products like
18 breakfast cereals, roasted coffee, crackers, bread crusts, roasted asparagus, French fries, potato
19 chips, canned sweet potatoes, canned black olives, roasted nuts, and toast.

20 **B. There Is No Evidence That Acrylamide Created During The Baking Process
21 Causes Cancer.**

22 40. The federal government has studied acrylamide and does not recommend avoiding
23 foods that contain the substance.

24 41. Rather, many of the foods consumers are encouraged to eat by the FDA, such as
25 nuts, grains and other foods, contain acrylamide.

26 42. Most scientists, including European and U.S. government scientists, agree that
27 acrylamide in food does not cause cancer in humans.
28

1 43. The National Cancer Institute (“NCI”), the federal government’s principal agency
2 for cancer research and training, states that “a large number of epidemiologic studies (both case-
3 control and cohort studies) in humans have found no consistent evidence that dietary acrylamide
4 exposure is associated with the risk of any type of cancer.” NCI, *Acrylamide and Cancer Risk*
5 (Dec. 5, 2017), [https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-fact-](https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-fact-sheet)
6 [sheet](https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-fact-sheet).

7 44. The American Cancer Society recently has re-confirmed its review of
8 epidemiological studies which “*show that dietary acrylamide isn’t likely to be related to risk for*
9 *most common types of cancer.*” American Cancer Society, *Acrylamide and Cancer Risk* (Feb. 11,
10 2019), <https://www.cancer.org/cancer/cancer-causes/acrylamide.html> (emphasis added).

11 45. The American Cancer Society further states that it has no idea whether acrylamide
12 increases cancer risk, stating that it is “not yet clear if the levels of acrylamide in foods raise cancer
13 risk” *Id.*

14 46. In a 2012 systematic review published in the *European Journal of Cancer*
15 *Prevention*, researchers found “no consistent or credible evidence that dietary acrylamide increases
16 the risk of any type of cancer in humans, either overall or among nonsmokers”:

17 After an extensive examination of the published literature, we found
18 no consistent or credible evidence that dietary acrylamide increases
19 the risk of any type of cancer in humans, either overall or among
20 nonsmokers. In particular, the collective evidence suggests that a
high level of dietary acrylamide intake is not a risk factor for breast,
endometrial, or ovarian cancers

21 In conclusion, epidemiologic studies of dietary acrylamide intake
22 have failed to demonstrate an increased risk of cancer. In fact, the
23 sporadically and slightly increased and decreased risk ratios reported
in more than two dozen papers examined in this review strongly
suggest the pattern one would expect to find for a true null
association over the course of a series of trials.

24 L. Lipworth, et al., *Review of Epidemiologic Studies of Dietary Acrylamide Intake and the Risk of*
25 *Cancer*, EUROPEAN J. OF CANCER PREVENTION, Vol. 21(4):375-86 (2012); *see also* C. Pelucchi, et
26 al., *Dietary Acrylamide & Cancer Risk: An Updated Meta-Analysis*, INT’L J. OF CANCER, Vol.
27 136(12):2912–22 (2015) (“This systematic review and meta-analysis of epidemiological studies
28 indicates that dietary acrylamide is not related to the risk of most common cancers.”); A. Kotemori,

1 et al., *Dietary Acrylamide Intake and Risk of Breast Cancer: the Japan Public Health Center-*
2 *Based Prospective Study*, *CANCER SCIENCE*, Vol. 109(3):843-53 (2018) (“In conclusion, dietary
3 acrylamide intake was not associated with the risk of breast cancer in this population-based
4 prospective cohort study of Japanese women.”); M. McCullough, et al., *Dietary Acrylamide Is Not*
5 *Associated with Renal Cell Cancer Risk in the CPS-II Nutrition Cohort*, *Cancer Epidemiology,*
6 *BIOMARKERS & PREVENTION*, Vol. 28(3):616-619 (2019) (“In conclusion, we found no evidence
7 that greater dietary acrylamide intake was associated with risk of RCC [renal cell carcinoma].”); J.
8 Hogervorst, et al., *Interaction Between Dietary Acrylamide Intake and Genetic Variants for*
9 *Estrogen Receptor-Positive Breast Cancer Risk*, *EUROPEAN J. OF NUTRITION*, Vol. 58:1033-1045
10 (2019) (“This study did not provide evidence for a positive association between acrylamide intake
11 and ER+ [estrogen receptor-positive] breast cancer risk. If anything, acrylamide was associated
12 with a decreased ER+ breast cancer risk.”).

13 47. In fact, studies have shown that certain foods that contain acrylamide likely reduce
14 the risk of cancer in humans.

15 48. For example, in June 2018, the International Agency for Research on Cancer
16 (“IARC”) concluded that there is an “inverse association” between drinking coffee (which contains
17 acrylamide) and certain types of cancer. IARC, *Monographs on the Evaluation of Carcinogenic*
18 *Risks to Humans, Drinking Coffee, Mate, and Very Hot Beverages*, Vol. 116 at 434 (2018).

19 49. Likewise, a recent study showed that whole-grain foods may reduce the risk of liver
20 cancer. AMERICAN CANCER SOCIETY, *Study Ties Whole Grains to Lower Risk of Liver Cancer*
21 (Feb. 27, 2019), [https://www.cancer.org/latest-news/study-ties-whole-grains-to-lower-risk-of-liver-](https://www.cancer.org/latest-news/study-ties-whole-grains-to-lower-risk-of-liver-cancer.html)
22 [cancer.html](https://www.cancer.org/latest-news/study-ties-whole-grains-to-lower-risk-of-liver-cancer.html).

23 50. The sole basis for California’s Proposition 65 warning requirement for acrylamide
24 are laboratory studies in which pure acrylamide was given to rats or mice.

25 51. As NCI has explained, however, “toxicology studies have shown that humans and
26 rodents not only absorb acrylamide at different rates, they metabolize it differently as well.” NCI,
27 *Acrylamide and Cancer Risk* (Updated Dec. 5, 2017), [https://www.cancer.gov/about-cancer/causes-](https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-fact-sheet)
28 [prevention/risk/diet/acrylamide-fact-sheet](https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-fact-sheet).

1 52. Neither the Environmental Protection Agency (“EPA”) and IARC have classified
2 acrylamide as a probable carcinogen based on studies in humans.

3 53. In its most recent assessment of acrylamide, for example, IARC concluded in 1994
4 that there was “*inadequate evidence* in humans for the carcinogenicity of acrylamide.” IARC,
5 *Monographs on the Identification of Carcinogenic Risks to Humans, Some Industrial Chemicals*,
6 Vol. 60 at 425 (Feb. 1994), <https://monographs.iarc.fr/wp-content/uploads/2018/06/mono60.pdf>.

7 54. Similarly, in its most recent toxicological review of acrylamide in 2010, EPA
8 explained that human studies assessing the carcinogenicity of acrylamide (including studies of both
9 dietary and industrial exposures) “are judged as providing limited or no evidence of carcinogenicity
10 in humans.” EPA, *Toxicological Review of Acrylamide*, 167 (March 2010),
11 https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/0286tr.pdf.

12 **C. The State Has Acknowledged That Acrylamide In Food Does Not Cause**
13 **Cancer.**

14 55. The State of California also has admitted under oath that, despite listing acrylamide
15 as a dangerous chemical, it has no knowledge of that fact.

16 56. OEHHA conceded in 2007 that acrylamide is not actually known to cause cancer in
17 humans.

18 57. Specifically, Martha Sandy, now the Branch Chief of OEHHA’s Reproductive and
19 Cancer Hazard Assessment Branch, was designated as OEHHA’s “Person Most Knowledgeable” in
20 an action involving acrylamide. *See* Cal. Code Civ. P. § 2025.230. Ms. Sandy testified that: (a)
21 she was not aware of any governmental health organization listing acrylamide as a known human
22 carcinogen, (b) she was not aware of any pharmacodynamic data regarding rats and humans and
23 acrylamide, and (c) OEHHA did not actually “know” that acrylamide was a human carcinogen.

24 58. OEHHA also has recognized that acrylamide in certain food products – namely,
25 coffee – does not increase human cancer risk.

26 59. In particular, in June 2019, OEHHA adopted a new regulation that states:
27 “Exposures to chemicals in coffee, listed on or before March 15, 2019 as known to the state to
28 cause cancer, that are created by and inherent in the processes of roasting coffee beans or brewing

1 coffee do not pose a significant risk of cancer.” 27 Cal. Code Regs. § 25704 (effective Oct. 1,
2 2019).

3 60. In adopting this regulation, OEHHA explained that “[t]he weight of the evidence
4 from the very large number of studies in the scientific literature does not support an association
5 between the complex mixture of chemicals that is coffee [including acrylamide] and significant risk
6 of cancer to the average consumer.” OEHHA, *Final Statement of Reasons, Adoption of New*
7 *Section 25704 Exposures to Listed Chemicals in Coffee Posing No Significant Risk* (June 7, 2019),
8 <https://oehha.ca.gov/media/downloads/crnrf/sorcoffee060719.pdf>.

9 61. In sum, Defendants and the State have no evidence that acrylamide in the Cookie
10 Cakes or Sandwich Cookies is harmful to anyone.

11 **D. The Warning Defendants Require Would Be False.**

12 62. Despite the overwhelming evidence that acrylamide in food does not cause cancer
13 and despite the pendency of a serious challenge to the constitutionality of Proposition 65
14 acrylamide lawsuits in *Calchamber*, on April 22, 2019, Defendant Embry notified the State and
15 Plaintiff that she intended to require Plaintiff to place a warning label on the Cookie Cakes telling
16 consumers that the products “cause cancer.”

17 63. The State did not object to Embry’s Notice of Violation or seek to curtail or limit it.

18 64. Ms. Embry’s Notice of Violation seeks relief on behalf of the “Public” of California
19 and pursuant to the State’s regulations and enforcement guidelines discussed above.

20 65. On October 8, 2020, despite the overwhelming evidence that acrylamide in food
21 does not cause cancer and despite the pendency of *Calchamber*, Defendant EHA notified the State
22 and Plaintiff that it intended to require Plaintiff to place a warning label on all Sandwich Cookies to
23 tell consumers that the products “cause cancer.”

24 66. The State did not object to EHA’s Notice of Violation or seek to curtail or limit it.

25 67. EHA’s Notice of Violation also seeks relief on behalf of the “Public” of California
26 and pursuant to the State’s regulations and enforcement guidelines discussed above.

27
28

1 68. On March 6, 2020, Kim Embry sued B&G Foods. Her lawsuit seeks to compel
2 B&G Foods to label its Cookie Cakes with a warning that they contain a chemical “known” to the
3 state to cause cancer.

4 69. On January 22, 2021, EHA sued B&G Foods. The lawsuit seeks to compel B&G
5 Foods to label its Sandwich Cookies with a warning that they contain a chemical known to the state
6 to cause cancer.

7 **II. DEFENDANTS’ LAWSUIT IS AN UNPROTECTED SHAM THAT MAY BE**
8 **REMEDIED THROUGH A SECTION 1983 ACTION**

9 70. Defendants have relied upon the *Noerr-Pennington* doctrine to protect their
10 extortionate practices. But their lawsuits are a sham and not protected by *Noerr-Pennington* for at
11 least nine reasons: (a) Defendants spoliated evidence; (b) Defendants’ lawsuits are based on false
12 and/or fraudulent certificates of merit; (c) Defendants failed to adequately investigate their claims
13 before filing suit; (d) Defendants made false statements to the courts in their complaints;(e)
14 Defendants know that the Cookies do not cause cancer and there would be no public benefit in
15 requiring the Cookies to carry a false cancer warning; (f) Defendants’ lawsuits are part of a pattern
16 of sham Proposition 65 lawsuits manufactured by Defendants’ lawyers and which are filed and
17 settled without regard to the public interest; (g) Defendants knowingly filed their lawsuits, and
18 continue to prosecute them, despite the fact they violate the First Amendment to the United States
19 Constitution.

20 71. The *Noerr-Pennington* doctrine derives from the Petition Clause of the First
21 Amendment and provides that those who petition any department of the government for redress are
22 generally immune from statutory liability for their petitioning conduct. The Ninth Circuit has held
23 that the *Noerr-Pennington* doctrine can be applied to state actors. The Ninth Circuit also
24 acknowledges, however, that neither the Petition Clause nor the *Noerr-Pennington* doctrine protect
25 sham petitions.

26 72. Immunity is not extended to conduct that, although ostensibly directed toward
27 influencing governmental action, is a mere sham to cover what is actually nothing more than an
28 attempt to interfere directly with the business relationships of a competitor, or to otherwise abuse

1 the publicity/lobbying process. The sham exception to the *Noerr-Pennington* Doctrine applies to
2 litigation in three circumstances: “first, where the lawsuit is objectively baseless and defendant’s
3 motive in bringing it was unlawful; second, where the conduct involves a series of lawsuits brought
4 pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful
5 purpose; third, if the allegedly unlawful conduct consists of making intentional misrepresentations
6 to the court, litigation can be deemed a sham if a party’s knowing fraud upon, or its intentional
7 misrepresentations to, the court deprive the litigation of its legitimacy” *B&G Foods N. Am. v.*
8 *Embry*, 29 F.4th 527, 537–38 (9th Cir. 2022), *cert. denied*, No. 22-83, 2022 WL 4654543 (U.S.
9 Oct. 3, 2022).

10 73. These three circumstances are simply three ways in which litigation might be a
11 sham because it lacks legitimacy.

12 74. Defendants’ litigation against B&G Foods is a sham for all of these reasons, and
13 because Defendants conduct deprives their lawsuits of legitimacy.

14 **A. Defendants Spoliated The Only Evidence Supporting Their Claims.**

15 75. Defendants intentionally and willfully destroyed the only products they tested to
16 support their claims, thereby preventing B&G Foods from retesting the products to determine if
17 Plaintiff’s results were adequate. Spoliation of evidence warrants a finding that third sham
18 exception applies. *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 647 (9th Cir. 2009) (finding
19 that spoliation of evidence was tantamount to fraud upon the court).

20 76. Defendants spoliated evidence by testing their products at an out-of-state laboratory
21 that uses non-standard testing procedures (including the destruction of all samples immediately
22 after testing). On information and belief, Defendants’ chosen laboratory, IEH routinely uses
23 improper or unreliable testing methodologies to produce skewed results showing unusually high
24 levels of acrylamide are present in foods. B&G Foods’ own testing showed that the acrylamide
25 levels in the Cookies were an order of magnitude lower and, crucially, below the NSRL.
26 Defendants’ spoliation prevents B&G Foods from ever uncovering how Defendants tested the
27 products or if the testing was accurate or reliable. Under California state law, such spoliation
28 warrants terminating sanctions. *Williams v. Russ*, 167 Cal. App. 4th 1215, 1223 (2008).

1 77. B&G Foods learned of Defendants’ spoliation when it attempted to subpoena
2 Defendants’ laboratory. On February 16, 2021, B&G Foods served IEH with a subpoena for
3 records relating to its testing of the Cookie Cakes on behalf of Ms. Embry and the accuracy of its
4 testing methodology.

5 78. On March 30, 2021, IEH responded to the subpoena by producing some documents
6 regarding its acrylamide testing protocols, and a letter noting that it was withholding all other
7 responsive documents based on an objection interposed by Ms. Embry that the requested
8 documents were “consumer records.”

9 79. On April 1, 2021, B&G Foods asked IEH if it had retained any of the Cookie Cakes
10 it tested.

11 80. IEH stated that it had destroyed the samples at Ms. Embry’s instruction on or about
12 30 days after it tested the sample—approximately May 4, 2019, after Plaintiff initiated the litigation
13 by filing her April 19, 2019, Notice of Violation. Ex. J, Decl. of David Kwasniewski in support of
14 mot. for terminating sanctions (April 30, 2021), Exhibit 4, Case No. RG20057491.

15 81. B&G Foods requested that Ms. Embry dismiss her claim, given the evidence upon
16 which she based her entire lawsuit had been destroyed after commencement of the action.

17 82. Ms. Embry declined to do so, admitting that the spoliation was intentional and,
18 indeed that it was her practice to spoliage the product samples in every Proposition 65 case she
19 brought.

20 83. Ms. Embry demanded B&G Foods pay her \$500,000 in exchange for a dismissal.
21 *Id.*, Exhibit 7.

22 84. When B&G Foods did not pay, Ms. Embry moved to stay the case.

23 85. Defendants’ conduct prevents B&G Foods from testing the validity of the spurious
24 test results Defendants purport to rely upon.

25 **B. Defendants Made False Statements In Their Certificates Of Merit.**

26 86. Defendants’ lawsuits are shams for the separate and independent reason that they are
27 based on certificates of merit which are either fraudulent or false. Proposition 65 requires that, prior
28 to filing suit, private enforcers submit certificates of merit to the State attesting, under oath, that

1 they have conducted reasonable and good faith investigation into their claims and determined that a
2 Proposition 65 violation occurred. While Defendants submitted certificates of merit, they do not
3 reflect any such investigation, are inconsistent with Defendants’ prior statements in discovery, and
4 indeed appear to have been manufactured to avoid a finding of sham litigation in this case.

5 87. Defendants had a statutory duty to produce certificates of merit attesting that the
6 signatory “has consulted with one or more persons with relevant and appropriate experience or
7 expertise who has reviewed facts, studies, or other data regarding the exposure to the listed
8 chemical” when they served their notices of violation. Cal. Health & Safety Code § 25249.7(d)(1).

9 88. The certificates of merit submitted by Defendants contained false statements.

10 89. In this case Embry submitted a pro-forma certificate of merit on April 22, 2019, and
11 an “amended” notice of violation with an updated certificate of merit attached on July 27, 2022,
12 after it had sued B&G Foods and shortly before it filed its motion to dismiss in this case.

13 90. The amended certificate of merit included the apparent basis for Ms. Embry’s
14 claims—a brief letter from John Meeker, an employee of the lab that provides Defendants and
15 other Proposition 65 enforcers with test results, which stated a single sample of the Cookie Cakes
16 contained a high level of acrylamide. The report is heavily redacted, so it is unclear if the results of
17 other tests of the Cookie Cakes returned different results.

18 91. This supposed expert admitted that acrylamide is caused by cooking, which would
19 provide Plaintiff with an affirmative defense to this action. Cal. Code Regs. Tit. 27, § 25703(b)(1).

20 92. Embry also admitted in discovery that the acrylamide in cookies is the result of
21 cooking.

22 93. Therefore, Embry and her attorneys were aware that Plaintiff had an affirmative
23 defense that would defeat the action.

24 94. Yet Embry’s certificates of merit, signed by Noam Glick, claims that his pre-suit
25 investigation did not prove any affirmative defense. That statement was false.

26 95. EHA also submitted a pro-forma certificate of merit on October 8, 2020, and an
27 amended certificate of merit after it had commenced this litigation on July 27, 2022.

28

1 96. Again Noam Glick attested that he “consulted with one or more persons with
2 relevant and appropriate experience or expertise who has reviewed facts, studies, or other data
3 regarding the exposure to the listed chemical that is the subject of the action, and that, based on that
4 information, the person executing the certificate believes there is a reasonable and meritorious case
5 for the private action.” Cal. Health and Safety Code § 25249.7(d)(1). The certificate of merit must
6 be served on the Attorney General. *Id.*

7 97. This statement was false, as EHA admitted that it had not obtained a written
8 statement or interviewed any person about its claims, and that no person—including any expert—
9 had prepared a report pertaining to its claims. EHA stated that, at least as of March 23, 2021, no
10 report had been made concerning the subject matter of this case. Ex. F, EHA Resp. Form Int. No.
11 12.6.

12 98. EHA’s amended certificate of merit, submitted on July 27, 2022 and after EHA had
13 denied ever consulting with any expert in its discovery responses also included a letter from John
14 Meeker, however this time his opinion was based on a single test result from another lab.

15 99. Again, Meeker acknowledged that acrylamide is the result of cooking—and
16 therefore that Plaintiff had an affirmative defense that would defeat the action.

17 100. Nonetheless, Noam Glick certified that his presuit investigation did not prove any
18 affirmative defense.

19 101. While Proposition 65 enforcers do not need to independently determine whether a
20 listed chemical causes cancer, they are obligated to investigate whether statutory affirmative
21 defenses defeat their claim (*Bucur v. Ahmad*, 244 Cal. App. 4th 175, 191 (2016) [affirming
22 sanctions against a party whose “assertion of claims so clearly barred by (the affirmative defenses)
23 res judicata, judicial admissions and judicial estoppel was objectively unreasonable.”]; *see also*
24 *F.D.I.C. v. Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994) (prior to filing suit, parties must consider
25 “whether any obvious affirmative defenses bar the case”)); and all litigants are required to refrain
26 from knowingly violating California and Federal law.

27
28

1 102. Here, Defendants were aware that an affirmative defense was available to B&G
2 Foods in both actions but conducted no research or investigation that could plausibly undermine
3 that defense.

4 **C. Defendants’ Failed To Adequately Investigate Their Claims Before Filing Suit.**

5 103. Defendants’ lawsuits are also shams for the separate and independent reason that
6 they were filed without adequate investigation and with no regard to the merits. Prior to filing suit,
7 Defendants did not meaningfully investigate whether the trace amounts of acrylamide allegedly
8 present in the Cookies would exceed the NSRL when considering the rate at which consumers
9 actually enjoy cookies – namely, infrequently and in small amounts. Nor did Defendants
10 investigate whether the NSRL should apply at all considering that acrylamide forms as a result of
11 the baking process, which is necessary to ensure the Cookies are safe to eat (or, indeed, are cookies
12 at all and not mounds of raw dough). Because Defendants did not investigate either of these
13 defenses prior to filing suit, and because these defenses would be fatal to their claims, Defendants’
14 lawsuits are shams.

15 **1. Defendants’ investigation showed that its claims were barred by the “No**
16 **Significant Risk Level” exception to Proposition 65.**

17 104. Proposition 65 does not require placing a cancer warning on the Cookie Cakes or
18 Sandwich Cookies, and any reasonable pre-suit investigation by Defendants would have shown that
19 B&G Foods has not violated Proposition 65.

20 105. Cookie Cakes and Sandwich Cookies are the type of classic snack foods which
21 consumers only enjoy at infrequent snacking intervals. When the rate of consumption of the
22 Cookie Cakes and Sandwich Cookies is considered, the amount of acrylamide allegedly present
23 does not exceed the NSRL.

24 106. Proposition 65 imposes a statutory duty on Defendants to certify they have
25 “consulted with one or more persons with relevant and appropriate experience or expertise who has
26 reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the
27 subject of the action, and that, based on that information, the person executing the certificate
28 believes there is a reasonable and meritorious case for the private action.” Cal. Health & Safety

1 Code, § 25249.7(d)(1). This “Certificate of Merit” must be served with the enforcer’s notice of
2 violation. The certificate of merit that is served on the Attorney General must have attached to it
3 “[f]actual information sufficient to establish the basis of the certificate of merit, including” “the
4 identity of the persons consulted with and relied on by the certifier, and the facts studies, or other
5 data reviewed by those persons.” Cal. Health & Safety, § 25249.7(d)(1), (h)(2).

6 107. “If a court finds that there was no credible factual basis for the certifier’s belief that
7 an exposure to a listed chemical had occurred or was threatened, then the action shall be deemed
8 frivolous within the meaning of Section 128.5 of the Code of Civil Procedure.” Cal. Health &
9 Safety, § 25249.7(h)(2).

10 108. Defendants also had a duty to ensure that no obvious, statutory affirmative defenses
11 foreclosed their claims. *See* Cal. Code Civ. Proc. § 128.7; *Bucur v. Ahmad*, 244 Cal. App. 4th 175,
12 191 (2016) [affirming sanctions against a party whose “assertion of claims so clearly barred by (the
13 affirmative defenses) res judicata, judicial admissions and judicial estoppel was objectively
14 unreasonable.”]; *see also F.D.I.C. v. Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994) (prior to filing
15 suit, parties must consider “whether any obvious affirmative defenses bar the case”). In fact,
16 Defendants both attested in their certificates of merit that they had conducted such an investigation.

17 109. Both EHA and Embry stated in their certificates of merit that Noam Glick
18 understood “that ‘reasonable and meritorious case for the private action’ means that the information
19 provides a credible basis that all elements of the plaintiff’s case can be established and the
20 information did not prove that the alleged violator will be able to establish any of the affirmative
21 defenses set forth in the statute.” (July 26, 2022 Certificate of Merit, August 17, 2022 (ECF 52-2,
22 Ex. J, Ex. I)).” That statement was not true.

23 110. Ms. Embry did not do any research into how often people eat Cookie Cakes or
24 similar products before claiming in her complaint that people eat Cookie Cakes so frequently they
25 are at risk of cancer or birth defects. Ex. A, Embry Dep. 82:22-83:22; Ex. B, Embry Supp. Resp.
26 RFA 2 (“Plaintiff admits she has not personally reviewed any scientific research, analysis, or
27 studies showing that acrylamide in food causes cancer, and that she instead defers to her expert on
28

1 these matters.”) Ms. Embry purports to rely on her attorney and experts, but she was not aware of
2 any expert analysis pertinent to her lawsuit against B&G Foods.

3 111. EHA admitted in discovery that it “does not have, and has never had” any
4 documents concerning the frequency with which consumers consume cakes, cookies, bars, or any
5 other similar product, including the Sandwich Cookies, and relied exclusively on the National
6 Health Nutrition Examination Survey database (Ex. C, EHA Resp. to RFP No. 7)—which shows
7 that people eat cookies infrequently.

8 112. Although Defendants now claim they did consult with an “expert” prior to filing
9 their lawsuit, their prior denials that any such expert existed, or was consulted, support the
10 inference that these “reports” were manufactured after the fact and/or were never included in
11 Defendants’ original certificates of merit, making them false or defective.

12 113. Further, Embry and EHA’s “expert” did not research the rate of consumption of
13 Cookie Cakes, Sandwich Cookies, or other similar foods, as would be necessary to determine
14 whether the Cookie Cakes or Sandwich Cookies require a Proposition 65 warning. *See* ECF 52-2
15 Exs. I, J (“Amended Certificate of Merit”). *See Environmental Law Foundation v. Beech-Nut*
16 *Nutrition Corp.* (2015) 235 Cal.App.4th 307, 327.

17 114. Defendants’ “expert” did not consider the test results conducted by B&G Foods and
18 produced to Defendants which showed that the Devil’s Food Cookie Cakes would not exceed the
19 NSRL even if consumers ate one serving of Cookie Cakes per day.

20 115. Defendants’ “expert” appears to have relied solely on the testing conducted by
21 Defendants, which was based on spoliated evidence.

22 116. Therefore, neither EHA nor Embry investigated an obvious affirmative defense.

23 117. Moreover, the information Defendants acquired prior to commencing their actions
24 against B&G Foods demonstrated that their cases lacked merit.

25 **2. Defendants’ investigation showed that its claims were barred by the**
26 **“Cooking” exception to Proposition 65.**

27 118. Embry, EHA, and their “expert” knew that the acrylamide in the Cookie Cakes was
28 created during the cooking process, and therefore falls within an exception to Proposition 65’s

1 labelling requirements. (Ex. B, Embry Supp. Resp. RFA No. 7 (“Plaintiff understands this
2 statement [that acrylamide may form in food when it is baked] to be true”); Ex. D, EHA Resp. RFA
3 No. 7 (admitting “acrylamide may form in food when it is baked.”). *See* Health & Saf. Code, §
4 25249.7(k)(1)(B)(ii).

5 119. Ms. Embry testified that acrylamide is “a chemical found in foods. When cooked –
6 baked at really high temperatures. . . . To my understanding, I – when it’s at a very high
7 temperature, baked and fried, that’s when it forms.” Ex. A, Embry Dep. Tr. 61:11-22.

8 120. EHA admitted that acrylamide may form in food when it is baked. *See* Ex. D, EHA
9 Resp. RFA No. 7.

10 121. Defendants supposed “expert” explained that the acrylamide in the Cookie Cakes
11 and Sandwich Cookies is created when “carbohydrate-rich foods are processed at high
12 temperatures (such as cooking, frying, roasting, and baking).” (July 26, 2022 Certificate of Merit,
13 August 17, 2022 Certificate of Merit (ECF 52-2, Ex. J, Ex. I)).

14 122. Proposition 65 provides an exception “where chemicals in food are produced by
15 cooking necessary to render the food palatable or to avoid microbiological contamination.” Cal.
16 Code Regs. § 25703(b)(1).

17 123. Defendants base their entire case on a comparison of the level of acrylamide found
18 in one lab result with the NSRL, without considering the rate with which consumers eat the Cookie
19 Cakes or Sandwich Cookies as required (*see Beech-Nut Nutrition Corp.*, 235 Cal.App.4th 307, 327
20 (2015) (experts appropriately calculated exposure by averaging test results across lots and time,
21 rather than evaluating individual exposure on the day of consumption.)), or the alternative NSRL
22 that would be required by Cal. Code Regs. § 25703(b)(1). *See* Defs.’ MPA iso MTD 13:21-28.

23 **D. Defendants Made False Statements In Their Complaints.**

24 124. Defendants’ lawsuits are also shams for the separate and independent reason that
25 their complaints contain several false statements. In particular, Defendants misrepresented to the
26 Court that acrylamide is “known” to the State to cause cancer; that they filed valid certificates of
27 merit prior to bringing suit; that they performed an adequate pre-suit investigation; and that B&G
28 Foods’s products were not exempt from Proposition 65 under any known affirmative defenses.

1 125. EHA and Embry both allege that acrylamide is known to the state of California to
 2 cause cancer, the Cookie Cakes and Sandwich Cookies contain acrylamide, and therefore a
 3 Proposition 65 warning is required.

4 126. Defendants know that the state of California does not know acrylamide in foods
 5 causes cancer, and that the acrylamide found in the Cookie Cakes and Sandwich Cookies is caused
 6 by baking and therefore does not necessitate a cancer warning.

7 127. Defendants also allege that they provided code compliant notices of violation sixty
 8 days before filing suit. On the contrary, Defendants did not provide certificates of merit supported
 9 by evidence to the Attorney General, as required by law prior to filing suit. It was only when their
 10 certificates of merit were under scrutiny that they filed Amended Notices of Violation with the
 11 Attorney General attaching the substantiation for their certificates of merit.

12 128. No amendment would have been required had they included this information with
 13 the certificates of merit they initially served on the Attorney General

14 129. Defendants failure to satisfy the certificate of merit requirements is fatal to their
 15 claims. *See DiPirro v. Am. Isuzu Motors, Inc.*, 119 Cal. App. 4th 966, 972, (2004) (failure to
 16 provide certificate of merit prior to commencing action could not be cured by filing a certificate of
 17 merit after the litigation commenced. Affirming dismissal with prejudice.)

18 130. Below is a chart contrasting representations made by Defendants in their certificates
 19 of merit and complaints, and admissions obtained after the complaints were filed.

| Representation | Admissions |
|---|--|
| 21 131. “Defendants manufactured, 22 imported, sold, and/or distributed Products 23 containing acrylamide in violation of 24 Health and Safety Code, section 25249.6 et 25 seq.” (Ex. E (“Embry Compl.”) ¶ 15; Ex. G 26 (“EHA Compl.”) ¶ 16) 27 | 132. Defendants were aware B&G Foods’s products fall within exceptions to Proposition 65’s labelling requirement. 28 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

| | |
|---|---|
| <p>133. “More than sixty days prior to naming each defendant in this lawsuit, Plaintiff issued a 60-Day Notice of Violation (“Notice”) as required by and in compliance with Proposition 65.” (Embry Compl. ¶ 20; EHA Compl. ¶ 21; Ex. H (“EHA Am. Compl.”) ¶ 21.)</p> | <p>134. Defendants submitted “amended” sixty day notices including the requisite certificate of merit supported by the basis for their claims on July 27, 2022 and August 17, 2022—long after they filed their lawsuits. (<i>See</i> ECF 52-2 Exs. I and J).</p> |
| <p>135. “Individuals exposed to acrylamides [sic] contained in the Products through direct ingestion resulting from reasonably foreseeable use of the Products have suffered and continue to suffer irreparable harm. There is no other plain, speedy, or adequate remedy at law.” (Embry Compl. ¶ 22; EHA Compl. ¶ 23; EHA Am. Compl. ¶ 23.)</p> | <p>136. Defendants admit they have no evidence that any individual exposed to acrylamide was harmed or that Proposition 65’s warning requirement applies to Cookie Cakes or Sandwich Cookies. <i>See</i> Embry Suppl. Resp. RFA 1. (“Plaintiff is not aware of specific instances of the Cookie Cakes causing cancer in any specific customer.”) <i>See</i> EHA Resp. RFA No. 2 (“Plaintiff admits it has not personally reviewed any scientific research, analysis, or studies showing that acrylamide in food causes cancer, and that it instead defers to its expert on these matters.”)</p> |
| <p>137. “Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that ‘reasonable and meritorious</p> | <p>138. Noam Glick was aware that these cases were foreclosed by affirmative defenses.</p> <p>139. His alleged “consultation” with John Meeker revealed “acrylamide is a carcinogen that can form as a reducing</p> |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

| | |
|---|---|
| <p>case for the private action’ means that the information provides a credible basis that all elements of the plaintiff’s case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.” (See ECF 52-2, Exs. I and J)</p> | <p>sugars react with free asparagine when carbohydrate-rich foods are processed at high temperatures (such as cooking, frying, roasting, and baking), primarily through what is known as the Maillard reaction.” (See ECF 52-2, Exs. I and J).</p> |
| <p>140. “This Complaint is a representative action brought by Plaintiff in the public interest of the citizens of the State of California (“the People.”) (Embry Compl. ¶ 1). Plaintiff KIM EMBRY (“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” (Embry Compl. ¶ 6)</p> | <p>141. Embry has admitted that she settles cases in a manner contrary to even her own definition of “the public interest”. See <i>supra</i> paragraphs 172-188.</p> |
| <p>142. “Plaintiff seeks to remedy Defendants’ failure to inform the People of exposure to acrylamide, a known carcinogen.” (Embry Compl. ¶ 1)</p> | <p>143. Embry testified that she had no personal knowledge regarding the merits of her case, and that she relies upon her expert and attorney. See <i>supra</i> paragraphs 150-156. She also testified to entering settlements that would not alert</p> |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

| | |
|---|---|
| | people to exposure to acrylamide. <i>See supra</i> paragraphs 172-188. |
| <p>144. “This Complaint is a representative action brought by Environmental Health Advocates, Inc. (“Plaintiff”) in the public interest of the citizens of California (“the People). Plaintiff seeks to remedy Defendants failure to inform the People of exposure to acrylamide, a known carcinogen.” (EHA Compl. ¶ 1; Am. Compl. ¶ 1)</p> | <p>145. EHA has admitted that it settles cases in a manner contrary to even its own definition of “the public interest”. <i>See supra</i> paragraphs 172-188.</p> |

E. Defendants Know That The Cookies Do Not Cause Cancer And There Would Be No Public Benefit To A Warning.

146. Defendants’ lawsuits are also a sham for the separate and independent reason that they know, or reasonably should know, that the Cookies do not cause cancer. As detailed above at ¶¶ 40-61, *supra*, there is extensive, longstanding evidence that acrylamide in baked goods like the Cookies does not cause cancer. Despite this knowledge, Defendants filed these suits because their true intent is not to serve any public interest, but only to enrich themselves and their lawyers.

147. Indeed, Embry and EHA have not conducted the research that one genuinely concerned with the health consequences of acrylamide would.

148. EHA failed to provide or identify any evidence showing that acrylamide causes or potentially causes cancer. *See e.g.* Ex. D, EHA Resp. RFA No. 1 (“Plaintiff is not aware of specific instances of the Subject Products causing cancer in any specific customer”)

149. EHA failed to provide or identify any evidence showing that acrylamide is known to the State of California to cause cancer.

150. EHA admitted it had not reviewed any scientific research, analysis, or studies showing that acrylamide in food causes cancer. *See* Ex. D, EHA Resp. RFA No. 2 (“Plaintiff

1 admits it has not personally reviewed any scientific research, analysis, or studies showing that
2 acrylamide in food causes cancer, and that it instead defers to its expert on these matters.”)

3 151. EHA admitted that it had done no research into the State of California’s knowledge
4 regarding acrylamide’s carcinogenic effects. *See* Ex. D, EHA Resp. RFA No. 4 (“Plaintiff is
5 informed and believes that acrylamide causes cancer, but admits it has not done any independent
6 research or analysis into the State of California’s knowledge regarding its carcinogenic effect.”)

7 152. EHA stated that, at least as of March 23, 2021, no report had been made concerning
8 the subject matter of this case. Ex. F, EHA Resp. Form Int. No. 12.6.

9 153. Likewise, Embry has never read any scientific literature or analysis showing that
10 acrylamide in food causes cancer. Ex. A, Embry Dep. 82:22-83:22; Ex. B, Embry Supp. Resp. RFA
11 2 (“Plaintiff admits she has not personally reviewed any scientific research, analysis, or studies
12 showing that acrylamide in food causes cancer, and that she instead defers to her expert on these
13 matters.”)

14 154. Embry was unaware of “any scientific study about whether the Cookie Cakes cause
15 cancer or birth defects or whether any person had ever contracted cancer or has had a birth defect
16 as a result of eating the Cookie Cakes. Ex. A, Embry Dep. Tr. 80:9-21; Ex. B, Embry Suppl. Resp.
17 RFA 1. (“Plaintiff is not aware of specific instances of the Cookie Cakes causing cancer in any
18 specific customer.”)

19 155. Embry did not do any research as to how often people eat Cookie Cakes or similar
20 foods. Ex. A, Embry Dep. Tr. 82:22-83:22.

21 156. Embry purports to rely on her attorney and experts, but she was not aware of any
22 expert analysis pertinent to her lawsuit against B&G Foods.

23 157. On March 20, 2020, Plaintiff notified Defendants that the products at issue could not
24 possibly violate Proposition 65, and that acrylamide in baked-goods does not cause cancer in
25 humans. B&G Foods provided Defendants with:

26 • OEHHA’s “person most knowledgeable’s” sworn testimony admitting that (a) she
27 was not aware of any governmental health organization listing acrylamide as a known human
28

1 carcinogen, (b) she was not aware of any pharmacodynamic data regarding rats and humans and
2 acrylamide, and (c) OEHHA did not actually “know” that acrylamide was a human carcinogen.

3 • A review of the relevant epidemiologic studies demonstrated that there was no
4 consistent evidence that dietary acrylamide exposure increases the risk of any type of cancer in
5 humans.

6 • A consent judgment entered by the California Attorney General setting a safe-harbor
7 level of 281 parts per billion of acrylamide in food products.

8 • A consent judgment entered by Center for Environmental Health setting a safe-
9 harbor level of 350 parts per billion of acrylamide in food products.

10 • A consent judgment entered by Kim Embry setting a safe-harbor level of 280 parts
11 per billion of acrylamide in food products.

12 • Test results showing the Cookie Cakes contain 47.6, 65.2, and 73.1 parts per billion
13 of acrylamide.

14 158. Defendants, however, refused to withdraw their notices unless Plaintiff paid a
15 substantial sum or put a false cancer warning on the products.

16 159. Neither Embry nor EHA produced any evidence supporting their claims at any time.
17 That is because they have no evidence that the Cookies cause cancer, that they violate Proposition
18 65, or that the public would receive any benefit from a false cancer warning on the Cookies.

19 **F. Defendants’ Lawsuits Against B&G Foods Are Part Of A Series Of Lawsuits**
20 **Brought Without Regard To Their Merit And For An Unlawful Purpose.**

21 160. Defendants file a high volume of Notices of Violation with the hope that some
22 accused parties will pay them to go away. This is their business model. They are not interested in
23 the merits of their cases, because their goal is to impose litigation costs on defendants. The
24 expense and burden of litigation is sufficient to coerce some defendants into labelling their
25 products as carcinogens, regardless of whether it is true. If Defendants’ targets do not settle after
26 considerable litigation costs are imposed, the case is abandoned.

27 161. In concluding that a lawsuit is part of a series of lawsuits brought pursuant to their
28 policy of starting legal proceedings without regard to their merit Courts ask “were the legal filings

1 made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of
2 successive filings undertaken essentially for the purposes of harassment?” *B&G Foods N. Am.,*
3 *Inc. v. Embry*, 29 F.4th 527, 539 (9th Cir. 2022), *cert. denied*, No. 22-83, 2022 WL 4654543 (U.S.
4 Oct. 3, 2022).

5 162. These cases were not brought to address a legitimate grievance. Defendants have
6 and will continue to enter into settlement agreements that, by their own admission, they believe are
7 harmful to the people of California as explained in the paragraphs below.

8 163. Further, Defendants typically will abandon their claims prior to a final adjudication
9 when their “shake-down” tactics do not work.

10 164. On information and belief, Defendants routinely base their Notices of Violation on
11 testing performed by an out-of-state laboratory, such as IEH.

12 165. On information and belief, Defendants select this laboratory because it uses non-
13 standard testing procedures that result in inflated test results.

14 166. On information and belief, Defendants select IEH because it destroys products
15 immediately after testing, making it impossible for anyone to retest the products and thus challenge
16 the reliability or accuracy of the testing methods.

17 167. On information and belief, Defendants select IEH because it is located out of state,
18 thus making it more difficult to obtain discovery from the laboratory establishing its improper and
19 inadequate testing and quality control regimen.

20 168. Defendant Embry has filed at least 260 Notices of Violation pertaining to
21 acrylamide.

22 169. Of those, she withdrew 129 without filing suit or obtaining a settlement.

23 170. Of the remaining 131 Notices of Violation, Defendant Embry settled just 25 cases.

24 171. Thus, less than ten percent of Defendants’ Proposition 65 acrylamide lawsuits have
25 resulted in any sort of resolution.

26 172. As discussed above, many of the settlements entered by Embry were contrary to her
27 stated goal of serving the public interest. Embry enters settlements that permit the defendant to sell
28 products containing a level of acrylamide that Defendants claim is “not safe” without a warning, or

1 requires warnings for products that contain a level of acrylamide Embry believes is so safe no
2 warning label is needed.

3 173. Many of these settlements require food producers to label foods that contain levels
4 of acrylamide well below the NSRL. On information and belief, the products at issue in these
5 cases contained levels of acrylamide below the NSRL, but the defendants settled anyway because it
6 was less expensive than litigation. These “over-warnings” do not benefit the public. Rather they
7 undermine the purpose of Proposition 65.

8 174. And virtually all of Embry’s settlements were for small, five-figure sums—classic
9 “nuisance value” settlements paid by defendants because, as detailed above, the nature of
10 Proposition 65 makes defending lawsuits prohibitively expensive, and not because the claims have
11 any merit.

12 175. Similarly, EHA has filed over 800 Notices of Violation, including 316 Notices of
13 Violation pertaining to acrylamide.

14 176. Less than 30% of these Notices of Violation resulted in the filing of a complaint.

15 177. Only approximately 20% of EHA’s Notices of Violation resulted in any kind of
16 settlement.

17 178. As was the case with Embry, many of these settlements require food producers to
18 label foods that contain levels of acrylamide well below the NSRL. On information and belief, the
19 products at issue in these cases contained levels of acrylamide below the NSRL, but the defendants
20 settled anyway because it was less expensive than litigation. Again, these over-warnings do not
21 benefit the public.

22 179. These settlements do not demonstrate that EHA’s’ cases were meritorious or
23 successful. On the contrary they underscore that EHA prioritizes monetary rewards over the public
24 benefit or any good faith enforcement of Proposition 65.

25 180. EHA and Embry traded a public benefit for money. Specifically, they have entered
26 settlements that permit companies to sell products they believe are unsafe for the public to consume
27 so long as they get paid.

28

1 181. Further, any Proposition 65 litigation that is not “in the public interest” is unlawful.
2 The statute requires that private enforcers act “in the public interest.” Cal. Health and Safety Code
3 § 25249.7(d).

4 182. The Attorney General has found that Embry and Glick have attempted to enter at
5 least one settlement that was “contrary to the law, against public policy, and not enforceable.”
6 Attorney General’s Mar. 2, 2018, Letter re *Embry v. Earthbound Farm*, Out-of-Court Proposition
7 65 Settlement. Upon receipt of this letter, Embry appears to have abandoned this litigation.

8 183. In 2018, Embry attempted to settle a Proposition 65 claim against Earthbound Farm,
9 LLC. The Attorney General objected to this settlement, which included \$3,000 in civil penalties
10 and a \$37,000 attorney fee award, because (1) Defendant Embry received more than 25% of the
11 civil penalties; (2) the settlement “is not likely to result in any benefit to the public,” and (3)
12 Defendant Glick’s \$37,000 fee award was unreasonable.

13 184. In response to this letter, the parties rescinded the settlement agreement and have not
14 submitted another for review.

15 185. EHA and Embry’s long history of meritless and unlawful Proposition 65 litigation is
16 relevant here because they are suing B&G Foods with the same cut-and paste complaint, based on
17 the same false certificate of merit they submit in all of these cases. Their pattern and practice of
18 unlawful conduct directed by Noam Glick has now become a recurring problem for B&G Foods.

19 186. On information and belief, the “attorney’s fees” claimed by Defendants in their
20 settlements are inflated, and bear little to no relationship to the amount of time or effort
21 Defendants’ counsel expend in prosecuting Proposition 65 actions.

22 187. Defendants are aware that it is unconstitutional to compel a company to falsely label
23 its products, but they have sought to do so hundreds of times, and will continue to do so unless the
24 Court intervenes.

25 188. Therefore, Defendants’ serial litigation was brought for an unlawful purpose.

26 **G. Defendants Knew Their Claims Are Unconstitutional**

27 189. Defendants’ state court lawsuits are also shams for the separate and independent
28 reason that Defendants knew, or reasonably should have known, that their litigation violated the

1 First Amendment. Defendants’ lawsuits against B&G Foods were both filed after serious
2 constitutional questions were raised about Proposition 65 acrylamide litigation in *CalChamber*.
3 Defendants have continued to prosecute their lawsuits even after the issuance of the injunction in
4 *Calchamber*, such as by filing amended Notices of Violation. And Defendants continued to fil new
5 Proposition 65 acrylamide lawsuits *after* the *CalChamber* injunction issued. This is because
6 Defendants know that their lawsuits are objectively baseless, but file them anyway without regard
7 for the merits.

8 190. From the outset, Defendants have prosecuted their claims despite knowing, or
9 having a reasonable basis to know, that their claims are unconstitutional. In October, 2019 – prior
10 to either Embry or EHA’s lawsuit, the California Chamber of Commerce filed a lawsuit claiming
11 the First Amendment prohibits California from forcing businesses to make false statements, so
12 because California does not “know” that eating food with acrylamide causes cancer in people,
13 Proposition 65 is unconstitutional if it mandates that assertion.

14 191. On March 30, 2021, this Court held in *California Chamber of Commerce v.*
15 *Becerra*, 529 F. Supp. 3d 1099 (E.D. Cal. 2021), *aff’d* 29 4th 468 (9th Cir. 2022) (“*Calchamber*”),
16 that the available evidence, including much of the evidence that B&G Foods provided to
17 Defendants on March 20, 2020, shows that the state does not, in fact “know” acrylamide causes
18 cancer.

19 192. This Court observed in that case that “Some evidence does support [an inference
20 that acrylamide in food causes cancer in humans], including laboratory experiments with mice and
21 rats, in vitro studies of human cells, and statistical investigations of tumor genomes. But dozens of
22 epidemiological studies have failed to tie human cancer to a diet of food containing acrylamide.
23 Nor have public health authorities advised people to eliminate acrylamide from their diets . . . In
24 short, [Proposition 65’s] safe harbor warning is controversial because it elevates one side of a
25 legitimately unresolved scientific debate about whether eating foods and drinks containing
26 acrylamide increases the risk of cancer.” *California Chamber of Com. v. Becerra*, 529 F. Supp. 3d
27 1099, 1117 (E.D. Cal. 2021), *aff’d sub nom. California Chamber of Com. v. Council for Educ. &*
28 *Rsch. on Toxics*, 29 F.4th 468 (9th Cir. 2022).

1 193. A preliminary injunction issued: “no person may file or prosecute a new lawsuit to
2 enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and
3 beverage products. This injunction applies to the requirement that any “person in the course of
4 doing business” provides a “clear and reasonable warning” for cancer before “expos[ing] any
5 individual to” acrylamide in food and beverage products under California Health & Safety Code §
6 25249.6. It applies to the Attorney General and his officers, employees, or agents, and all those in
7 privity or acting in concert with those entities or individuals, including private enforcers under
8 section 25249.7(d) of the California Health & Safety Code.” That injunction was dissolved, then
9 reinstated by the Ninth Circuit.

10 194. Defendants were aware of the controversy over Proposition 65 labels for food
11 products that contain acrylamide, whether acrylamide in food causes cancer, and whether the state
12 could “know” that acrylamide in food causes cancer in humans, before bringing their lawsuits.

13 195. Defendants are aware of this Court’s holdings, and the Ninth Circuit’s holdings, in
14 *California Chamber of Com. v. Becerra*. See e.g. Ex. I, Plaintiff Kim Embry’s Memo. P. and A.
15 iso Mot. to Stay Court Proceedings (April 20, 2021), Case No. RG20057491 at 1:18.

16 196. Defendants are aware, and are obliged to know, that Plaintiff cannot be compelled to
17 make false or controversial statements about its own products.

18 197. Nonetheless, Defendants seek to compel Plaintiff to make statements about its
19 products that are false or at least controversial in violation of the United States and California
20 constitutions. When provided evidence that there is—at the very least—a controversy over
21 whether acrylamide causes cancer, Defendants responded by demanding hundreds of thousands of
22 dollars.

23 198. Defendants continue to prosecute their unconstitutional claims against Plaintiff
24 because they hope to leverage settlements from Plaintiff.

25 199. Defendants believed, and continue to believe, that the costs of litigation are
26 sufficient to pressure Plaintiff to pay them to go away. This abuse of the litigation process is the
27 core of their business model.

28

1 200. The end result that is likely to result from Defendants’ lawsuit is irrelevant to their
2 calculus regarding whether these cases should be filed or prosecuted. The goal of the lawsuit is to
3 cause enough harm to B&G Foods through injury to their reputations and litigation costs that they
4 pay Defendants to go away.

5 **H. Compelling B&G Foods To Make False Or Controversial Statements About Its
6 Products Violates The U.S. Constitution.**

7 201. Defendants lawsuits are a sham for the separate and independent reason that their
8 lawsuits are unconstitutional. A lawsuit is a sham if “no reasonable litigant could have realistically
9 expected success on the merits” *White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000). That is
10 necessarily true here because Defendants’ lawsuits are unconstitutional on their face, as this Court
11 correctly held in *CalChamber*.

12 202. The First Amendment to the United States Constitution prohibits state actors from
13 compelling false or controversial statements.

14 203. The government may compel truthful disclosure in commercial speech as long as the
15 compelled disclosure is reasonably related to a substantial governmental interest. The required
16 disclosure must be limited to purely factual and uncontroversial information. *California Chamber
17 of Com. v. Becerra*, 529 F. Supp. 3d 1099, 1116 (E.D. Cal. 2021), *aff’d sub nom. California
18 Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468 (9th Cir. 2022).

19 204. The warning label that Defendants seek to compel Plaintiff to place on its products
20 is false. The State of California does not know that acrylamide in food causes cancer, or that the
21 Cookie Cakes or Sandwich Cookies cause cancer.

22 205. For these very reasons, on March 30, 2021, this Court enjoined future prosecution of
23 Proposition 65 acrylamide lawsuits. In issuing that injunction, the Court explained:

24 [T]he State has not shown [the Proposition 65 acrylamide cancer
25 warning] is purely factual and uncontroversial. By asserting vaguely
26 that consuming a product can “expose” a person to acrylamide—a
27 chemical most people have likely never used in preparing food or
28 even heard of—the warning implies incorrectly that acrylamide is an
additive or ingredient. . . .

[D]ozens of epidemiological studies have failed to tie human cancer
to a diet of food containing acrylamide. Nor have public health
authorities advised people to eliminate acrylamide from their

1 diets. . . . California has also decided that coffee, one of the most
2 common sources of acrylamide, actually reduces the risks of some
3 cancers. . . . In short, the safe harbor warning is controversial because
4 it elevates one side of a legitimately unresolved scientific debate
5 about whether eating foods and drinks containing acrylamide
6 increases the risk of cancer.

7 *Calchamber*, 529 F. Supp. 3d at 1117-18. On March 17, 2022, the Ninth Circuit affirmed this
8 Court’s *Calchamber* decision. 29 F.4th 468. Notwithstanding the injunction, Defendants have
9 continued to threaten Plaintiff with prosecution of their claims and have continued to file new
10 Proposition 65 claims based on the presence of acrylamide in food.

11 **I. Compelling B&G Foods To Make False Or Controversial Statements About Its**
12 **Products Violates The California Constitution.**

13 206. Defendants’ state court lawsuits are a sham for the separate and independent reason
14 that they violate the California Constitution. Even if Defendants’ lawsuits were not unconstitutional
15 under the First Amendment, they would still be objectively baseless and shams because they
16 violate the broad free speech rights guaranteed by the California Constitution.

17 207. Article I, section 2 of the California Constitution provides: “(a) Every person may
18 freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse
19 of this right. A law may not restrain or abridge liberty of speech or press.”

20 208. Article I’s free speech clause enjoys existence and force independent of the First
21 Amendment to the federal Constitution. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal. 4th 468,
22 489 “*Gerawan I*”.)

23 209. The state Constitution’s free speech clause is at least as broad, and in some ways
24 broader, than the comparable provision of the federal Constitution. (*Kasky v. Nike, Inc.* (2002) 27
25 Cal.4th 939, 958–959.) The California Constitution’s protection of speech “on all subjects” extends
26 without limitation to non-misleading commercial speech. (*Id.* at p.959.)

27 210. Article I, section 2 “comprises both a right to speak freely and also a right to refrain
28 from doing so at all, and is therefore put at risk both by prohibiting a speaker from saying what he
29 otherwise would say and also by compelling him to say what he otherwise would not say.”
30 (*Gerawan I, supra*, at p. 491.) “For corporations as for individuals, the choice to speak includes

1 within it the choice of what not to say.” (*Pacific Gas & Elec. Co. v. Public Util. Comm'n, supra*,
2 475 U.S. 1, 16, 106 S.Ct. 903, 89 L.Ed.2d 1.)

3 211. “[T]his general rule, that the speaker has the right to tailor the speech, applies not
4 only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker
5 would rather avoid.” (*Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston* (1995)
6 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487.)

7 212. “[A]rticle I’s right to freedom of speech, without more, would not allow compelling
8 one who engages in commercial speech to say through advertising what he otherwise would not
9 say, when his message is about a lawful product or service and is not otherwise false or
10 misleading.” (*Gerawan I, supra*, at p. 509.)

11 213. B&G Foods therefore cannot be compelled to label its products as carcinogenic
12 under California law.

13 214. Therefore, Defendants’ lawsuits have been brought for an unlawful purpose.

14 **III. DEFENDANTS ARE STATE ACTORS**

15 215. The State is responsible for, and benefits from, Defendants’ conduct.

16 216. Under Proposition 65, the State authorizes numerous persons to prosecute the statute
17 on the State’s behalf: the Attorney General, a district attorney, a variety of local government
18 officials or a private enforcer, such as Ms. Embry or EHA. California Health & Safety Code
19 § 25249.7(c) and (d).

20 217. The State allows all these enforcement representatives to seek penalties of up to
21 \$2,500 per day for each violation. *Id.* § 25249.7(b).

22 218. Anyone who brings a case is eligible to recover 25 percent of the penalty, *id.*
23 § 25249.12(d), as well as reasonable attorneys’ fees and costs, Cal. Code Civ. Proc. § 1021.5.

24 219. This creates strong incentives for litigation and a perverse incentive for abusive
25 conduct. *See, e.g., Anthony T. Caso, Bounty Hunters and the Public Interest—A Study of*
26 *California’s Proposition 65*, 13 ENGAGE 30, 31 (Mar. 2012) (describing case in which “law firm
27 created an ‘astroturf’ environmental group to be a plaintiff in Proposition 65 litigation,” which
28 group “consisted of partners from the law firm” and which “sent out hundreds of demand letters

1 charging businesses with failure to provide warnings” and “extort[ing] payments of attorney fees or
2 contributions to the front group”).

3 220. In addition to penalties, the State allows enforcement representatives to seek
4 injunctive relief to require mandatory consumer warnings by food companies in “a court of
5 competent jurisdiction.” Cal. Health & Safety Code § 25249.7(a).

6 221. Enforcement representatives rely on OEHHA to identify chemicals and
7 concentration levels that are supposedly “known” to cause cancer. *Id.* §§ 25249.8(a)-(b).

8 222. Acrylamide currently is listed as a cancer-causing substance by OEHHA.

9 223. The State encourages enforcement representatives like Defendants to sue food
10 companies for injunctive and monetary relief.

11 224. If a product such as the Cookie Cakes or Sandwich Cookies is found to contain
12 acrylamide at the proscribed level, the State, through its representatives, requires food companies to
13 notify consumers that the affected product contains acrylamide which is “known to the State of
14 California to cause cancer”:

15 WARNING: Consuming this product can expose you to
16 [Acrylamide], which is known to the State of California to cause
cancer. For more information, go to www.P65Warnings.ca.gov/food.

17 27 Cal. Code Regs § 25607.2(a)(2).

18 225. The required warnings on product labels mandated by the State and enforced by
19 prosecutors must be large and obvious, *i.e.*, “must be set off from other surrounding information”
20 and “enclosed in a box.” *Id.* § 25607.1(b).

21 226. The State revises and regulates these requirements from time to time, and consults
22 with its private enforcement representatives in doing so.

23 227. Under Proposition 65, private plaintiffs are required to provide 60-days’ notice to
24 the California Attorney General, the district attorney, city attorney, or prosecutor in whose
25 jurisdiction the violation is alleged to have occurred, and to the alleged violator before filing suit.
26 Cal. Health & Safety Code § 25249.7(d)(1).

27 228. The California Attorney General maintains a database of these 60-day notices,
28 available at <https://oag.ca.gov/prop65/60-day-notice-search>.

1 229. To date, nearly 1420 60-day notices for alleged violations of the Proposition 65
2 warning requirement with respect to alleged exposures to acrylamide have been filed.

3 230. Two hundred and sixty-three of these acrylamide notices were filed by Embry, and
4 316 were filed by EHA.

5 231. Hundreds of these 60-day notices relate to acrylamide in food products.

6 232. These 60-day notices include alleged violations related to potato and potato-based
7 products (more than 90 notices); nut butters, including peanut and almond butter (more than 40
8 notices); almonds (more than 30 notices); cereals (more than 20 notices); and olives (more than 10
9 notices).

10 233. The rate of notices of violation for acrylamide have steadily increased in recent
11 years, from just 32 notices in 2016 to 205 in 2019.

12 234. As described below, Defendants Embry and EHA are state actors purporting to act
13 on behalf of the government of California.

14 a. The State is intimately entwined in, encourages, and closely monitors
15 Defendants' Proposition 65 litigation, which it directly and indirectly regulates, controls and guides
16 through the California Attorney General's office.

17 b. Prior to initiating any private action, bounty hunters like Defendants serve a
18 Notice of Violation on the State through the Attorney General's office, together with evidence
19 supporting the supposed merit of the bounty hunter's allegations.

20 c. This is so that the State can regulate, monitor, and encourage the proposed
21 action.

22 d. If the State believes the notice lacks merit, it serves a letter on the parties to
23 object to any action. Cal. Health & Safety Code § 25249.7(f). In doing so, the State takes an
24 active role as gatekeeper to permit supposedly meritorious cases to proceed and to reject or contest
25 cases that lack merit.

26 e. The State also monitors the activity of its Proposition 65 enforcement
27 representatives such as Defendants by, among other things: requesting pre-approval of any
28 potential settlement or consent judgment, receiving and reviewing notices regarding the progress of

1 acrylamide case litigation, intervening in particular cases, regulating the conduct of representatives,
2 demanding to receive proportional cuts of civil penalties, and retaining the ability to change, alter
3 or amend the regulations governing a particular Proposition 65 chemical and enforcement activity.

4 f. The Attorney General specifically regulates individual settlement
5 agreements involving Defendants.

6 g. Defendants' actions are so substantively "entwined" in the State's
7 enforcement regime that their action constitutes state conduct by the government.

8 h. Indeed, without the State's imprimatur, support, guidance and regulations,
9 Defendants would not have the ability to threaten and impose upon Plaintiff's constitutional rights.
10 *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, (1961) (where restaurant leased premises
11 from a government agency and both parties benefited financially from the arrangement, restaurant's
12 racial discrimination constituted state action).

13 i. Defendants also are performing a quintessential state function by acting as
14 California's enforcement arm relating to the presence of targeted chemicals in the environment.

15 j. Moreover, the State is not merely a passive actor in such activity, but has an
16 entire department devoted to regulating, following, and encouraging the unconstitutional activity at
17 issue here. *See Lee v. Katz*, 276 F.3d 550, 554-57 (9th Cir. 2002) (private lessee of a public
18 outdoor area owned by the city performed a traditional sovereign function when it sought to
19 regulate free speech activity on the land).

20 k. Defendants are further engaged in state action because, on information and
21 belief, they conspire with state officials to deprive businesses of their free speech right by enforcing
22 Proposition 65 in violation of the First Amendment to the United States Constitution, in exchange
23 for which state officials receive substantial compensation. *See Dennis v. Sparks*, 449 U.S. 24
24 (1980) (private person who bribed a judge to obtain an injunction was engaged in state action).

25 235. And, Defendants are serving as government actors because California has
26 interjected itself into this dispute by virtue of the fact that Proposition 65 is a state statute and
27 Defendants have filed suit in state court. *See Grant v. Johnson*, 15 F.3d 146, 149 (9th Cir. 1994)
28 (existence of state statute and necessary involvement of state judge provided state action necessary

1 to present challenge to Oregon statute allowing appointment of temporary guardian ad litem for
2 person deemed mentally incompetent).

3 236. On information and belief, the State’s employees have communicated with
4 Defendants repeatedly over the last several years and encouraged and assisted them in securing
5 monetary penalties from food companies accused of having acrylamide in their products.

6 237. The State also has received monetary compensation from Defendants in connection
7 with frivolous acrylamide lawsuits against other food companies and would receive compensation
8 should Defendants obtain monetary relief from Plaintiff.

9 **IV. DEFENDANTS’ CONDUCT HAS INJURED B&G FOODS**

10 238. Defendants’ conduct has caused B&G Foods to incur monetary damages by
11 imposing litigation costs in excess of \$345,000, and impugning the reputation of its products and
12 brands.

13 **CAUSES OF ACTION**

14 **First Cause of Action against All Defendants**
15 **(42 U.S.C. § 1983)**
16 **(Violation of the First Amendment to the United States Constitution)**

17 239. Plaintiff incorporates the foregoing paragraphs as if fully restated herein.

18 240. The Free Speech Clause of the First Amendment of the United States Constitution
19 provides that “Congress shall make no law ... abridging the freedom of speech.” U.S. CONST.
20 AMEND. I. The Fourteenth Amendment of the United States Constitution made this proscription
21 applicable to the States and their political subdivisions. *Id.* AMEND. XIV § 1.

22 241. In addition to providing protections against restrictions on speech, the First
23 Amendment provides protection against the government *compelling* individuals or entities to
24 engage in speech.

25 242. Under the First Amendment, laws compelling speech receive strict scrutiny. *Wooley*
26 *v. Maynard*, 430 U.S. 705, 715-16 (1977). Laws regulating commercial speech generally receive at
27 least intermediate scrutiny, *i.e.*, they are prohibited if they do not directly and materially advance
28 the government’s interest, or are more extensive than necessary. *Cent. Hudson Gas & Elec. Corp.*
v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980). And even laws that require businesses to provide

1 information in connection with commercial transactions are permissible only if the compelled
2 disclosure is of information that is purely factual and uncontroversial, reasonably related to a
3 substantial government purpose, and not unjustified or unduly burdensome. *Nat'l Inst. of Family*
4 *Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372, 2377; *Zauderer v. Office of Disciplinary*
5 *Counsel*, 471 U.S. 626, 651 (1985).

6 243. A Proposition 65 warning, irrespective of the specific language used, conveys that
7 the chemical at issue (here, acrylamide) causes cancer in humans.

8 244. Contrary to the warning mandated by Proposition 65, there is no reliable scientific
9 evidence that dietary acrylamide found in the Cookie Cakes or Sandwich Cookies increases the risk
10 of cancer in humans.

11 245. To the contrary, a large number of epidemiological studies suggest that there is no
12 association between exposure to acrylamide from food products and cancer in humans.

13 246. Nor does California “know” that dietary acrylamide causes cancer.

14 247. In fact, the California agency responsible for implementing Proposition 65,
15 OEHHA, has admitted that it does *not* know that acrylamide is a human carcinogen.

16 248. The Proposition 65 warning requirement as applied to acrylamide in the Cookie
17 Cakes or Sandwich Cookies thus seeks to compel speech that is literally false, misleading, and
18 factually controversial. *See California Chamber of Com. v. Council for Educ. & Rsch. on Toxics*,
19 29 F.4th 468, 479 (9th Cir. 2022).

20 249. Because Proposition 65’s warning requirement as applied to acrylamide in the
21 Cookie Cakes and Sandwich Cookies is false, misleading, and factually controversial, it cannot
22 survive any level of constitutional scrutiny. *See Video Software Dealers Ass’n v. Schwarzenegger*,
23 556 F.3d 950, 967 (9th Cir. 2009) (“[T]he State has no legitimate reason to force retailers to affix
24 false information on their products.”). Proposition 65’s warning as applied constitutes
25 impermissible compelled speech under the First Amendment and should be enjoined.

26 250. Defendants are enforcement representatives of the State of California. Their actions
27 are regulated, governed by and ostensibly taken to economically benefit the State.

28

1 251. Defendants seek to enforce Proposition 65 against Plaintiff based on the alleged
2 presence of acrylamide in the Cookie Cakes and Sandwich Cookies.

3 252. Defendants' threatened enforcement and prosecution violates Plaintiff's rights under
4 the First Amendment to the Constitution, by impermissibly seeking to require Plaintiff to place an
5 objectionable warning on its products that would falsely tell consumers the products cause cancer.
6 *See California Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 479 (9th
7 Cir. 2022).

8 253. Cookie Cakes and Sandwich Cookies have never caused cancer.

9 254. Defendants' threatened enforcement is made under color of state law for many
10 reasons highlighted throughout this Complaint: The State is entwined and has a symbiotic
11 relationship with Defendants; Defendants are fulfilling a traditional governmental function; and
12 Defendants and the State are engaged in conduct that would rise to a conspiracy.

13 255. All of those actions involve an intended violation of Plaintiff's First Amendment
14 Rights.

15 256. Further, a California statute and California court are necessarily involved in this
16 dispute.

17 257. Plaintiff is entitled to an injunction against further prosecution or threats of
18 prosecution under Proposition 65 related to the alleged acrylamide in its Cookie Cakes and
19 Sandwich Cookies, and to an award of double Plaintiff's damages, including attorneys' fees and
20 costs, as permitted under Section 1983.

21 258. Federal courts are obligated under Section 1983 to provide a remedy against state
22 prosecutions impinging on Constitutional rights, including the First Amendment. *Mitchum v.*
23 *Foster*, 407 U.S. 225, 227 (1972).

24 259. Moreover, Defendants' Proposition 65 litigation relating to the alleged acrylamide
25 in the Cookie Cakes and Sandwich Cookies is not protected petitioning activity because their
26 lawsuits are objectively baseless and Defendants' motive in bringing them was to extort money
27 from B&G Foods; Defendants initiated litigation against B&G Foods as part of a series of lawsuits
28

1 brought pursuant to a policy of starting legal proceedings without regard to the merits and for the
2 purpose of extorting settlements; and, Defendants made intentional misrepresentations to the court.

3 **Second Cause of Action against All Defendants**
4 **Declaratory Judgment**
(28 U.S.C. § 2201)

5 260. Plaintiff incorporates the foregoing paragraphs as if fully restated herein.

6 261. There is an actual and imminent controversy between the parties regarding whether
7 the application of Proposition 65's acrylamide warning requirement to the Cookie Cakes and
8 Sandwich Cookies violates the First ~~and/or Fourteenth~~ Amendments to the United States
9 Constitution.

10 262. Plaintiff accordingly requests a declaration that the enforcement of Proposition 65
11 against the Cookie Cakes and Sandwich Cookies is unconstitutional.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiff prays for judgment and relief against Defendants as follows:

14 A. For an injunction against further unconstitutional threats and lawsuits against
15 Plaintiff regarding the acrylamide in its Cookie Cakes and Sandwich Cookies products.

16 B. A declaration that the Proposition 65 warning requirement for cancer as applied to
17 Cookie Cakes and Sandwich Cookies violates the First Amendment of the United States
18 Constitution.

19 C. For damages in an amount to be determined according to proof.

20 D. Plaintiff's attorneys' fees and costs.

21 E. All such other and further relief as the Court may deem just, proper, and equitable.

22 Dated: November 23, 2022

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

25 By: /s/ J. Noah Hagey
26 J. Noah Hagey

27 *Attorneys for Plaintiff*
28 *B&G Foods North America, Inc.*

EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

KIM EMBRY, AN INDIVIDUAL,
Plaintiff,

vs.

CASE NO. RG20057491

B&G FOODS NORTH AMERICA, INC.,
A DELAWARE CORP., RALPH'S
GROCERY COMPANY, AN OHIO CORP.
Defendants.

DEPOSITION OF KIM EMBRY
APPEARING REMOTELY FROM
San Francisco, California
Friday, November 13, 2020

Stenographically Reported by: Ashley Soevyn,
CSR No. 12019

APPEARING REMOTELY FROM MARIN COUNTY, CALIFORNIA

Magna Job No. 663115

Pages 1 - 98

1 Kim Embry about the legal issues. 10:44:27

2 MR. KWASNIEWSKI: Counsel, you need to
3 stop with the speaking objections, that's
4 inappropriate. Your role here is to object to form
5 and preserve other evidentiary objections for the 10:44:37
6 record, that's it. If you want to argue or discuss
7 with me, you know, the relevancy of my questions, we
8 can do so off line, but I'm not going to waste
9 record time doing that. So I'm going to proceed
10 with my examination. 10:44:50

11 MR. GLICK: Objection. Calls -- calls
12 for a legal conclusion.

13 MR. KWASNIEWSKI: So, Madam Court
14 Reporter, could you read back my question?

15 THE REPORTER: Sure, David, hold on. I 10:44:56
16 have to go above the colloquy. "But of course if a
17 product doesn't cause cancer, there would be no
18 public benefit in requiring a warning, right?"

19 MR. GLICK: Same objection. Incomplete
20 hypothetical. 10:45:22

21 THE WITNESS: I'm just wanting to make
22 sure I'm answering this correctly because of how it
23 was worded. I would say yes. I don't want to just
24 guess here but...

25 BY MR. KWASNIEWSKI: 10:45:47

1 Q So I don't want you to guess either, 10:45:47

2 Ms. Embry, but just to be clear, is your answer that

3 there would be a public benefit to put a warning on

4 a product even if the product doesn't cause cancer?

5 MR. GLICK: Calls -- calls for a legal 10:46:00

6 conclusion, incomplete hypothetical.

7 THE WITNESS: I agree. I think that

8 question is hypothetical.

9 BY MR. KWASNIEWSKI:

10 Q And I -- it is a hypothetical, and I'm -- 10:46:09

11 I'm just asking you to -- to answer the

12 hypothetical.

13 Hypothetically, let's assume there's a

14 product out there that doesn't cause cancer, has no

15 ingredient that causes cancer. You would agree in 10:46:21

16 that instance that putting a warning on that product

17 that says it does cause cancer would not benefit

18 anyone?

19 A Correct.

20 Q And it would be wrong to make a company 10:46:36

21 put a warning on its products that says it causes

22 cancer when that product doesn't cause cancer,

23 right?

24 MR. GLICK: Objection. Vague and

25 ambiguous as to "wrong," calls for a legal 10:46:46

1 conclusion. Vague and ambiguous altogether, 10:46:48
2 incomplete hypothetical. You can do your best to
3 answer that question, Kim, if you're able to
4 understand it.

5 THE WITNESS: Yes. 10:47:01

6 BY MR. KWASNIEWSKI:

7 Q So returning briefly to our discussion
8 about the Attorney General's regulations. You
9 understand that the Attorney General has also said
10 that civil penalties in a Prop 65 settlement are not 10:47:19
11 to be traded for payments of attorney's fees, right?

12 MR. GLICK: Objection. Calls for a legal
13 conclusion.

14 THE WITNESS: I -- I don't know.

15 BY MR. KWASNIEWSKI: 10:47:35

16 Q Okay. I mean, do you agree that it would
17 be wrong for lawyers to shake down businesses purely
18 for their own benefit?

19 MR. GLICK: Objection. Argumentative,
20 calls for a legal conclusion, incomplete 10:47:47
21 hypothetical, vague and ambiguous.

22 THE WITNESS: Yes.

23 BY MR. KWASNIEWSKI:

24 Q Prop 65 was enacted, as you mentioned
25 earlier, to help protect consumers, correct? 10:48:10

1 conclusion, vague and ambiguous, lacks foundation. 11:59:17

2 BY MR. KWASNIEWSKI:

3 Q You can answer, Ms. Embry, if you can.

4 A I -- actually, I don't know the answer to
5 this, so I would say no. 11:59:37

6 Q Okay. Earlier we talked a little bit
7 about your research into acrylamide. I want to get
8 a bit more specific now.

9 Have you read any scientific study about
10 whether the cookie cakes at issue in this lawsuit 11:59:58
11 cause cancer?

12 A No.

13 Q What about any study that the cookie
14 cakes cause birth defects?

15 A No. 12:00:09

16 Q Are you aware of any person who has ever
17 contracted cancer because he ate these cookie cakes?

18 A No.

19 Q Or any person who has had a birth defect
20 because he ate these cookie cakes or she? 12:00:29

21 A No.

22 Q So your goal in bringing this lawsuit or
23 at least one goal is to get warnings on these
24 products, correct?

25 A Yes. 12:00:56

1 So the chemical that's in there is what causes 12:02:15
2 cancer, just like a cigarette. The wrapper of a
3 cigarette doesn't cause cancer, but what the
4 chemicals are inside is what do. That's why people
5 went after big cigarette companies. 12:02:27

6 BY MR. KWASNIEWSKI:

7 Q Got it. So do I understand you to be
8 suggesting that cookie cakes are as bad for you as
9 cigarettes?

10 A That's not what I -- 12:02:36

11 MR. GLICK: Hold on. Hold on.
12 Objection. Calls for expert testimony, lacks
13 foundation, argumentative. Go ahead.

14 THE WITNESS: That's not --

15 BY MR. KWASNIEWSKI: 12:02:47

16 Q You can answer the question.

17 A No.

18 Q And you said before that you're not aware
19 of anyone who has ever contracted cancer because
20 they ate cookie cakes, right? 12:02:58

21 A Not cookie cakes, no.

22 Q Did you specifically do any research
23 before you filed this complaint regarding how often
24 people eat cookie cakes?

25 A I did not do research, no. 12:03:17

1 Q Do you have an understanding, apart from 12:03:20
2 any discussions you may have had with your
3 attorneys, about how many cookie cakes a person
4 would have to eat to be exposed to a dangerous level
5 of acrylamide? 12:03:33

6 MR. GLICK: Objection. Calls for expert
7 testimony and calls for attorney-client
8 communications, and although he did caveat that to
9 say apart from our communications, do not reveal in
10 answering the question anything that might be 12:03:47
11 protected by the attorney-client privilege.

12 THE WITNESS: Could you repeat the
13 question?

14 MR. KWASNIEWSKI: Sure. Madam Court
15 Reporter, would you mind reading it back. 12:03:57

16 THE REPORTER: (Record read.) Do you
17 have an understanding apart from any discussions you
18 may have had with your attorneys about how many
19 cookie cakes a person would have to eat to be
20 exposed to a dangerous level of acrylamide? 12:04:18

21 THE WITNESS: No, that's where I would
22 trust an expert's opinion.

23 BY MR. KWASNIEWSKI:

24 Q So let's talk about the co-defendant, my
25 other client, which is Ralph's Grocery Company. Why 12:04:26

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby
3 certify:

4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth;
6 that any witnesses in the foregoing proceedings,
7 prior to testifying, were duly sworn; that a record
8 of the proceedings was made by me using machine
9 shorthand, which was thereafter transcribed under my
10 direction; further, that the foregoing is a true
11 record of the testimony given.

12 I further certify I am neither financially
13 interested in the action nor a relative or employee
14 of any attorney or party to this action.

15 IN WITNESS WHEREOF, I have this November
16 30, 2020 subscribed my name.

17
18
19
20

21 _____
22 ASHLEY SOEVYN
23 CSR No. 12019

24
25

EXHIBIT B

1 **NICHOLAS & TOMASEVIC, LLP**
2 Craig M. Nicholas (SBN 178444)
3 Jake Schulte (SBN 293888)
4 225 Broadway, Suite 1900
5 San Diego, California 92101
6 Tel: (619) 325-0492
7 Email: craig@nicholaslaw.org
8 Email: jschulte@nicholaslaw.org

9 **GLICK LAW GROUP, PC**
10 Noam Glick (SBN 251582)
11 225 Broadway, Suite 1900
12 San Diego, California 92101
13 Tel: (619) 382-3400
14 Fax: (619) 393-0154
15 Email: noam@glicklawgroup.com

16 Attorneys for Plaintiff
17 Kim Embry

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF ALAMEDA**

20 KIM EMBRY, an individual,
21
22 Plaintiff,
23
24 v.
25 B&G FOODS NORTH AMERICA, INC., a
26 Delaware corporation, RALPHS GROCERY
27 COMPANY, an Ohio corporation, DOES 1
28 through 100, inclusive,
29
30 Defendants.

Case No.: RG20057491
**KIM EMBRY’S SUPPLEMENTAL
RESPONSES TO DEFENDANTS B&G
FOODS NORTH AMERICA, INC.’S
REQUESTS FOR ADMISSION (SET ONE)**
Dept: 520
Judge: The Honorable Julia Spain
Complaint Filed: March 6, 2020
Trial Date: November 19, 2021

PROPOUNDING PARTY: DEFENDANT, B&G FOODS NORTH AMERICA, INC.
RESPONDING PARTY: PLAINTIFF, KIM EMBRY
SET NUMBER: ONE (1)

Pursuant to California Code of Civil Procedure (“C.C.P.”) § 2031 et seq., Plaintiff KIM EMBRY (“Plaintiff”) provides these responses to Defendant B&G FOODS NORTH AMERICA, INC. (“Defendant”) First Set of Requests for Admission (“Requests”), as follows:

///

PRELIMINARY STATEMENT

1
2 Responding Party reserves her right to amend, supplement, or otherwise modify her
3 objections as she may hereafter discover new information. All objections and grounds therefore
4 are hereby expressly reserved to be interposed, either by motion or otherwise, at a later time.
5 However, Plaintiff does not assume any ongoing duty to amend these responses and/or objections.
6 Each response is given subject to any protective order entered or to be entered in this case.

7 The objections set forth are made solely for purposes of this dispute. Objections as to
8 relevance, materiality and admissibility, and any and all other objections and grounds which would
9 require the exclusion of statements, if such statements were made by a witness present and
10 testifying at court, are expressly reserved and may be interposed at the deposition or at the time of
11 arbitration.

12 No admissions of any nature whatsoever are to be implied or inferred. The fact that a
13 request here may be responded to should not be taken as an admission, or concession of the
14 existence of any set of facts assumed by such request, or that such response constitutes evidence
15 thus set forth or assumed.

GENERAL OBJECTIONS

16
17 1. Plaintiff has not completed her investigation or analysis of the facts or defenses
18 raised in and related to this action and has not yet completed preparation for trial. The following
19 responses are given without prejudice to Plaintiff's right to produce or disclose, at a later date,
20 subsequent information. Without in any way assuming any obligation to do so, Plaintiff reserves
21 the right to alter, supplement, amend or otherwise modify these responses in any way at any time,
22 including at trial, in light of facts determined to be relevant or revealed through discovery, further
23 investigation or further legal analysis. Plaintiff also reserves the right to apply for relief to permit
24 the insertion into these responses of any information that has been inadvertently or unintentionally
25 omitted or to introduce such information into evidence at the time of arbitration or trial.

26 2. Responding Party objects to each request to the extent it seeks the production or
27 disclosure of any information or writing protected by the attorney-client privilege, the attorney
28 work product doctrine, or other applicable privilege or protection, including, but not limited to, the

1 right to privacy of Plaintiff, the deponent, and/or third-parties.

2 3. Responding Party objects to each request to the extent they seek information,
3 documents, or testimony containing confidential or proprietary information or trade secrets.

4 4. Responding Party objects to each request to the extent they are vague, overbroad,
5 oppressive, and unreasonably burdensome, that they use terms that are not defined or that lack
6 common meaning, and that they do not appear focused on information that may be relevant to this
7 litigation and are not reasonably calculated to lead to the discovery of admissible evidence.

8 5. Responding Party objects to each request to the extent it requests information
9 equally available to the propounding party.

10 6. Responding Party objects to each request to the extent it requests information that
11 does not exist and is not in the deponent's possession, custody, or control.

12 7. Responding Party objects to each request to the extent it is overbroad, unreasonably
13 burdensome, and oppressive on the grounds that they require the deponent to produce "any and
14 all" "documents," "communications," and "e-mails."

15 8. Responding Party objects to each request to the extent it is duplicative, cumulative,
16 and/or repetitive.

17 9. Responding Party objects to each request to the extent it purports to impose a duty
18 of the deponent to undertake a search for information or documents beyond a diligent search of
19 the locations where documents or information responsive to each request would reasonably be
20 expected to be found.

21 10. Plaintiff reserves the right to challenge the relevance or admissibility of any of these
22 responses or parts thereof at the trial or other proceeding in this or any other action. All such
23 objections are reserved and may be interposed at the time of trial, arbitration, or other proceeding.

24 11. Responding Party objects to each request to the extent it requires a compilation of
25 documents beyond which is required under the California Code of Civil Procedure.

26 12. Responding Party objects to the instructions and definitions to the extent, if any,
27 they are vague and ambiguous with respect to this specific case or go beyond the requirements of

28 ///

1 the California Code of Civil Procedure, the California Rules of Court, or the applicable rules of
2 this Court.

3 **OBJECTIONS TO DOCUMENT REQUESTS**

4 **REQUEST FOR ADMISSION NO. 1**

5 Admit that YOU are not aware of any instance of the COOKIE CAKES causing cancer in
6 anyone.

7 **RESPONSE TO REQUEST FOR ADMISSION NO. 1:**

8 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
9 objects on the ground that the term “instance,” in the context of this Request, is vague and
10 ambiguous. Plaintiff further objects to this request to the extent that it seeks premature disclosure
11 of experts and expert opinion. Plaintiff further objects on the grounds that this question is not
12 reasonably calculated to lead to the discovery of evidence relevant to any party’s claim or defense.
13 Plaintiff further objects to this request to the extent that the requested information is equally
14 available to Defendant.

15 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 1:**

16 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
17 objects on the ground that the term “instance,” in the context of this Request, is vague and
18 ambiguous. Plaintiff further objects to this request to the extent that it seeks premature disclosure
19 of experts and expert opinion. Plaintiff further objects on the grounds that this question is not
20 reasonably calculated to lead to the discovery of evidence relevant to any party’s claim or defense.
21 Plaintiff further objects to this request to the extent that the requested information is equally
22 available to Defendant.

23 Subject to and without waiving the Preliminary Statement and General Objections and the
24 specific objections, Plaintiff responds as follows: Plaintiff is informed and believes that acrylamide
25 causes cancer, and that the Cookie Cakes contain high levels of acrylamide. Beyond that, Plaintiff
26 is not aware of specific instances of the Cookie Cakes causing cancer in any specific customer.

27 ///

28 ///

1 **REQUEST FOR ADMISSION NO. 2:**

2 Admit that YOU are not aware of any scientific research, analysis, or study showing that
3 acrylamide in food causes cancer.

4 **RESPONSE TO REQUEST FOR ADMISSION NO. 2:**

5 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
6 objects to the terms “scientific research,” “analysis,” and “study” as vague and ambiguous.
7 Plaintiff further objects to this request to the extent that it seeks premature disclosure of experts
8 and expert opinion. Plaintiff further objects to this request to the extent that the requested
9 information is equally available to Defendant. Plaintiff further objects on the grounds that this
10 question is not reasonably calculated to lead to the discovery of evidence relevant to any party’s
11 claim or defense.

12 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 2:**

13 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
14 objects to the terms “scientific research,” “analysis,” and “study” as vague and ambiguous.
15 Plaintiff further objects to this request to the extent that it seeks premature disclosure of experts
16 and expert opinion. Plaintiff further objects to this request to the extent that the requested
17 information is equally available to Defendant. Plaintiff further objects on the grounds that this
18 question is not reasonably calculated to lead to the discovery of evidence relevant to any party’s
19 claim or defense.

20 Subject to and without waiving the Preliminary Statement and General Objections and the
21 specific objections, Plaintiff responds as follows: Plaintiff admits she has not personally reviewed
22 any scientific research, analysis, or studies showing that acrylamide in food causes cancer, and
23 that she instead defers to her expert on these matters.

24 **REQUEST FOR ADMISSION NO. 3:**

25 Admit that there is a controversy about whether acrylamide in food causes cancer.

26 **RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

27 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
28 objects to the term “controversy” as vague and ambiguous. Plaintiff further objects to this request

1 to the extent that it seeks premature disclosure of experts and expert opinion. Plaintiff further
2 objects to this request to the extent that the requested information is equally available to Defendant.
3 Plaintiff further objects on the grounds that this question is not reasonably calculated to lead to the
4 discovery of evidence relevant to any party's claim or defense.

5 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

6 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
7 objects to the term "controversy" as vague and ambiguous. Plaintiff further objects to this request
8 to the extent that it seeks premature disclosure of experts and expert opinion. Plaintiff further
9 objects to this request to the extent that the requested information is equally available to Defendant.
10 Plaintiff further objects on the grounds that this question is not reasonably calculated to lead to the
11 discovery of evidence relevant to any party's claim or defense.

12 Subject to and without waiving the Preliminary Statement and General Objections and the
13 specific objections, Plaintiff responds as follows: Plaintiff is informed and believes that acrylamide
14 causes cancer but admits she has not done any independent research or analysis on any purported
15 "controversy" regarding whether acrylamide causes cancer. Instead, she defers to her expert on
16 these matters.

17 **REQUEST FOR ADMISSION NO. 4:**

18 Admit that the State of California does not know whether acrylamide in food causes cancer.

19 **RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

20 Plaintiff incorporates all General Objections as though fully set forth here. Responding
21 objects to the term "know" as vague and ambiguous. Plaintiff further objects to this request to the
22 extent that the requested information is equally available to Defendant. Plaintiff further objects to
23 this request to the extent that it seeks premature disclosure of experts and expert opinion. Plaintiff
24 further objects on the grounds that this question is not reasonably calculated to lead to the discovery
25 of evidence relevant to any party's claim or defense.

26 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

27 Plaintiff incorporates all General Objections as though fully set forth here. Responding
28 objects to the term "know" as vague and ambiguous. Plaintiff further objects to this request to the

1 extent that the requested information is equally available to Defendant. Plaintiff further objects to
2 this request to the extent that it seeks premature disclosure of experts and expert opinion. Plaintiff
3 further objects on the grounds that this question is not reasonably calculated to lead to the discovery
4 of evidence relevant to any party's claim or defense.

5 Subject to and without waiving the Preliminary Statement and General Objections and the
6 specific objections, Plaintiff responds as follows: Plaintiff is informed and believes that acrylamide
7 causes cancer but admits she has not personally done any independent research or analysis into the
8 State of California's knowledge regarding its carcinogenic effects.

9 **REQUEST FOR ADMISSION NO. 5:**

10 Admit that, prior to filing the COMPLAINT, you did nothing to investigate the source of
11 the alleged acrylamide in the COOKIE CAKES.

12 **RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

13 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
14 objects to the term "investigate" as vague and ambiguous. Plaintiff further objects to this request
15 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney
16 work product doctrine. Plaintiff further objects to this request to the extent that it seeks premature
17 disclosure of experts and expert opinion. Plaintiff further objects on the grounds that this question
18 is not reasonably calculated to lead to the discovery of evidence relevant to any party's claim or
19 defense.

20 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

21 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
22 objects to the term "investigate" as vague and ambiguous. Plaintiff further objects to this request
23 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney
24 work product doctrine. Plaintiff further objects to this request to the extent that it seeks premature
25 disclosure of experts and expert opinion. Plaintiff further objects on the grounds that this question
26 is not reasonably calculated to lead to the discovery of evidence relevant to any party's claim or
27 defense.

28 ///

1 Subject to and without waiving the Preliminary Statement and General Objections and the
2 specific objections, Plaintiff responds as follows: Deny.

3 **REQUEST FOR ADMISSION NO. 6:**

4 Admit that, prior to filing the COMPLAINT, you did nothing to investigate how frequently
5 consumers consume the COOKIE CAKES.

6 **RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

7 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
8 objects to the term “investigate” as vague and ambiguous. Plaintiff further objects to this request
9 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney
10 work product doctrine. Plaintiff further objects to this request to the extent that it seeks premature
11 disclosure of experts and expert opinion. Plaintiff further objects on the grounds that this question
12 is not reasonably calculated to lead to the discovery of evidence relevant to any party’s claim or
13 defense.

14 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

15 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
16 objects to the term “investigate” as vague and ambiguous. Plaintiff further objects to this request
17 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney
18 work product doctrine. Plaintiff further objects to this request to the extent that it seeks premature
19 disclosure of experts and expert opinion. Plaintiff further objects on the grounds that this question
20 is not reasonably calculated to lead to the discovery of evidence relevant to any party’s claim or
21 defense.

22 Subject to and without waiving the Preliminary Statement and General Objections and the
23 specific objections, Plaintiff responds as follows: Deny.

24 **REQUEST FOR ADMISSION NO. 7:**

25 Admit that acrylamide may form in food when it is baked.

26 **RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

27 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
28 objects to this request to the extent that it seeks premature disclosure of experts and expert opinion.

1 Plaintiff further objects to this request to the extent that the requested information is equally
2 available to Defendant. Plaintiff further objects on the grounds that this question is not reasonably
3 calculated to lead to the discovery of evidence relevant to any party's claim or defense.

4 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

5 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
6 objects to this request to the extent that it seeks premature disclosure of experts and expert opinion.
7 Plaintiff further objects to this request to the extent that the requested information is equally
8 available to Defendant. Plaintiff further objects on the grounds that this question is not reasonably
9 calculated to lead to the discovery of evidence relevant to any party's claim or defense.

10 Subject to and without waiving the Preliminary Statement and General Objections and the
11 specific objections, Plaintiff understand this statement to be true, but defers to her experts as she
12 has no personal knowledge regarding the chemical processes involved in the formation of
13 acrylamide.

14 **REQUEST FOR ADMISSION NO. 8:**

15 Admit that cookies are baked.

16 **RESPONSE TO REQUEST FOR ADMISSION NO. 8:**

17 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
18 objects to the term "cookies" as vague and ambiguous. Plaintiff further objects to this request to
19 the extent that the requested information is equally available to Defendant. Plaintiff further objects
20 on the grounds that this question is not reasonably calculated to lead to the discovery of evidence
21 relevant to any party's claim or defense.

22 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 8:**

23 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
24 objects to the term "cookies" as vague and ambiguous. Plaintiff further objects to this request to
25 the extent that the requested information is equally available to Defendant. Plaintiff further objects
26 on the grounds that this question is not reasonably calculated to lead to the discovery of evidence
27 relevant to any party's claim or defense.

28 ///

1 Subject to and without waiving the Preliminary Statement and General Objections and the
2 specific objections, Plaintiff responds as follows: Plaintiff admits that some cookies are baked,
3 and others are not baked.

4 **REQUEST FOR ADMISSION NO. 9:**

5 Admit that the COOKIE CAKES are delicious.

6 **RESPONSE TO REQUEST FOR ADMISSION NO. 9:**

7 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
8 objects to the term “delicious” as vague and ambiguous. Plaintiff further objects on the grounds
9 that this question is not reasonably calculated to lead to the discovery of evidence relevant to any
10 party’s claim or defense. Plaintiff further objects that this request is unintelligible in the context of
11 this lawsuit.

12 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 9:**

13 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
14 objects to the term “delicious” as vague and ambiguous. Plaintiff further objects on the grounds
15 that this question is not reasonably calculated to lead to the discovery of evidence relevant to any
16 party’s claim or defense. Plaintiff further objects that this request is unintelligible in the context of
17 this lawsuit.

18 Subject to and without waiving the Preliminary Statement and General Objections and the
19 specific objections, Plaintiff responds as follows: Plaintiff is unable to admit or deny this request
20 because she has never eaten the Cookie Cakes.

21 **REQUEST FOR ADMISSION NO. 10:**

22 Admit that it is safe for consumers to consume foods containing up to 280 parts per billion
23 of acrylamide.

24 **RESPONSE TO REQUEST FOR ADMISSION NO. 10:**

25 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
26 objects to the term “safe” as vague and ambiguous. Plaintiff further objects to this request to the
27 extent that it seeks premature disclosure of experts and expert opinion. Plaintiff further objects to
28 this request on the ground that it is an incomplete hypothetical, omitting information necessary to

1 formulate a response. Plaintiff further objects on the grounds that this question is not reasonably
2 calculated to lead to the discovery of evidence relevant to any party's claim or defense.

3 **SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 10:**

4 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
5 objects to the term "safe" as vague and ambiguous. Plaintiff further objects to this request to the
6 extent that it seeks premature disclosure of experts and expert opinion. Plaintiff further objects to
7 this request on the ground that it is an incomplete hypothetical, omitting information necessary to
8 formulate a response. Plaintiff further objects on the grounds that this question is not reasonably
9 calculated to lead to the discovery of evidence relevant to any party's claim or defense.

10 Subject to and without waiving the Preliminary Statement and General Objections and the
11 specific objections, Plaintiff responds as follows: Plaintiff defers to her experts as she has no
12 personal knowledge regarding the information in this statement.

13 Respectfully submitted,

14 Dated: March 3, 2021

GLICK LAW GROUP, P.C.

15
16 By:



Noam Glick (SBN 251582)

17
18 **GLICK LAW GROUP, PC**

19 Craig M. Nicholas (SBN 178444)
20 Jake W. Schulte (SBN 293777)


21 Attorneys for Plaintiff
22
23
24
25
26
27
28

VERIFICATION

Kim Embry v. B&G Foods North America, Inc., et al.
Alameda County Superior Court Case No. RG20057491

I am senior counsel for Plaintiff Kim Embry in the above-entitled action and am authorized to make this verification on her behalf. I have read to foregoing Plaintiff Kim Embry's Supplemental Responses to Defendant B&G Foods North America, Inc.'s Requests for Admission (Set One) and know the contents thereof. I am informed and believe that the matters stated therein are true and, on that ground, declare that under penalty of perjury under the laws of the State of California that the same are true and correct.

Executed on March 3, 2021, at San Francisco, California.

By: 

Kim Embry

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT C

1 **NICHOLAS & TOMASEVIC, LLP**
Craig M. Nicholas (SBN 178444)
2 Jake Schulte (SBN 293888)
225 Broadway, Suite 1900
3 San Diego, California 92101
Tel: (619) 325-0492
4 Email: craig@nicholaslaw.org
Email: jschulte@nicholaslaw.org
5

6 **GLICK LAW GROUP, PC**
Noam Glick (SBN 251582)
7 225 Broadway, Suite 1900
San Diego, California 92101
8 Tel: (619) 382-3400
Fax: (619) 393-0154
9 Email: noam@glicklawgroup.com

10 Attorneys for Plaintiff
Environmental Health Advocates, Inc.
11

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF ALAMEDA**

14 ENVIRONMENTAL HEALTH
ADVOCATES, INC.,

15 Plaintiff,

16 v.

17 B&G FOODS NORTH AMERICA, INC., a
Delaware corporation, AMAZON.COM, INC.
18 a Delaware corporation, BERKELEY BOWL
PRODUCE, INC., a California Corporation,
19 and DOES 1-100, inclusive,
20 Defendants.
21
22

Case No.: RG21086510

**PLAINTIFF ENVIRONMENTAL HEALTH
ADVOCATES, INC.'S RESPONSE TO
DEFENDANT B&G FOODS NORTH
AMERICA, INC.'S REQUESTS FOR
PRODUCTION OF DOCUMENTS (SET
ONE)**

Dept: 17

Judge: Hon. Frank Roesch

Complaint Filed: January 22, 2021

Trial Date: Not Set

23 **PROPOUNDING PARTY:** DEFENDANT, B&G FOODS NORTH AMERICA, INC.

24 **RESPONDING PARTY:** PLAINTIFF, ENVIRONMENTAL HEALTH ADVOCATES,
25 INC.

26 **SET NUMBER:** ONE (1)

27 Pursuant to California Code of Civil Procedure ("C.C.P.") § 2031 et seq., Plaintiff
28 ENVIRONMENTAL HEALTH ADVOCATES, INC. ("Plaintiff") provides these responses to

1 Defendant B&G FOODS NORTH AMERICA, INC. (“Defendant”) First Set of Requests for
2 Production of Documents (“Requests”), as follows:

3 **PRELIMINARY STATEMENT**

4 Responding Party reserves its right to amend, supplement, or otherwise modify its
5 objections as it may hereafter discover new information. All objections and grounds therefore are
6 hereby expressly reserved to be interposed, either by motion or otherwise, at a later time. However,
7 Plaintiff does not assume any ongoing duty to amend these responses and/or objections. Each
8 response is given subject to any protective order entered or to be entered in this case.

9 The objections set forth are made solely for purposes of this dispute. Objections as to
10 relevance, materiality and admissibility, and any and all other objections and grounds which would
11 require the exclusion of statements, if such statements were made by a witness present and
12 testifying at court, are expressly reserved and may be interposed at the deposition or at the time of
13 arbitration.

14 No admissions of any nature whatsoever are to be implied or inferred. The fact that a
15 request here may be responded to should not be taken as an admission, or concession of the
16 existence of any set of facts assumed by such request, or that such response constitutes evidence
17 thus set forth or assumed.

18 **GENERAL OBJECTIONS**

19 1. Plaintiff has not completed its investigation or analysis of the facts or defenses
20 raised in and related to this action and has not yet completed preparation for trial. The following
21 responses are given without prejudice to Plaintiff’s right to produce or disclose, at a later date,
22 subsequent information. Without in any way assuming any obligation to do so, Plaintiff reserves
23 the right to alter, supplement, amend or otherwise modify these responses in any way at any time,
24 including at trial, in light of facts determined to be relevant or revealed through discovery, further
25 investigation or further legal analysis. Plaintiff also reserves the right to apply for relief to permit
26 the insertion into these responses of any information that has been inadvertently or unintentionally
27 omitted or to introduce such information into evidence at the time of arbitration or trial.

28 ///

1 2. Responding Party objects to each request to the extent it seeks the production or
2 disclosure of any information or writing protected by the attorney-client privilege, the attorney
3 work product doctrine, or other applicable privilege or protection, including, but not limited to, the
4 right to privacy of Plaintiff, the deponent, and/or third parties.

5 3. Responding Party objects to each request to the extent they seek information,
6 documents, or testimony containing confidential or proprietary information or trade secrets.

7 4. Responding Party objects to each request to the extent they are vague, overbroad,
8 oppressive, and unreasonably burdensome, that they use terms that are not defined or that lack
9 common meaning, and that they do not appear focused on information that may be relevant to this
10 litigation and are not reasonably calculated to lead to the discovery of admissible evidence.

11 5. Responding Party objects to each request to the extent it requests information
12 equally available to the propounding party.

13 6. Responding Party objects to each request to the extent it requests information that
14 does not exist and is not in the deponent's possession, custody, or control.

15 7. Responding Party objects to each request to the extent it is overbroad, unreasonably
16 burdensome, and oppressive on the grounds that they require the deponent to produce "any and
17 all" "documents," "communications," and "e-mails."

18 8. Responding Party objects to each request to the extent it is duplicative, cumulative,
19 and/or repetitive.

20 9. Responding Party objects to each request to the extent it purports to impose a duty
21 of the deponent to undertake a search for information or documents beyond a diligent search of
22 the locations where documents or information responsive to each request would reasonably be
23 expected to be found.

24 10. Plaintiff reserves the right to challenge the relevance or admissibility of any of these
25 responses or parts thereof at the trial or other proceeding in this or any other action. All such
26 objections are reserved and may be interposed at the time of trial, arbitration, or other proceeding.

27 11. Responding Party objects to each request to the extent it requires a compilation of
28 documents beyond which is required under the California Code of Civil Procedure.

1 12. Responding Party objects to the instructions and definitions to the extent, if any,
2 they are vague and ambiguous with respect to this specific case or go beyond the requirements of
3 the California Code of Civil Procedure, the California Rules of Court, or the applicable rules of
4 this Court.

5 **RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

6 **REQUEST FOR PRODUCTION NO. 1**

7 ALL DOCUMENTS CONCERNING the results of any test performed on YOUR behalf
8 for the presence of acrylamide in any food product that YOU later learned was inaccurate.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

10 Plaintiff objects to the extent that this request is vague and ambiguous as to “inaccurate”,
11 “CONCERNING” (as defined), and “any food product”. Plaintiff further objects to the extent that
12 this request calls for attorney-client communications and/or attorney work product. Plaintiff
13 further objects to this request on the grounds that it lacks a reasonable date range and is overly
14 broad, oppressive, harassing, and unduly burdensome as to time and scope. Plaintiff further objects
15 to the extent that this request calls for expert opinion, and/or the premature disclosure of experts
16 in violation of Cal. Code of Civ. Proc. § 2034.010 et seq.

17 **REQUEST FOR PRODUCTION NO. 2:**

18 ALL COMMUNICATIONS CONCERNING the results of any test performed on YOUR
19 behalf for the presence of acrylamide in any food product that YOU later learned was inaccurate.

20 **RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

21 Plaintiff objects to the extent that this request is vague and ambiguous as to what is meant
22 by “COMMUNICATIONS” (as defined), “CONCERNING” (as defined), “any food product”, and
23 “inaccurate”. Plaintiff further objects to the extent that this request calls for attorney-client
24 communications and/or attorney work product. Plaintiff further objects to this request on the
25 grounds that it lacks a reasonable date range and is overly broad, oppressive, harassing, and unduly
26 burdensome as to time and scope. Plaintiff further objects to the extent that this request calls for
27 expert opinion, and/or the premature disclosure of experts in violation of Cal. Code of Civ. Proc.
28 § 2034.010 et seq.

1 **REQUEST FOR PRODUCTION NO. 3:**

2 ALL DOCUMENTS CONCERNING any Proposition 65 Notice of Violation that YOU
3 withdrew, including but not limited to notices you withdrew because they were based on inaccurate
4 test results.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

6 Plaintiff objects to the extent that this request is vague and ambiguous as to what is meant
7 by “CONCERNING” (as defined), and “inaccurate”. Plaintiff further objects to the extent that this
8 request calls for attorney-client communications and/or attorney work product. Plaintiff further
9 objects to this request on the grounds that it lacks a reasonable date range and is overly broad,
10 oppressive, harassing, and unduly burdensome as to time and scope. Plaintiff further objects to the
11 extent that this request calls for expert opinion, and/or the premature disclosure of experts in
12 violation of Cal. Code of Civ. Proc. § 2034.010 et seq. Plaintiff further objects on the grounds that
13 this request is not reasonably calculated to lead to the discovery of evidence relevant to any party’s
14 claim or defense. Plaintiff further objects to this request to the extent that the requested documents
15 are equally available to Defendant.

16 **REQUEST FOR PRODUCTION NO. 4:**

17 ALL COMMUNICATIONS CONCERNING any Proposition 65 Notice of Violation that
18 YOU withdrew, including but not limited to notices you withdrew because they were based on
19 inaccurate test results.

20 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

21 Plaintiff objects to the extent that this request is vague and ambiguous as to what is meant
22 by “COMMUNICATIONS”, “CONCERNING” (as defined), and “inaccurate”. Plaintiff further
23 objects to the extent that this request calls for attorney-client communications and/or attorney work
24 product. Plaintiff further objects to this request on the grounds that it lacks a reasonable date range
25 and is overly broad, oppressive, harassing, and unduly burdensome as to time and scope. Plaintiff
26 further objects to the extent that this request calls for expert opinion, and/or the premature
27 disclosure of experts in violation of Cal. Code of Civ. Proc. § 2034.010 et seq. Plaintiff further
28 objects on the grounds that this request is not reasonably calculated to lead to the discovery of

1 evidence relevant to any party's claim or defense. Plaintiff further objects to this request to the
2 extent that the requested documents are equally available to Defendant.

3 **REQUEST FOR PRODUCTION NO. 5:**

4 All DOCUMENTS CONCERNING the presence or absence of acrylamide in Defendant's
5 products, including without limitation the ACCUSED PRODUCTS.

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

7 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
8 request to the extent that it seeks premature disclosure of experts and expert opinion. Plaintiff also
9 objects to this request to the extent that it seeks information protected by the attorney-client
10 privilege and/or the attorney work product doctrine. Plaintiff also objects to this request on the
11 grounds that it lacks a reasonable date range and is overly broad, oppressive, harassing, and unduly
12 burdensome as to time, scope, and cost. Plaintiff objects to the terms "Defendant's products" and
13 "DOCUMENTS CONCERNING" as vague and ambiguous. In addition, Plaintiff also objects to
14 this request on the grounds that it goes beyond the scope of this case and the product at issue.

15 Subject to and without waiving the Preliminary Statement and General Objections and the
16 specific objections, Plaintiff will produce any test results and related documents (including chain
17 of custody forms) received from the laboratory used to test the products at issue in this lawsuit,
18 upon entry of a mutually-agreeable protective order.

19 **REQUEST FOR PRODUCTION NO. 6:**

20 All DOCUMENTS CONCERNING YOUR testing of Defendant's products for
21 acrylamide, including without limitation the ACCUSED PRODUCTS, and including without
22 limitation all test results, laboratory documents, receipts, and complete chain of custody
23 information for any and all samples from the time of purchase to the time of testing.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

25 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
26 request to the extent that it seeks premature disclosure of experts and expert opinion. Plaintiff also
27 objects to this request to the extent that it seeks information protected by the attorney-client
28 privilege and/or the attorney work product doctrine. Plaintiff also objects to this request on the

1 grounds that it lacks a reasonable date range and is overly broad, oppressive, harassing, and unduly
2 burdensome as to time, scope, and cost. Plaintiff objects to the terms/phrases “Defendant’s
3 products”, “YOUR”, and “DOCUMENTS CONCERNING” as vague and ambiguous. In addition,
4 Plaintiff also objects to this request on the grounds that it goes beyond the scope of this case and
5 the product at issue.

6 Subject to and without waiving the Preliminary Statement and General Objections and the
7 specific objections, Plaintiff will produce any test results and related documents (including chain
8 of custody forms) received from the laboratory used to test the products at issue in this lawsuit,
9 upon entry of a mutually-agreeable protective order.

10 **REQUEST FOR PRODUCTION NO. 7:**

11 All DOCUMENTS CONCERNING the frequency with which consumers consume the
12 ACCUSED PRODUCTS.

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

14 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
15 request to the extent that the requested documents are equally available to Defendant. Plaintiff
16 objects to this request on the grounds that it seeks information protected by the attorney-client
17 privilege and/or the attorney work product doctrine. Plaintiff also objects to this request on the
18 grounds that it lacks a reasonable date range and is overly broad, oppressive, harassing, and unduly
19 burdensome as to time, scope, and cost. Plaintiff objects to the term “DOCUMENTS
20 CONCERNING” as compound, vague, ambiguous, overbroad, and unduly burdensome especially
21 to the extent it calls for information not in Plaintiff’s possession or control. Plaintiff also objects
22 that this request seeks premature disclosure of experts and expert opinion.

23 Subject to and without waiving the Preliminary Statement and General Objections and the
24 specific objections, Plaintiff directs Defendant to the publicly available data in the National Health
25 and Nutrition Examination Survey (“NHANES”) database. Other than the NHANES data,
26 Plaintiff does not have, and has never had, responsive documents in her possession, custody or
27 control.

28 ///

1 **REQUEST FOR ADMISSION NO. 8:**

2 All DOCUMENTS CONCERNING the frequency with which consumers consume cakes,
3 cookies, bars, and/or any other product that you contend is similar to the ACCUSED PRODUCTS
4 with respect to the rate of consumption among consumers.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

6 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
7 request to the extent that the requested documents are equally available to Defendant. Plaintiff
8 objects to this request on the grounds that it seeks information protected by the attorney-client
9 privilege and/or the attorney work product doctrine. Plaintiff also objects to this request on the
10 grounds that it lacks a reasonable date range and is overly broad, oppressive, harassing, and unduly
11 burdensome as to time, scope, and cost. Plaintiff objects to the term “DOCUMENTS
12 CONCERNING” as compound, vague, ambiguous, overbroad, and unduly burdensome especially
13 to the extent it calls for information not in Plaintiff’s possession or control. Plaintiff also objects
14 that this request seeks premature disclosure of experts and expert opinion.

15 Subject to and without waiving the Preliminary Statement and General Objections and the
16 specific objections, Plaintiff directs Defendant to the publicly available data in the National Health
17 and Nutrition Examination Survey (“NHANES”) database. Other than the NHANES data,
18 Plaintiff does not have, and has never had, responsive documents in her possession, custody or
19 control.

20 **REQUEST FOR PRODUCTION NO. 9:**

21 All DOCUMENTS CONCERNING the source of acrylamide in the ACCUSED
22 PRODUCTS or similar products, including without limitation all DOCUMENTS regarding the
23 formation of acrylamide during cooking.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

25 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
26 request to the extent that the requested documents are equally available to Defendant. Plaintiff
27 objects to this request on the grounds that it seeks information protected by the attorney-client
28 privilege and/or the attorney work product doctrine. Plaintiff also objects to this request on the

1 grounds that it lacks a reasonable date range and is overly broad, oppressive, harassing, and unduly
2 burdensome as to time, scope, and cost. Plaintiff objects to the terms “source” and “DOCUMENTS
3 CONCERNING” as compound, vague, ambiguous, overbroad, and unduly burdensome especially
4 to the extent it calls for information not in Plaintiff’s possession or control. Plaintiff also objects
5 that this request seeks premature disclosure of experts and expert opinion.

6 **REQUEST FOR PRODUCTION NO. 10:**

7 All DOCUMENTS CONCERNING whether or not acrylamide causes, or potentially
8 causes, cancer.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 10:**

10 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
11 request to the extent that the requested documents are equally available to Defendant. Plaintiff also
12 objects that this request seeks premature disclosure of experts and expert opinion. In addition,
13 Plaintiff objects to this request on the grounds that it lacks a reasonable date range and is overly
14 broad, vague, ambiguous, oppressive, harassing, and unduly burdensome as to time, scope, and
15 cost. Plaintiff objects to the term “DOCUMENTS CONCERNING” as compound, overbroad, and
16 unduly burdensome especially to the extent it calls for information not in Plaintiff’s possession or
17 control.

18 **REQUEST FOR PRODUCTION NO. 11:**

19 All DOCUMENTS CONCERNING whether or not acrylamide is known to the State of
20 California to cause cancer.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

22 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
23 request to the extent that the requested documents are equally available to Defendant. Plaintiff also
24 objects that this request seeks premature disclosure of experts and expert opinion. In addition,
25 Plaintiff objects to this request on the grounds that it lacks a reasonable date range and is overly
26 broad, vague, ambiguous, oppressive, harassing, and unduly burdensome as to time, scope, and
27 cost. Plaintiff objects to the phrases “DOCUMENTS CONCERNING” and “known to the State of

28 ///

1 California to cause cancer” as compound, vague, ambiguous, overbroad, and unduly burdensome
2 especially to the extent it calls for information not in Plaintiff’s possession or control.

3 **REQUEST FOR PRODUCTION NO. 12:**

4 All DOCUMENTS CONCERNING YOUR allegation that YOU are bringing this action
5 “in the public interest of the citizens of the State of California (“the People”)

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

7 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
8 request to the extent that the requested documents are equally available to Defendant. Plaintiff also
9 objects to the extent that this request seeks premature disclosure of experts and expert opinion. In
10 addition, Plaintiff objects to this request to the extent that it seeks information protected by the
11 attorney-client privilege and/or the attorney work product doctrine. Plaintiff also objects to this
12 request on the grounds that it lacks a reasonable date range and is overly broad, oppressive,
13 harassing, and unduly burdensome as to time, scope, and cost. Plaintiff objects to the terms
14 “YOUR”, “YOU” and “DOCUMENTS CONCERNING” as compound, vague, ambiguous,
15 overbroad, and unduly burdensome especially to the extent it calls for information not in Plaintiff’s
16 possession or control.

17 Subject to and without waiving the Preliminary Statement and General Objections and the
18 specific objections, Plaintiff will produce all non-privileged documents in its possession, custody
19 or control located after a reasonable search and diligent inquiry.

20 **REQUEST FOR PRODUCTION NO. 13:**

21 All COMMUNICATIONS with any STATE OFFICIAL CONCERNING Proposition 65,
22 including without limitation all COMMUNICATIONS involving YOU and/or YOUR current or
23 former attorneys.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 13:**

25 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
26 request to the extent that the requested documents are equally available to Defendant. Plaintiff also
27 objects that this request to the extent that it seeks confidential communication protected by
28 settlement privilege and/or any other privileges. Plaintiff objects to this request to the extent that

1 it seeks information protected by the attorney work product doctrine. Plaintiff also objects to this
2 request on the grounds that it lacks a reasonable date range and is overly broad, oppressive,
3 harassing, and unduly burdensome as to time, scope, and cost, and is not reasonably calculated to
4 lead to the discovery of evidence relevant to any party's claim or defense, and not proportional to
5 the needs of this case. Plaintiff objects to the terms "YOUR" and "YOU" as compound, vague,
6 ambiguous, overbroad, and unduly burdensome.

7 **REQUEST FOR PRODUCTION NO. 14:**

8 All DOCUMENTS CONCERNING payments, awards, fees, assets, or other compensation
9 YOU have received in connection with YOUR activities CONCERNING Proposition 65.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 14:**

11 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
12 request to the extent that the requested documents are equally available to Defendant. Plaintiff also
13 objects that this request to the extent that it seeks confidential communication protected by
14 settlement privilege and/or any other privileges. Plaintiff objects to this request to the extent that
15 it seeks information protected by the attorney-client privilege and the attorney work product
16 doctrine. Plaintiff objects to the terms "YOUR", "YOU" and "DOCUMENTS CONCERNING"
17 as compound, vague, ambiguous, and overbroad.

18 **REQUEST FOR PRODUCTION NO. 15:**

19 Deposition transcripts for any and all depositions given by YOU in any legal proceeding
20 CONCERNING Proposition 65.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 15:**

22 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
23 request on the grounds that it lacks a reasonable date range and is overly broad, oppressive,
24 harassing, and unduly burdensome as to time, scope, and cost, and is not reasonably calculated to
25 lead to the discovery of evidence relevant to any party's claim or defense, and not proportional to
26 the needs of this case. Plaintiff objects to the terms "YOU" and "CONCERNING" as compound,
27 vague, ambiguous, overbroad, and unduly burdensome especially to the extent it calls for

28 ///

1 information not in Plaintiff's possession or control Plaintiff also objects to this request on the
2 grounds that it lacks a reasonable date range and is overly broad, oppressive, harassing, and unduly
3 burdensome.

4 **REQUEST FOR PRODUCTION NO. 16:**

5 All responses by YOU to interrogatories, special interrogatories, requests for admission, or
6 requests for production in any legal proceeding CONCERNING Proposition 65.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 16:**

8 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
9 request on the grounds that it lacks a reasonable date range and is overly broad, oppressive,
10 harassing, and unduly burdensome as to time, scope, and cost, and is not reasonably calculated to
11 lead to the discovery of evidence relevant to any party's claim or defense, and not proportional to
12 the needs of this case. Plaintiff objects to the terms "YOU" and "CONCERNING" as compound,
13 vague, ambiguous, overbroad, and unduly burdensome especially to the extent it calls for
14 information not in Plaintiff's possession or control Plaintiff also objects to this request on the
15 grounds that it lacks a reasonable date range and is overly broad, oppressive, harassing, and unduly
16 burdensome.

17 **REQUEST FOR PRODUCTION NO. 17:**

18 Every out-of-court settlement agreement that YOU have agreed to CONCERNING
19 Proposition 65.

20 *[Rest of page intentionally left blank]*

21
22
23
24
25
26
27
28

1 **RESPONSE TO REQUEST FOR PRODUCTION NO. 17:**

2 In addition to the Preliminary Statement and General Objections, Plaintiff objects to this
3 request to the extent that the requested documents are equally available to Defendant. Plaintiff also
4 objects to this request on the grounds that it lacks a reasonable date range and is overly broad,
5 oppressive, harassing, and unduly burdensome as to time, scope, and cost. Plaintiff objects to the
6 terms “YOU” and “CONCERNING” as compound, vague, ambiguous, overbroad, and unduly
7 burdensome.

8
9 Respectfully submitted,

10
11 Dated: March 23, 2021

GLICK LAW GROUP, P.C.

12
13 By:



14 _____
Noam Glick (SBN 251582)

15 **NICHOLAS & TOMASEVIC, LLP**
16 Jake Schulte (SBN 293888)
Craig M. Nicholas (SBN 178444)


17 Attorneys for Plaintiff
18 Environmental Health Advocates, Inc.

VERIFICATION

Environmental Health Advocates, Inc. v. B&G Foods North America, Inc., et al.
Alameda County Superior Court Case No. RG21086510

I, Kim Embry, the undersigned, am Secretary of Environmental Health Advocates, Inc., Plaintiff in the above-named action. I am familiar with the contents of the foregoing Plaintiff Environmental Health Advocates, Inc.'s Responses to Defendant B&G Foods North America, Inc.'s Request for Production of Documents (Set One) and declare that the matters stated in the document are true based on my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification is executed on March 23, 2021, at San Francisco, California.

By: 
_____ Kim Embry

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT D

1 **NICHOLAS & TOMASEVIC, LLP**
2 Craig M. Nicholas (SBN 178444)
3 Jake Schulte (SBN 293888)
4 225 Broadway, Suite 1900
5 San Diego, California 92101
6 Tel: (619) 325-0492
7 Email: craig@nicholaslaw.org
8 Email: jschulte@nicholaslaw.org

9 **GLICK LAW GROUP, PC**
10 Noam Glick (SBN 251582)
11 225 Broadway, Suite 1900
12 San Diego, California 92101
13 Tel: (619) 382-3400
14 Fax: (619) 393-0154
15 Email: noam@glicklawgroup.com

16 Attorneys for Plaintiff
17 Environmental Health Advocates, Inc.

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF ALAMEDA**

20 ENVIRONMENTAL HEALTH
21 ADVOCATES, INC.,

22 Plaintiff,

23 v.

24 B&G FOODS NORTH AMERICA, INC., a
25 Delaware corporation, AMAZON.COM,
26 INC. a Delaware corporation, BERKELEY
27 BOWL PRODUCE, INC., a California
28 Corporation, and DOES 1-100, inclusive,

Defendants.

Case No.: RG21086510

**ENVIRONMENTAL HEALTH
ADVOCATES, INC.'S RESPONSES TO
DEFENDANTS B&G FOODS NORTH
AMERICA, INC.'S REQUESTS FOR
ADMISSION (SET ONE)**

Dept: 17
Judge: The Honorable Frank Roesch

Complaint Filed: January 22, 2021
Trial Date: Not Set

29 **PROPOUNDING PARTY:** DEFENDANT, B&G FOODS NORTH AMERICA, INC.

30 **RESPONDING PARTY:** PLAINTIFF, ENVIRONMENTAL HEALTH ADVOCATES,
31 INC.

32 **SET NUMBER:** ONE (1)

33 Pursuant to California Code of Civil Procedure ("C.C.P.") § 2031 et seq., Plaintiff

34 ENVIRONMENTAL HEALTH ADVOCATES, INC. ("Plaintiff") provides these responses to

1 Defendant B&G FOODS NORTH AMERICA, INC. (“Defendant”) First Set of Requests for
2 Admission (“Requests”), as follows:

3 **PRELIMINARY STATEMENT**

4 Responding Party reserves its right to amend, supplement, or otherwise modify its
5 objections as it may hereafter discover new information. All objections and grounds therefore are
6 hereby expressly reserved to be interposed, either by motion or otherwise, at a later time. However,
7 Plaintiff does not assume any ongoing duty to amend these responses and/or objections. Each
8 response is given subject to any protective order entered or to be entered in this case.

9 The objections set forth are made solely for purposes of this dispute. Objections as to
10 relevance, materiality and admissibility, and any and all other objections and grounds which would
11 require the exclusion of statements, if such statements were made by a witness present and
12 testifying at court, are expressly reserved and may be interposed at the deposition or at the time of
13 arbitration.

14 No admissions of any nature whatsoever are to be implied or inferred. The fact that a
15 request here may be responded to should not be taken as an admission, or concession of the
16 existence of any set of facts assumed by such request, or that such response constitutes evidence
17 thus set forth or assumed.

18 **GENERAL OBJECTIONS**

19 1. Plaintiff has not completed its investigation or analysis of the facts or defenses
20 raised in and related to this action and has not yet completed preparation for trial. The following
21 responses are given without prejudice to Plaintiff’s right to produce or disclose, at a later date,
22 subsequent information. Without in any way assuming any obligation to do so, Plaintiff reserves
23 the right to alter, supplement, amend or otherwise modify these responses in any way at any time,
24 including at trial, in light of facts determined to be relevant or revealed through discovery, further
25 investigation or further legal analysis. Plaintiff also reserves the right to apply for relief to permit
26 the insertion into these responses of any information that has been inadvertently or unintentionally
27 omitted or to introduce such information into evidence at the time of arbitration or trial.

28 ///

1 2. Responding Party objects to each request to the extent it seeks the production or
2 disclosure of any information or writing protected by the attorney-client privilege, the attorney
3 work product doctrine, or other applicable privilege or protection, including, but not limited to, the
4 right to privacy of Plaintiff, the deponent, and/or third-parties.

5 3. Responding Party objects to each request to the extent they seek information,
6 documents, or testimony containing confidential or proprietary information or trade secrets.

7 4. Responding Party objects to each request to the extent they are vague, overbroad,
8 oppressive, and unreasonably burdensome, that they use terms that are not defined or that lack
9 common meaning, and that they do not appear focused on information that may be relevant to this
10 litigation and are not reasonably calculated to lead to the discovery of admissible evidence.

11 5. Responding Party objects to each request to the extent it requests information
12 equally available to the propounding party.

13 6. Responding Party objects to each request to the extent it requests information that
14 does not exist and is not in the deponent's possession, custody, or control.

15 7. Responding Party objects to each request to the extent it is overbroad, unreasonably
16 burdensome, and oppressive on the grounds that they require the deponent to produce "any and
17 all" "documents," "communications," and "e-mails."

18 8. Responding Party objects to each request to the extent it is duplicative, cumulative,
19 and/or repetitive.

20 9. Responding Party objects to each request to the extent it purports to impose a duty
21 of the deponent to undertake a search for information or documents beyond a diligent search of
22 the locations where documents or information responsive to each request would reasonably be
23 expected to be found.

24 10. Plaintiff reserves the right to challenge the relevance or admissibility of any of these
25 responses or parts thereof at the trial or other proceeding in this or any other action. All such
26 objections are reserved and may be interposed at the time of trial, arbitration, or other proceeding.

27 11. Responding Party objects to each request to the extent it requires a compilation of
28 documents beyond which is required under the California Code of Civil Procedure.

1 12. Responding Party objects to the instructions and definitions to the extent, if any,
2 they are vague and ambiguous with respect to this specific case or go beyond the requirements of
3 the California Code of Civil Procedure, the California Rules of Court, or the applicable rules of
4 this Court.

5 **OBJECTIONS TO DOCUMENT REQUESTS**

6 **REQUEST FOR ADMISSION NO. 1**

7 Admit that YOU are not aware of any instance of acrylamide in food causing cancer in
8 anyone.

9 **RESPONSE TO REQUEST FOR ADMISSION NO. 1:**

10 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
11 objects on the ground that the term “instance,” in the context of this Request, is vague and
12 ambiguous. Plaintiff further objects to this request to the extent that it seeks premature disclosure
13 of experts and expert opinion. Plaintiff further objects on the grounds that this question is not
14 reasonably calculated to lead to the discovery of evidence relevant to any party’s claim or defense.
15 Plaintiff further objects to this request to the extent that the requested information is equally
16 available to Defendant.

17 Subject to and without waiving the Preliminary Statement and General Objections and the
18 specific objections, Plaintiff responds as follows: Plaintiff is informed and believes that acrylamide
19 causes cancer, and that the Subject Products contain high levels of acrylamide. Beyond that,
20 Plaintiff is not aware of specific instances of the Subject Products causing cancer in any specific
21 customer.

22 **REQUEST FOR ADMISSION NO. 2:**

23 Admit that YOU are not aware of any scientific research, analysis, or study showing that
24 acrylamide in food causes cancer.

25 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
26 objects to the terms “scientific research,” “analysis,” and “study” as vague and ambiguous.
27 Plaintiff further objects to this request to the extent that it seeks premature disclosure of experts
28 and expert opinion. Plaintiff further objects to this request to the extent that the requested

1 information is equally available to Defendant. Plaintiff further objects on the grounds that this
2 question is not reasonably calculated to lead to the discovery of evidence relevant to any party's
3 claim or defense.

4 Subject to and without waiving the Preliminary Statement and General Objections and the
5 specific objections, Plaintiff responds as follows: Plaintiff admits it has not personally reviewed
6 any scientific research, analysis, or studies showing that acrylamide in food causes cancer, and
7 that it instead defers to its expert on these matters.

8 **REQUEST FOR ADMISSION NO. 3:**

9 Admit that there is a controversy about whether acrylamide in food causes cancer.

10 **RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

11 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
12 objects to the term "controversy" as vague and ambiguous. Plaintiff further objects to this request
13 to the extent that it seeks premature disclosure of experts and expert opinion. Plaintiff further
14 objects to this request to the extent that the requested information is equally available to Defendant.
15 Plaintiff further objects on the grounds that this question is not reasonably calculated to lead to the
16 discovery of evidence relevant to any party's claim or defense.

17 Subject to and without waiving the Preliminary Statement and General Objections and the
18 specific objections, Plaintiff responds as follows: Plaintiff is informed and believes that acrylamide
19 causes cancer, but admits it has not done any independent research or analysis on any purported
20 "controversy" regarding whether acrylamide causes cancer. Instead, it defers to her expert on
21 these matters.

22 **REQUEST FOR ADMISSION NO. 4:**

23 Admit that the State of California does not know whether acrylamide in food causes cancer.

24 **RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

25 Plaintiff incorporates all General Objections as though fully set forth here. Responding
26 objects to the term "know" as vague and ambiguous. Plaintiff further objects to this request to the
27 extent that the requested information is equally available to Defendant. Plaintiff further objects to
28 this request to the extent that it seeks premature disclosure of experts and expert opinion. Plaintiff

1 further objects on the grounds that this question is not reasonably calculated to lead to the discovery
2 of evidence relevant to any party's claim or defense.

3 Subject to and without waiving the Preliminary Statement and General Objections and the
4 specific objections, Plaintiff responds as follows: Plaintiff is informed and believes that acrylamide
5 causes cancer, but admits it has not done any independent research or analysis into the State of
6 California's knowledge regarding its carcinogenic effects.

7 **REQUEST FOR ADMISSION NO. 5:**

8 Admit that, prior to filing the COMPLAINT, you did nothing to investigate the source of
9 the alleged acrylamide in the SUBJECT PRODUCT.

10 **RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

11 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
12 objects to the term "investigate" as vague and ambiguous. Plaintiff further objects to this request
13 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney
14 work product doctrine. Plaintiff further objects to this request to the extent that it seeks premature
15 disclosure of experts and expert opinion. Plaintiff further objects on the grounds that this question
16 is not reasonably calculated to lead to the discovery of evidence relevant to any party's claim or
17 defense.

18 Subject to and without waiving the Preliminary Statement and General Objections and the
19 specific objections, Plaintiff responds as follows: Deny.

20 **REQUEST FOR ADMISSION NO. 6:**

21 Admit that, prior to filing the COMPLAINT, you did nothing to investigate how frequently
22 consumers consume the SUBJECT PRODUCT.

23 **RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

24 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
25 objects to the term "investigate" as vague and ambiguous. Plaintiff further objects to this request
26 to the extent that it seeks information protected by the attorney-client privilege and/or the attorney
27 work product doctrine. Plaintiff further objects to this request to the extent that it seeks premature
28 disclosure of experts and expert opinion. Plaintiff further objects on the grounds that this question

1 is not reasonably calculated to lead to the discovery of evidence relevant to any party's claim or
2 defense.

3 Subject to and without waiving the Preliminary Statement and General Objections and the
4 specific objections, Plaintiff responds as follows: Deny.

5 **REQUEST FOR ADMISSION NO. 7:**

6 Admit that acrylamide may form in food when it is baked.

7 **RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

8 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
9 objects to this request to the extent that it seeks premature disclosure of experts and expert opinion.
10 Plaintiff further objects to this request to the extent that the requested information is equally
11 available to Defendant. Plaintiff further objects on the grounds that this question is not reasonably
12 calculated to lead to the discovery of evidence relevant to any party's claim or defense.

13 Subject to and without waiving the Preliminary Statement and General Objections and the
14 specific objections, Plaintiff responds as follows: Admit.

15 **REQUEST FOR ADMISSION NO. 8:**

16 Admit that the SUBJECT PRODUCT is delicious.

17 **RESPONSE TO REQUEST FOR ADMISSION NO. 8:**

18 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
19 objects to the term "delicious" as vague and ambiguous. Plaintiff further objects on the grounds
20 that this question is not reasonably calculated to lead to the discovery of evidence relevant to any
21 party's claim or defense. Plaintiff further objects that this request is unintelligible in the context of
22 this lawsuit.

23 Subject to and without waiving the Preliminary Statement and General Objections and the
24 specific objections, Plaintiff responds as follows: Plaintiff is unable to admit or deny this request.

25 **REQUEST FOR ADMISSION NO. 9:**

26 Admit that it is safe for consumers to consume foods containing up to 280 parts per billion
27 of acrylamide.

28 ///

1 **RESPONSE TO REQUEST FOR ADMISSION NO. 9:**

2 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
3 objects to the term “safe” as vague and ambiguous. Plaintiff further objects to this request to the
4 extent that it seeks premature disclosure of experts and expert opinion. Plaintiff further objects to
5 this request on the ground that it is an incomplete hypothetical, omitting information necessary to
6 formulate a response. Plaintiff further objects on the grounds that this question is not reasonably
7 calculated to lead to the discovery of evidence relevant to any party’s claim or defense.

8 Subject to and without waiving the Preliminary Statement and General Objections and the
9 specific objections, Plaintiff responds as follows: Plaintiff is informed and believes that it is not
10 safe for consumers to consume foods containing up to 280 parts per billion of acrylamide.

11 **REQUEST FOR ADMISSION NO. 10:**

12 Admit that, prior to filing the COMPLAINT, you did nothing to investigate whether
13 AMAZON alters or removes any Proposition 65 warning label from the SUBJECT PRODUCT.

14 **RESPONSE TO REQUEST FOR ADMISSION NO. 10:**

15 Plaintiff incorporates all General Objections as though fully set forth here. Plaintiff further
16 objects on the grounds that this question is not reasonably calculated to lead to the discovery of
17 evidence relevant to any party’s claim or defense. Plaintiff further objects to the terms
18 “investigate,” “alters,” and “removes” as vague and ambiguous. Without waiving these objections,
19 Plaintiff denies this request.

20 Subject to and without waiving the Preliminary Statement and General Objections and the
21 specific objections, Plaintiff responds as follows: Deny.

22 *[Rest of page intentionally left blank]*
23
24
25
26
27
28

1 Respectfully submitted,

2 Dated: March 23, 2021

GLICK LAW GROUP, P.C.

3



4

By: _____

Noam Glick (SBN 251582)

5

NICHOLAS & TOMASEVIC, LLP

6

Craig M. Nicholas (SBN 178444)

7

Jake W. Schulte (SBN 293777)

8

Attorneys for Plaintiff

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27


28

VERIFICATION

Environmental Health Advocates, Inc. v. B&G Foods North America, Inc., et al.
Alameda County Superior Court Case No. RG21086510

I, Kim Embry, the undersigned, am Secretary of Environmental Health Advocates, Inc., Plaintiff in the above-named action. I am familiar with the contents of the foregoing Plaintiff Environmental Health Advocates, Inc.'s Responses to Defendant B&G Foods North America, Inc.'s Requests for Admission (Set One) and declare that the matters stated in the document are true based on my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification is executed on March 23, 2021, at San Francisco, California.

By: 

Kim Embry

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NICHOLAS & TOMASEVIC, LLP
Craig M. Nicholas (SBN 178444)
Jake Schulte (SBN 293888)
225 Broadway, Suite 1900
San Diego, California 92101
Tel: (619) 325-0492
Email: craig@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) 393-0154
Email: noam@glicklawgroup.com

Attorneys for Plaintiff
Kim Embry

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

KIM EMBRY, an individual,

Plaintiff,

v.

B&G FOODS NORTH AMERICA, INC., a
Delaware corporation, RALPHS GROCERY
COMPANY, an Ohio corporation, DOES 1
through 100, inclusive,

Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code § 25249.6 et seq.)

FILED BY FAX
ALAMEDA COUNTY
March 06, 2020
CLERK OF
THE SUPERIOR COURT
By Xian-xii Bowie, Deputy
CASE NUMBER:
RG20057491

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 Snack Well’s Devil’s Food Fat
6 Free Cookie Cakes (“Products”). Defendants know and intend that customers will ingest Products
7 containing 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).)

II.
PARTIES

23
24
25 6. Plaintiff KIM EMBRY (“Embry”) is a citizen of the State of California dedicated to
26 protecting the health of California citizens through the elimination or reduction of toxic exposure from
27 consumer products. She brings this action in the public interest pursuant to Health and Safety Code,
28 section 25249.7.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 Notice (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' action in this regard were deliberate and not accidental.

20. More than sixty days prior to naming each defendant in this lawsuit, Plaintiff issued a 60-Day Notice of Violation ("Notice") 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 Notice 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 Notice failed to 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 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 Respectfully submitted:

16 Dated: March 6, 2020

GLICK LAW GROUP, PC


17
18
19 By: 
20 _____
21 Noam Glick
22 Attorney for Plaintiff
23
24
25
26
27
28

EXHIBIT F

1 **NICHOLAS & TOMASEVIC, LLP**
2 Craig M. Nicholas (SBN 178444)
3 Jake Schulte (SBN 293888)
4 225 Broadway, Suite 1900
5 San Diego, California 92101
6 Tel: (619) 325-0492
7 Email: craig@nicholaslaw.org
8 Email: jschulte@nicholaslaw.org

9 **GLICK LAW GROUP, PC**
10 Noam Glick (SBN 251582)
11 225 Broadway, Suite 1900
12 San Diego, California 92101
13 Tel: (619) 382-3400
14 Fax: (619) 393-0154
15 Email: noam@glicklawgroup.com

16 Attorneys for Plaintiff
17 Environmental Health Advocates, Inc.

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF ALAMEDA**

20 ENVIRONMENTAL HEALTH
21 ADVOCATES, INC.,

22 Plaintiff,

23 v.

24 B&G FOODS NORTH AMERICA, INC., a
25 Delaware corporation, AMAZON.COM, INC.
26 a Delaware corporation, BERKELEY BOWL
27 PRODUCE, INC., a California Corporation,
28 and DOES 1-100, inclusive,
Defendants.

Case No.: RG21086510

**PLAINTIFF ENVIRONMENTAL HEALTH
ADVOCATES, INC.’S RESPONSES TO
DEFENDANTS B&G FOODS NORTH
AMERICA, INC.’S FORM
INTERROGATORIES (SET ONE)**

Dept: 17
Judge: The Honorable Frank Roesch

Complaint Filed: January 22, 2021
Trial Date: Not set

PROPOUNDING PARTY: DEFENDANT, B&G FOODS NORTH AMERICA, INC.

RESPONDING PARTY: PLAINTIFF, ENVIRONMENTAL HEALTH ADVOCATES,
INC.

SET NUMBER: ONE (1)

1 Pursuant to California Code of Civil Procedure (“C.C.P.”) § 2031 *et seq.*, Plaintiff
2 ENVIRONMENTAL HEALTH ADVOCATES, INC. (“Plaintiff”) provides these responses to
3 Defendant B&G FOODS NORTH AMERICA, INC. (“Defendant”) First Set of Form
4 Interrogatories (“Requests”), as follows:

5 **PRELIMINARY STATEMENT**

6 Responding Party reserves its right to amend, supplement, or otherwise modify its
7 objections as it may hereafter discover new information. All objections and grounds therefore are
8 hereby expressly reserved to be interposed, either by motion or otherwise, at a later time. However,
9 Plaintiff does not assume any ongoing duty to amend these responses and/or objections. Each
10 response is given subject to any protective order entered or to be entered in this case.

11 The objections set forth are made solely for purposes of this dispute. Objections as to
12 relevance, materiality and admissibility, and any and all other objections and grounds which would
13 require the exclusion of statements, if such statements were made by a witness present and
14 testifying at court, are expressly reserved and may be interposed at the deposition or at the time of
15 arbitration.

16 No admissions of any nature whatsoever are to be implied or inferred. The fact that a
17 request here may be responded to should not be taken as an admission, or concession of the
18 existence of any set of facts assumed by such request, or that such response constitutes evidence
19 thus set forth or assumed.

20 **GENERAL OBJECTIONS**

21 1. Plaintiff has not completed its investigation or analysis of the facts or defenses
22 raised in and related to this action and has not yet completed preparation for trial. The following
23 responses are given without prejudice to Plaintiff’s right to produce or disclose, at a later date,
24 subsequent information. Without in any way assuming any obligation to do so, Plaintiff reserves
25 the right to alter, supplement, amend or otherwise modify these responses in any way at any time,
26 including at trial, in light of facts determined to be relevant or revealed through discovery, further
27 investigation or further legal analysis. Plaintiff also reserves the right to apply for relief to permit

28 ///

1 the insertion into these responses of any information that has been inadvertently or unintentionally
2 omitted or to introduce such information into evidence at the time of arbitration or trial.

3 2. Responding Party objects to each request to the extent it seeks the production or
4 disclosure of any information or writing protected by the attorney-client privilege, the attorney
5 work product doctrine, or other applicable privilege or protection, including, but not limited to, the
6 right to privacy of Plaintiff, the deponent, and/or third-parties.

7 3. Responding Party objects to each request to the extent they seek information,
8 documents, or testimony containing confidential or proprietary information or trade secrets.

9 4. Responding Party objects to each request to the extent they are vague, overbroad,
10 oppressive, and unreasonably burdensome, that they use terms that are not defined or that lack
11 common meaning, and that they do not appear focused on information that may be relevant to this
12 litigation and are not reasonably calculated to lead to the discovery of admissible evidence.

13 5. Responding Party objects to each request to the extent it requests information
14 equally available to the propounding party.

15 6. Responding Party objects to each request to the extent it requests information that
16 does not exist and is not in the deponent's possession, custody, or control.

17 7. Responding Party objects to each request to the extent it is overbroad, unreasonably
18 burdensome, and oppressive on the grounds that they require the deponent to produce "any and
19 all" "documents," "communications," and "e-mails."

20 8. Responding Party objects to each request to the extent it is duplicative, cumulative,
21 and/or repetitive.

22 9. Responding Party objects to each request to the extent it purports to impose a duty
23 of the deponent to undertake a search for information or documents beyond a diligent search of
24 the locations where documents or information responsive to each request would reasonably be
25 expected to be found.

26 10. Plaintiff reserves the right to challenge the relevance or admissibility of any of these
27 responses or parts thereof at the trial or other proceeding in this or any other action. All such
28 objections are reserved and may be interposed at the time of trial, arbitration, or other proceeding.

1 11. Responding Party objects to each request to the extent it requires a compilation of
2 documents beyond which is required under the California Code of Civil Procedure.

3 12. Responding Party objects to the instructions and definitions to the extent, if any,
4 they are vague and ambiguous with respect to this specific case or go beyond the requirements of
5 the California Code of Civil Procedure, the California Rules of Court, or the applicable rules of
6 this Court.

7 **OBJECTIONS TO DOCUMENT REQUESTS**

8 **FORM INTERROGATORY NO. 1.1:**

9 State the name, ADDRESS, telephone number, and relationship to you of each PERSON
10 who prepared or assisted in the preparation of the responses to these interrogatories. (Do not
11 identify anyone who simply typed or reproduced the responses.)

12 **RESPONSE TO FORM INTERROGATORY NO. 1.1:**

13 Noam Glick, Esq., Glick Law Group, P.C., 225 Broadway, 19th Floor, San Diego, CA,
14 (619) 382-3400.

15 **FORM INTERROGATORY NO. 2.1:**

16 State:

- 17 (a) Your name;
18 (b) Every name you have used in the past;
19 (c) The dates you used each name.

20 **RESPONSE TO FORM INTERROGATORY NO. 2.1:**

21 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
22 that it is unintelligible as Plaintiff is not an individual.

23 **FORM INTERROGATORY NO. 2.2:**

24 State the date and place of your birth.

25 **RESPONSE TO FORM INTERROGATORY NO. 2.2:**

26 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
27 that it is unintelligible as Plaintiff is not an individual.

28 ///

1 **FORM INTERROGATORY NO. 2.5:**

2 State:

- 3 (a) your present residence ADDRESS;
- 4 (b) your residence ADDRESSES for the past five years; and
- 5 (c) the dates you lived at each ADDRESS.

6 **RESPONSE TO FORM INTERROGATORY NO. 2.5:**

7 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds

8 that it is unintelligible as Plaintiff is not an individual.

9 **FORM INTERROGATORY NO. 2.6:**

10 State:

- 11 (a) the name, ADDRESS, and telephone number of your present employer or place of self-
- 12 employment; and
- 13 (b) the name, ADDRESS, dates of employment, job title, and nature of work for each employer
- 14 self-employment you have had from five years before the INCIDENT until today.

15 **RESPONSE TO FORM INTERROGATORY NO. 2.6:**

16 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds

17 that it is unintelligible as Plaintiff is not an individual.

18 **FORM INTERROGATORY NO. 2.7:**

19 State:

- 20 (a) the name and ADDRESS of each school or other academic or vocational institution you
- 21 have attended, beginning with high school;
- 22 (b) the dates you attended;
- 23 (c) the highest grade level you have completed; and
- 24 (d) the degrees received.

25 **RESPONSE TO FORM INTERROGATORY NO. 2.7:**

26 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds

27 that it is unintelligible as Plaintiff is not an individual.

28 ///

1 **FORM INTERROGATORY NO. 2.8:**

2 Have you ever been convicted of a felony? If so, for each conviction state:

3 (a) the city and state where you were convicted;

4 (b) the date of conviction;

5 (c) the offense; and

6 (d) the court and case number.

7 **RESPONSE TO FORM INTERROGATORY NO. 2.8:**

8 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
9 that it is unintelligible as Plaintiff is not an individual.

10 **FORM INTERROGATORY NO. 2.9:**

11 Can you speak English with ease? If not, what language and dialect do you normally use?

12 **RESPONSE TO FORM INTERROGATORY NO. 2.9:**

13 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
14 that it is unintelligible as Plaintiff is not an individual.

15 **FORM INTERROGATORY NO. 2.10:**

16 Can you read and write in English with ease? If not, what language and dialect do you
17 normally use?

18 **RESPONSE TO FORM INTERROGATORY NO. 2.10:**

19 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
20 that it is unintelligible as Plaintiff is not an individual.

21 **FORM INTERROGATORY NO. 2.11:**

22 At the time of the INCIDENT were you acting as an agent or employee for any PERSON?

23 If so, state:

24 (a) the name, ADDRESS, and telephone number of that PERSON: and

25 (b) a description of your duties.

26 **RESPONSE TO FORM INTERROGATORY NO. 2.11:**

27 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
28 that it is unintelligible as Plaintiff is not an individual.

1 **FORM INTERROGATORY NO. 2.12:**

2 At the time of the INCIDENT were you acting as an agent or employee for any PERSON?

3 If so, state:

4 (a) the name, ADDRESS, and telephone number of that PERSON: and

5 (b) a description of your duties.

6 **RESPONSE TO FORM INTERROGATORY NO. 2.12:**

7 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
8 that it is unintelligible as Plaintiff is not an individual.

9 **FORM INTERROGATORY NO. 6.1:**

10 Do you attribute any physical, mental, or emotional injuries to the INCIDENT?

11 **RESPONSE TO FORM INTERROGATORY NO. 6.1:**

12 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
13 that it is unintelligible as Plaintiff is not an individual.

14 **FORM INTERROGATORY NO. 9.1:**

15 Are there any other damages that you attribute to the INCIDENT? If so, for each item of
16 damage state:

17 (a) the nature;

18 (b) the date it occurred;

19 (c) the amount; and

20 (d) the name, ADDRESS, and telephone number of each PERSON to whom an
21 obligation was incurred.

22 **RESPONSE TO FORM INTERROGATORY NO. 9.1:**

23 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
24 that it is unintelligible as Plaintiff is not an individual.

25 **FORM INTERROGATORY NO. 9.2:**

26 Do any DOCUMENTS support the existence or amount of any item of damages claimed
27 in interrogatory 9.1? If so, describe each document and state the name, ADDRESS, and telephone
28 number of the PERSON who has each DOCUMENT.

1 **RESPONSE TO FORM INTERROGATORY NO. 9.2:**

2 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
3 that it is unintelligible as Plaintiff is not an individual.

4 **FORM INTERROGATORY NO. 12.1:**

5 State the name, ADDRESS, and telephone number of each individual:

6 (a) who witnessed the INCIDENT or the events occurring immediately before or after
7 the INCIDENT;

8 (b) who made any statement at the scene of the INCIDENT;

9 (c) who heard any statements made about the INCIDENT by any individual at the
10 scene; and

11 (d) who YOU OR ANYONE ACTING ON YOUR BEHALF claim has knowledge of
12 the INCIDENT

13 (except for expert witnesses covered by Code of Civil Procedure section 2034).

14 **RESPONSE TO FORM INTERROGATORY NO. 12.1:**

15 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
16 that it is vague, ambiguous and unintelligible as to the meaning of the term “INCIDENT” in the
17 context of this Interrogatory. Moreover, Plaintiff further objects to the extent that this request calls
18 for attorney-client communications and/or attorney work product.

19 Subject to and without waiving these objections, Plaintiff responds as follows: Plaintiff is
20 unaware of witnesses to the “INCIDENT” as the term is defined by Defendant.

21 **FORM INTERROGATORY NO. 12.2:**

22 Have YOU OR ANYONE ACTING ON YOUR BEHALF interviewed any individual
23 concerning the INCIDENT? If so, for each individual state:

24 (a) the name, ADDRESS, and telephone number of the individual interviewed;

25 (b) the date of the interview; and

26 (c) the name, ADDRESS, and telephone number of the PERSON who conducted the
27 interview.

28 ///

1 **RESPONSE TO FORM INTERROGATORY NO. 12.2:**

2 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
3 that it is vague, ambiguous and unintelligible as to the meaning of the term “INCIDENT” in the
4 context of this Interrogatory. Secondly, Plaintiff objects to the extent that this request calls for
5 attorney-client communications and/or attorney work product. Moreover, Plaintiff further objects
6 to the extent that it calls for expert opinion, and/or the premature disclosure of experts in violation
7 of Cal. Code of Civ. Proc. § 2034.010 *et seq.* Plaintiff further objects on the grounds that the
8 request is not reasonably calculated to lead to the discovery of evidence relevant to any party’s
9 claim or defense.

10 Subject to and without waiving these objections, Plaintiff responds as follows: No.

11 **FORM INTERROGATORY NO. 12.3:**

12 Have YOU OR ANYONE ACTING ON YOUR BEHALF obtained a written or recorded
13 statement from any individual concerning the INCIDENT? If so, for each statement state:

- 14 (a) the name, ADDRESS, and telephone number of the individual from whom the
15 statement was obtained;
- 16 (b) the name, ADDRESS, and telephone number of the individual who obtained the
17 statement;
- 18 (c) the date the statement was obtained; and
- 19 (d) the name, ADDRESS, and telephone number of each PERSON who has the original
20 statement or a copy.

21 **RESPONSE TO FORM INTERROGATORY NO. 12.3:**

22 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
23 that it is vague, ambiguous and unintelligible as to the meaning of the term “INCIDENT” in the
24 context of this Interrogatory. Secondly, Plaintiff objects to the extent that this request calls for
25 attorney-client communications and/or attorney work product. Moreover, Plaintiff further objects
26 to the extent that it calls for expert opinion, and/or the premature disclosure of experts in violation
27 of Cal. Code of Civ. Proc. § 2034.010 *et seq.* Plaintiff further objects on the grounds that the

28 ///

1 request is not reasonably calculated to lead to the discovery of evidence relevant to any party's
2 claim or defense.

3 Subject to and without waiving these objections, Plaintiff responds as follows: No.

4 **FORM INTERROGATORY NO. 12.5:**

5 Do YOU OR ANYONE ACTING ON YOUR BEHALF know of any diagram,
6 reproduction, or model of any place or thing (except for items developed by expert witnesses
7 covered by Code of Civil Procedure sections 2034.210-2034.310) concerning the INCIDENT? If
8 so, for each item state:

- 9 (a) the type (i.e., diagram, reproduction, or model);
10 (b) the subject matter; and
11 (c) the name, ADDRESS, and telephone number of each PERSON who has it.

12 **RESPONSE TO FORM INTERROGATORY NO. 12.5:**

13 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
14 that it is vague, ambiguous and unintelligible as to the meaning of the term "INCIDENT" in the
15 context of this Interrogatory. Secondly, Plaintiff objects to the extent that this request calls for
16 attorney-client communications and/or attorney work product. Moreover, Plaintiff further objects
17 to the extent that it calls for expert opinion, and/or the premature disclosure of experts in violation
18 of Cal. Code of Civ. Proc. § 2034.010 *et seq.* Plaintiff further objects on the grounds that the
19 request is not reasonably calculated to lead to the discovery of evidence relevant to any party's
20 claim or defense.

21 Subject to and without waiving these objections, Plaintiff responds as follows: No.

22 **FORM INTERROGATORY NO. 12.6:**

23 Was a report made by any PERSON concerning the INCIDENT? If so, state:

- 24 (a) the name, title, identification number, and employer of the PERSON who made the
25 report;
26 (b) the date and type of report made;
27 (c) the name, ADDRESS, and telephone number of the PERSON for whom the report
28 was made; and

1 (d) the name, ADDRESS, and telephone number of each PERSON who has the original
2 or a copy of the report.

3 **RESPONSE TO FORM INTERROGATORY NO. 12.6:**

4 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
5 that it is vague, ambiguous and unintelligible as to the meaning of the term “INCIDENT” in the
6 context of this Interrogatory. Secondly, Plaintiff objects to the extent that this request calls for
7 attorney-client communications and/or attorney work product. Moreover, Plaintiff further objects
8 to the extent that it calls for expert opinion, and/or the premature disclosure of experts in violation
9 of Cal. Code of Civ. Proc. § 2034.010 *et seq.* Plaintiff further objects on the grounds that the
10 request is not reasonably calculated to lead to the discovery of evidence relevant to any party’s
11 claim or defense.

12 Subject to and without waiving these objections, Plaintiff responds as follows: No.

13 **FORM INTERROGATORY NO. 12.7:**

14 Have YOU OR ANYONE ACTING ON YOUR BEHALF inspected the scene of the
15 INCIDENT? If so, for each inspection state:

16 (a) the name, ADDRESS, and telephone number of the individual making the
17 inspection (except for expert witnesses covered by Code of Civil Procedure sections 2034.210-
18 2034.310); and

19 (b) the date of the inspection.

20 **RESPONSE TO FORM INTERROGATORY NO. 12.7:**

21 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
22 that it is vague, ambiguous and unintelligible as to the meaning of the term “INCIDENT” in the
23 context of this Interrogatory. Secondly, Plaintiff objects to the extent that this request calls for
24 attorney-client communications and/or attorney work product. Moreover, Plaintiff further objects
25 to the extent that it calls for expert opinion, and/or the premature disclosure of experts in violation
26 of Cal. Code of Civ. Proc. § 2034.010 *et seq.* Plaintiff further objects on the grounds that the

27 ///

28 ///

1 request is not reasonably calculated to lead to the discovery of evidence relevant to any party's
2 claim or defense.

3 Subject to and without waiving these objections, Plaintiff responds as follows: No.

4 **FORM INTERROGATORY NO. 14.1:**

5 Do YOU OR ANYONE ACTING ON YOUR BEHALF contend that any PERSON involved in
6 the INCIDENT violated any statute, ordinance, or regulation and that the violation was a legal
7 (proximate) cause of the INCIDENT? If so, identify the name, ADDRESS, and telephone number
8 of each PERSON and the statute, ordinance, or regulation that was violated.

9 **RESPONSE TO FORM INTERROGATORY NO. 14.1:**

10 In addition to the General Objections, Plaintiff objects to this Interrogatory on the grounds
11 that it is not relevant to the subject matter of this lawsuit and not reasonably calculated to lead to
12 the discovery of admissible evidence relevant to any party's claim or defense. Secondly, Plaintiff
13 objects to this Interrogatory on the grounds that it is vague, ambiguous and unintelligible as to the
14 meaning of the term "INCIDENT."

15 Subject to and without waiving these objections, Plaintiff responds as follows: Plaintiff
16 contends that Defendants B&G Foods North America, Inc., Amazon.com, Inc., and Berkeley Bowl
17 Produce, Inc. violated Proposition 65 and related regulations as is alleged in the Complaint.

18 **FORM INTERROGATORY NO. 17.1:**

19 Is your response to each request for admission served with these interrogatories an
20 unqualified admission? If not, for each response that is not an unqualified admission:

- 21 a) state the number of the request;
- 22 b) state all facts upon which you base your response;
- 23 c) state the names, ADDRESSES, and telephone numbers of all PERSONS who have
24 knowledge of those facts; and
- 25 d) identify all DOCUMENTS and other tangible things that support your response and state
26 the name, ADDRESS, and telephone number of the PERSON who has each DOCUMENT
27 or thing.

28 ///

RESPONSE TO FORM INTERROGATORY NO. 17.1:

a) 7

b) The formation of acrylamide in food products, to the extent discoverable in the context of this lawsuit, is within the realm of expert discovery and testimony.

c) Plaintiff's expert, whose contact information will be disclosed in the course of expert disclosures.

d) Identification of any supporting documents, to the extent discoverable in the context of this lawsuit, is premature since expert discovery has not yet commenced.

Respectfully submitted,

Dated: March 23, 2021

GLICK LAW GROUP, P.C.

By: 
Noam Glick (SBN 251582)

NICHOLAS & TOMASEVIC, LLP.

Craig M. Nicholas (SBN 178444)
Jake W. Schulte (SBN 293777)


Attorneys for Plaintiff

VERIFICATION

Environmental Health Advocates, Inc. v. B&G Foods North America, Inc., et al.
Alameda County Superior Court Case No. RG21086510

I, Kim Embry, the undersigned, am Secretary of Environmental Health Advocates, Inc., Plaintiff in the above-named action. I am familiar with the contents of the foregoing Plaintiff Environmental Health Advocates, Inc.'s Responses to Defendant B&G Foods North America, Inc.'s Form Interrogatories (Set One) and declare that the matters stated in the document are true based on my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification is executed on March 23, 2021, at San Francisco, California.

By: 
Kim Embry

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT G

1 **GLICK LAW GROUP, PC**
 2 Noam Glick (SBN 251582)
 225 Broadway, Suite 1900
 San Diego, California 92101
 3 Tel: (619) 382-3400
 Fax: (619) 393-0154
 4 Email: noam@glicklawgroup.com

5 **NICHOLAS & TOMASEVIC, LLP**
 Craig M. Nicholas (SBN 178444)
 6 Jake W. Schulte (SBN 293777)
 225 Broadway, Suite 1900
 7 San Diego, California 92101
 Tel: (619) 325-0492
 8 Email: cnicholas@nicholaslaw.org
 Email: jschulte@nicholaslaw.org
 9

Attorneys for Plaintiff
 ENVIRONMENTAL HEALTH ADVOCATES, INC.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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

13 ENVIRONMENTAL HEALTH ADVOCATES,
 INC.,

14 Plaintiff,

15 v.

16 B&G FOODS NORTH AMERICA, INC, a
 Delaware corporation, AMAZON.COM, INC.
 17 a Delaware corporation, BERKELEY BOWL
 PRODUCT, INC, a California corporation, and
 18 DOES 1 through 100, inclusive,

19 Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES
 AND INJUNCTIVE RELIEF**

(Health & Safety Code § 25249.6 et seq.)

FILED BY FAX
 ALAMEDA COUNTY
 January 22, 2021
 CLERK OF
 THE SUPERIOR COURT
 By Lynn Wiley, Deputy
 CASE NUMBER:
RG21086510

I.
INTRODUCTION

1
2 1. This Complaint is a representative action brought by Environmental Health
3 Advocates, Inc. (“Plaintiff”) in the public interest of the citizens of the State of California (“the
4 People”). Plaintiff seeks to remedy Defendants’ failure to inform the People of exposure to
5 acrylamide, a known carcinogen. Defendants exposed consumers to acrylamide by manufacturing,
6 importing, selling, and/or distributing New York Flatbreads Everything and SnackWell’s Chocolate
7 Crème Sandwich Cookies (“Products”). Defendants know and intend that customers will ingest
8 Products containing acrylamide.

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

14 3. California identified and listed acrylamide as a chemical known to cause cancer as
15 early as January 1, 1990, and as a chemical known to cause developmental/reproductive toxicity on
16 February 25, 2011.

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

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

II.
PARTIES

24
25
26 6. Plaintiff ENVIRONMENTAL HEALTH ADVOCATES, INC. (“Plaintiff”) is a
27 corporation in the State of California dedicated to protecting the health of California citizens through
28

1 the elimination or reduction of toxic exposure from consumer products. It brings this action in the
2 public interest pursuant to Health and Safety Code, section 25249.7.

3 7. Defendant B&G FOODS NORTH AMERICA, INC. ("B&G") is a corporation
4 organized and existing under the laws of Delaware. B&G is registered to do business in California,
5 and does business in the County of Alameda, within the meaning of Health and Safety Code, section
6 25249.11. B&G manufactures, imports, sells, or distributes the Products in California and Alameda
7 County.

8 8. Defendant AMAZON.COM, INC. (Amazon) is a corporation organized and existing
9 under the laws of Delaware. Amazon is registered to do business in California, and does business in
10 the County of Alameda, within the meaning of Health and Safety Code, section 25249.11. Amazon
11 manufactures, imports, sells, or distributes the Products in California and Alameda County.

12 9. Defendant BERKELEY BOWL PRODUCT, INC. (Berkeley Bowl) is a corporation
13 organized and existing under the laws of California. Berkeley Bowl is registered to do business in
14 California, and does business in the County of Alameda, within the meaning of Health and Safety
15 Code, section 25249.11. Berkeley Bowl manufactures, imports, sells, or distributes the Products in
16 California and Alameda County.

17
18 10. Plaintiff does not know the true names and/or capacities, whether individual, partners,
19 or corporate, of the defendants sued herein as DOES 1 through 100, inclusive, and for that reason sues
20 said defendants under fictitious names. Plaintiff will seek leave to amend this Complaint when the true
21 names and capacities of these defendants have been ascertained. Plaintiff is informed and believes and
22 thereon alleges that these defendants are responsible in whole or in part for Plaintiff's alleged
23 damages.

24 **III.**
25 **VENUE AND JURISDICTION**

26 11. California Constitution Article VI, Section 10 grants the Superior Court original
27 jurisdiction in all cases except those given by statute to other trial courts. The Health and Safety Code
28

1 statute upon which this action is based does not give jurisdiction to any other court. As such, this
2 Court has jurisdiction.

3 12. Venue is proper in Alameda County Superior Court pursuant to Code of Civil
4 Procedure, sections 394, 395, and 395.5. Wrongful conduct occurred and continues to occur in this
5 County. Defendant conducted and continues to conduct business in this County as it relates to
6 Products.

7 13. Defendant has sufficient minimum contacts in the State of California or otherwise
8 purposefully avails itself of the California market. Exercising jurisdiction over Defendants would be
9 consistent with traditional notions of fair play and substantial justice.

10 **IV.**
11 **CAUSES OF ACTION**

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

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

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

17 16. Defendant(s) manufactured, imported, sold, and/or distributed Products containing
18 acrylamide in violation of Health and Safety Code, section 25249.6 et seq. Plaintiff is informed and
19 believes such violations have continued after receipt of the Notice (defined *infra*) and will continue to
20 occur into the future.

21 17. In manufacturing, importing, selling, and/or distributing Products, Defendants failed to
22 provide a clear and reasonable warning to consumers and individuals in California who may be
23 exposed to acrylamide through reasonably foreseeable use of the Products.

24 18. Products expose individuals to acrylamide through direct ingestion. This exposure is a
25 natural and foreseeable consequence of Defendant placing Products into the stream of commerce. As
26 such, Defendants intend that consumers will ingest Products, exposing them to acrylamide.

27 19. Defendants knew or should have known that the Products contained acrylamide and
28 exposed individuals to acrylamide in the ways provided above. The Notice informed Defendants of

1 the presence of acrylamide in the Products. Likewise, media coverage concerning acrylamide and
2 related chemicals in consumer products provided constructive notice to Defendants.

3 20. Defendants' action in this regard were deliberate and not accidental.

4 21. More than sixty days prior to naming each defendant in this lawsuit, Plaintiff issued a
5 60-Day Notice of Violation ("Notice") as required by and in compliance with Proposition 65. Plaintiff
6 provided the Notice to the various required public enforcement agencies along with a certificate of
7 merit. The Notice alleged that Defendants violated Proposition 65 by failing to sufficiently warn
8 consumers in California of the health hazards associated with exposures to acrylamide contained in the
9 Products.

10 22. The appropriate public enforcement agencies provided with the Notice failed to
11 commence and diligently prosecute a cause of action against Defendants.

12 23. Individuals exposed to acrylamide contained in Products through direct ingestion
13 resulting from reasonably foreseeable use of the Products have suffered and continue to suffer
14 irreparable harm. There is no other plain, speedy, or adequate remedy at law.

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

18 **PRAYER FOR RELIEF**

19 Wherefore, Plaintiff prays for judgment against Defendants as follows:

20 1. Civil penalties in the amount of \$2,500 per day for each violation. Plaintiff alleges that
21 damages total a minimum of \$1,000,000.

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

25 *[Rest of page intentionally left blank]*
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 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: January 22, 2021

GLICK LAW GROUP, PC

By: 
 Noam Glick

NICHOLAS & TOMASEVIC, LLP

Craig M. Nicholas
Jake W. Schulte

Attorneys for Plaintiff
Environmental Health Advocates, Inc.

EXHIBIT H

To: 15102671546

Page: 4 of 9

2021-01-28 23:51:11 GMT

16193930154

From: Samantha Dice

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

GLICK LAW GROUP, PC
Noam Glick (SBN 251582)
225 Broadway, Suite 1900
San Diego, California 92101
Tel: (619) 382-3400
Fax: (619) 393-0154
Email: noam@glicklawgroup.com

NICHOLAS & TOMASEVIC, L.L.P.
Craig M. Nicholas (SBN 178444)
Jake W. Schulte (SBN 293777)
225 Broadway, Suite 1900
San Diego, California 92101
Tel: (619) 325-0492
Email: cnicholas@nicholaslaw.org
Email: jschulte@nicholaslaw.org

Attorneys for Plaintiff
ENVIRONMENTAL HEALTH ADVOCATES, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ENVIRONMENTAL HEALTH ADVOCATES, INC.,

Plaintiff,

v.

**B&G FOODS NORTH AMERICA, INC, a
Delaware corporation, AMAZON.COM, INC.
a Delaware corporation, BERKELEY BOWL
PRODUCE, INC, a California corporation, and
DOES 1 through 100, inclusive,**

Defendants.

Case No.: RG21086510

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

(Health & Safety Code § 25249.6 et seq.)

FILED BY FAX
ALAMEDA COUNTY

January 29, 2021

CLERK OF
THE SUPERIOR COURT
By Shabra Iyamu, Deputy

CASE NUMBER
RG21086510

I.
INTRODUCTION

1
2 1. This Complaint is a representative action brought by Environmental Health
3 Advocates, Inc. (“Plaintiff”) in the public interest of the citizens of the State of California (“the
4 People”). Plaintiff seeks to remedy Defendants’ failure to inform the People of exposure to
5 acrylamide, a known carcinogen. Defendants exposed consumers to acrylamide by manufacturing,
6 importing, selling, and/or distributing New York Flatbreads Everything and SnackWell’s Chocolate
7 Crème Sandwich Cookies (“Products”). Defendants know and intend that customers will ingest
8 Products containing acrylamide.

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

14 3. California identified and listed acrylamide as a chemical known to cause cancer as
15 early as January 1, 1990, and as a chemical known to cause developmental/reproductive toxicity on
16 February 25, 2011.

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

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

II.
PARTIES

24
25
26 6. Plaintiff ENVIRONMENTAL HEALTH ADVOCATES, INC. (“Plaintiff”) is a
27 corporation in the State of California dedicated to protecting the health of California citizens through
28

1 the elimination or reduction of toxic exposure from consumer products. It brings this action in the
2 public interest pursuant to Health and Safety Code, section 25249.7.

3 7. Defendant B&G FOODS NORTH AMERICA, INC. ("B&G") is a corporation
4 organized and existing under the laws of Delaware. B&G is registered to do business in California,
5 and does business in the County of Alameda, within the meaning of Health and Safety Code, section
6 25249.11. B&G manufactures, imports, sells, or distributes the Products in California and Alameda
7 County.

8 8. Defendant AMAZON.COM, INC. (Amazon) is a corporation organized and existing
9 under the laws of Delaware. Amazon is registered to do business in California, and does business in
10 the County of Alameda, within the meaning of Health and Safety Code, section 25249.11. Amazon
11 manufactures, imports, sells, or distributes the Products in California and Alameda County.

12 9. Defendant BERKELEY BOWL PRODUCE, INC. (Berkeley Bowl) is a corporation
13 organized and existing under the laws of California. Berkeley Bowl is registered to do business in
14 California, and does business in the County of Alameda, within the meaning of Health and Safety
15 Code, section 25249.11. Berkeley Bowl manufactures, imports, sells, or distributes the Products in
16 California and Alameda County.

17
18 10. Plaintiff does not know the true names and/or capacities, whether individual, partners,
19 or corporate, of the defendants sued herein as DOES 1 through 100, inclusive, and for that reason sues
20 said defendants under fictitious names. Plaintiff will seek leave to amend this Complaint when the true
21 names and capacities of these defendants have been ascertained. Plaintiff is informed and believes and
22 thereon alleges that these defendants are responsible in whole or in part for Plaintiff's alleged
23 damages.

24
25 **III.**
VENUE AND JURISDICTION

26 11. California Constitution Article VI, Section 10 grants the Superior Court original
27 jurisdiction in all cases except those given by statute to other trial courts. The Health and Safety Code
28

1 statute upon which this action is based does not give jurisdiction to any other court. As such, this
2 Court has jurisdiction.

3 12. Venue is proper in Alameda County Superior Court pursuant to Code of Civil
4 Procedure, sections 394, 395, and 395.5. Wrongful conduct occurred and continues to occur in this
5 County. Defendant conducted and continues to conduct business in this County as it relates to
6 Products.

7 13. Defendant has sufficient minimum contacts in the State of California or otherwise
8 purposefully avails itself of the California market. Exercising jurisdiction over Defendants would be
9 consistent with traditional notions of fair play and substantial justice.

10 **IV.**
11 **CAUSES OF ACTION**

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

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

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

17 16. Defendant(s) manufactured, imported, sold, and/or distributed Products containing
18 acrylamide in violation of Health and Safety Code, section 25249.6 et seq. Plaintiff is informed and
19 believes such violations have continued after receipt of the Notice (defined *infra*) and will continue to
20 occur into the future.

21 17. In manufacturing, importing, selling, and/or distributing Products, Defendants failed to
22 provide a clear and reasonable warning to consumers and individuals in California who may be
23 exposed to acrylamide through reasonably foreseeable use of the Products.

24 18. Products expose individuals to acrylamide through direct ingestion. This exposure is a
25 natural and foreseeable consequence of Defendant placing Products into the stream of commerce. As
26 such, Defendants intend that consumers will ingest Products, exposing them to acrylamide.

27 19. Defendants knew or should have known that the Products contained acrylamide and
28 exposed individuals to acrylamide in the ways provided above. The Notice informed Defendants of

1 the presence of acrylamide in the Products. Likewise, media coverage concerning acrylamide and
2 related chemicals in consumer products provided constructive notice to Defendants.

3 20. Defendants' action in this regard were deliberate and not accidental.

4 21. More than sixty days prior to naming each defendant in this lawsuit, Plaintiff issued a
5 60-Day Notice of Violation ("Notice") as required by and in compliance with Proposition 65. Plaintiff
6 provided the Notice to the various required public enforcement agencies along with a certificate of
7 merit. The Notice alleged that Defendants violated Proposition 65 by failing to sufficiently warn
8 consumers in California of the health hazards associated with exposures to acrylamide contained in the
9 Products.

10 22. The appropriate public enforcement agencies provided with the Notice failed to
11 commence and diligently prosecute a cause of action against Defendants.

12 23. Individuals exposed to acrylamide contained in Products through direct ingestion
13 resulting from reasonably foreseeable use of the Products have suffered and continue to suffer
14 irreparable harm. There is no other plain, speedy, or adequate remedy at law.

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

18 **PRAYER FOR RELIEF**

19 Wherefore, Plaintiff prays for judgment against Defendants as follows:

20 1. Civil penalties in the amount of \$2,500 per day for each violation. Plaintiff alleges that
21 damages total a minimum of \$1,000,000.

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

25 *[Rest of page intentionally left blank]*
26
27
28


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 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: February 2, 2021

GLICK LAW GROUP, PC

By: 
Noam Glick

NICHOLAS & TOMASEVIC, LLP

Craig M. Nicholas
Jake W. Schulte

Attorneys for Plaintiff
Environmental Health Advocates, Inc.

EXHIBIT I

1 **NICHOLAS & TOMASEVIC, LLP**
Craig M. Nicholas (SBN 178444)
2 Jake Schulte (SBN 293777)
225 Broadway, Suite 1900
3 San Diego, CA 92101
Tel: (619) 325-0492
4 Fax: (619) 325-0496
Email: cnicholas@nicholaslaw.org
5 Email: jschulte@nicholaslaw.org

6 **GLICK LAW GROUP, P.C.**
Noam Glick (SBN 251582)
7 225 Broadway, Suite 1900
San Diego, CA 92101
8 Tel: (619) 382-3400
Fax: (619) 393-0154
9 Email: noam@glicklawgroup.com

10 Attorneys for Plaintiff,
Kim Embry

11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF ALAMEDA**

14 KIM EMBRY, an individual,
15 Plaintiff,
16 v.
17 B&G FOODS NORTH AMERICA, INC., a
Delaware corporation, RALPHS GROCERY
18 COMPANY, an Ohio corporation, and DOES 1
through 100, inclusive,
19 Defendants.

Case No.: RG20057491
Reservation No.: R- 2252365

**PLAINTIFF KIM EMBRY'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION TO STAY
STATE COURT PROCEEDINGS**

Date: May 12, 2021
Time: 2:00 p.m.
Dept.: 520
Judge: Hon. Julia Spain

Case Filed: March 6, 2020
Trial Date: November 19, 2021

TABLE OF CONTENTS

1

2 I. **INTRODUCTION**..... 1

3 II. **BACKGROUND**..... 1

4 A. **Embry Files This Action Against B&G Foods**..... 2

5 B. **B&G Foods’ Reactionary Suit**..... 2

6 C. **B&G Foods’ Suit is Dismissed with Prejudice**..... 2

7 D. **The First-Filed and Related *Cal. Chamber* Action**..... 3

8 E. **The District Court in *Cal. Chamber* Issues a Preliminary**
9 **Injunction**..... 3

10 F. **Meet and Confer**..... 3

11 III. **LAW AND ARGUMENT**..... 4

12 A. **The Stay of a State-Court Action is Appropriate When There Is**
13 **a Similar Federal Action Pending**..... 4

14 1. **This case and B&G Foods’ (dismissed, pending appeal)**
15 **retaliatory suit were filed after *Cal Chamber*.**..... 5

16 2. **The parties to this case are similar, and the subject**
17 **matter is substantially the same.**..... 5

18 3. **Allowing this case to go forward could needlessly waste**
19 **party and judicial resources.**..... 7

20 4. **This case poses a high risk of “unseemly conflict” with**
21 **the district court.**..... 7

22 5. **The federal court is equally positioned to determine the**
23 **rights of the parties.**..... 8

24 6. **This case should not make an end-run around *Cal.***
25 ***Chamber*.**..... 8

26 7. ***Cal. Chamber* is pending in California.**..... 8

27 B. **The Court Should Exercise Its Inherent Authority to Stay This**
28 **Action**..... 9

IV. **CONCLUSION**..... 9

TABLE OF AUTHORITIES

CASES

Berg v. MTC Elecs. Techs. Co. (1998) 61 Cal. App. 4th 349.....6

Caifa Prof'l Law Corp. v. State Farm Fire & Cas. Co. (1993) 15 Cal. App. 4th 800.....4, 5, 7, 8

California Chamber of Commerce v. Becerra (E.D. Cal. 2021, No. 2:19-cv-02019-KJM-EFB) 2021 WL 1193829.....1

Farmland Irrigation Co. v. Dopplmaier (1947) 48 Cal. 2d 2084

Gauthier v. Apple, Inc. (Santa Clara Cnty. Super. Ct. 2014, No. 1-13-cv-254557) 2014 WL 19998003.....6

Mave Enters., Inc. v. Travelers Indem. Co. of Conn. (2013) 219 Cal. App. 4th 1408.....4

Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal. 4th 953.....9

Simmons v. Super. Ct. (1950) 96 Cal. App. 2d 119.....4, 7

Stephen Slesinger, Inc. v. Walt Disney Co. (2007) 155 Cal. App. 4th 736.....9

Thomson v. Cont'l Ins. Co. (1967) 66 Cal.2d 7384, 8

STATUTES

Cal. Health & Safety Code, § 25249.6.....1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 Plaintiff Kim Embry (“Embry”) respectfully moves this Court to stay all proceedings in
3 this Proposition 65 action in light of the decision and injunction recently issued in *California*
4 *Chamber of Commerce v. Becerra* (E.D. Cal. 2021, No. 2:19-cv-02019-KJM-EFB) 2021 WL
5 1193829 (“*Cal. Chamber*”).¹ The injunction prohibits the filing of new lawsuits to enforce
6 Proposition 65’s warning requirement for cancer as applied to acrylamide in food and beverage
7 products. In granting the preliminary injunction, the district court found the plaintiff, California
8 Chamber of Commerce, was likely to succeed on the merits of its First Amendment claims – *i.e.*,
9 that Proposition 65’s mandated warning for dietary acrylamide is an unconstitutional compelled
10 speech requirement.

11 Given the injunction in the first-filed and related *Cal. Chamber* case, a stay of this action
12 is warranted. In this case, Embry seeks to require Defendant B&G Foods North America, Inc.
13 (“B&G Foods”) to place a cancer warning for acrylamide on its “Cookie Cakes” products. B&G
14 Foods asserts an affirmative defense that Proposition 65’s warning requirement with respect to
15 acrylamide is compelled speech that violates its First Amendment rights. This is precisely the
16 theory under which the preliminary injunction issued in *Cal. Chamber*. If the injunction in *Cal.*
17 *Chamber* becomes final, it would moot this entire action as B&G Foods’ constitutional defense
18 would prevail.

19 The most efficient, economical, and equitable course for the parties and this Court is to
20 stay these proceedings pending final resolution of the *Cal. Chamber* action.

21 **II. BACKGROUND**

22 This case arose out of California’s Safe Drinking Water and Toxic Enforcement Act of
23 1986, Cal. Health & Safety Code § 25249.6 *et seq.*, known as “Proposition 65.” Proposition 65
24 is a voter-enacted statute that protects the public’s right to know about potential exposures to
25 hazardous chemicals. It generally requires businesses to provide “clear and reasonable
26 warning[s]” on products that expose consumers to “chemical[s] known to the state to cause cancer
27 or reproductive toxicity.” Cal. Health & Safety Code § 25249.6. The statute permits any
28

¹ The order is attached as Ex. A to Embry’s Request for Judicial Notice (“RJN”).

1 “person” to bring an action “in the public interest” to enforce this requirement. *Id.*, § 25249.7(d).
2 Embry is one such citizen enforcer of Proposition 65. Declaration of Jake W. Schulte (“Schulte
3 Decl.”), ¶ 2.

4 **A. Embry Files This Action Against B&G Foods**

5 On March 6, 2020, Embry filed a Complaint for Civil Penalties and Injunctive Relief
6 against B&G Foods. *See* Compl. attached as Ex. 1 to Schulte Decl. The Complaint alleges that
7 B&G Foods’ Snack Well’s Devil’s Food Fat Free Cookie Cakes expose consumers to acrylamide
8 at levels that require a health hazard warning under Proposition 65. *Id.*, ¶¶ 1-5.

9 **B. B&G Foods’ Reactionary Suit**

10 On the same day that Embry filed this action, B&G Foods filed a reactionary suit in the
11 Eastern District of California. *See* Complaint for Declaratory and Injunctive Relief (“B&G
12 Compl.”), attached to RJN as Ex. B. B&G Foods named Embry and her counsel, Noam Glick, as
13 defendants. *Id.*, ¶¶ 7-8. The complaint alleged that Proposition 65’s warning requirement as
14 applied to acrylamide constitutes an unconstitutional speech requirement. *Id.*, ¶¶ 79-80. B&G
15 Foods sought a “declaration that the enforcement of Proposition 65 against the Cookie Cakes is
16 unconstitutional,” *id.* at ¶ 97, and “an injunction against further prosecution or threats of
17 prosecution under Proposition 65 related to the alleged acrylamide in its Cookie Cakes,” *id.* at ¶
18 97.

19 **C. B&G Foods’ Suit is Dismissed with Prejudice**

20 On October 7, 2020, the district court granted Embry and Glick’s motion to dismiss
21 without leave to amend. *See* Order, attached to RJN as Ex. C. The district court did not reach
22 the merits of B&G Foods’ claims that enforcement of Proposition 65 violated its constitutional
23 rights. Rather, the district court held that B&G Foods’ suit was barred by the *Noerr-Pennington*
24 doctrine, which protects petitioning activity. *See generally, id.* The district court entered
25 judgment in accordance with its Order. *See* Judgment, attached to RJN as Ex. D. B&G Foods
26 filed a Notice of Appeal and that appeal is before the Ninth Circuit.²

27 _____
28 ² Embry and Glick have filed a contemporaneous motion to stay the appeal for similar reasons
articulated in this motion. Schulte Decl., ¶ 3.

1 **D. The First-Filed and Related Cal. Chamber Action**

2 In October 2019 (about five months before Embry filed her complaint and B&G Foods
3 filed its reactionary suit), the California Chamber of Commerce (the “Chamber”) filed the *Cal.*
4 *Chamber* action against the California Attorney General in the Eastern District of California. *See*
5 *Complaint for Declaratory and Injunctive Relief*, attached to RJN as Ex. E. In its suit, the
6 Chamber alleges “the First Amendment prohibits California from forcing businesses to make
7 false statements ... because California does now ‘know’ that eating food with acrylamide causes
8 cancer in people.” *See* Order at p. 4, attached to RJN as Ex. A. Like in *Cal. Chamber*, B&G
9 Foods contends Proposition 65’s warning requirement as to acrylamide violates its First
10 Amendment rights. *See* B&G Foods’ Answer (17th Affirmative Defense) attached as Ex. 2 to
11 Schulte Decl.

12 **E. The District Court in Cal. Chamber Issues a Preliminary Injunction**

13 On March 30, 2021, the district court enjoined the filing of new lawsuits to enforce
14 Proposition 65’s warning requirement for cancer as applied to acrylamide in food and beverage
15 products. *See* Order at p. 4, attached to RJN as Ex. A. In granting the preliminary injunction, the
16 district court found that the Chamber is “likely to succeed on the merits of its First Amendment
17 claims” because it “is likely to show the acrylamide warning requirement by Proposition 65 is
18 controversial and not purely factual.” *Id.* at 27-28. The injunction “applies to the Attorney
19 General and his officers, employees, or agents, and all those in privity or acting in concert with
20 those entities or individuals, including private enforcers [like Embry] under section 25249.7(d) of
21 the California Health & Safety Code.” *Id.* at 31.

22 **F. Meet and Confer**

23 In early April 2021, counsel for Embry initiated meet-and-confer efforts with B&G Foods’
24 counsel requesting a stipulation to stay this case. B&G Foods’ counsel declined Embry’s
25 invitation to stay. Schulte Decl., 4.

26 ///

27 ///

28 ///

1 **III. LAW AND ARGUMENT**

2 **A. The Stay of a State-Court Action is Appropriate When There Is a Similar**
3 **Federal Action Pending.**

4 California courts adhere to a "strong policy of comity" supporting the stay of state-court
5 proceedings in favor of substantially similar federal actions. *Thomson v. Cont'l Ins. Co.* (1967) 66
6 Cal.2d 738, 747 (citing *Simmons v. Super. Ct.* (1950) 96 Cal. App. 2d 119, 124). Indeed, "[i]t is
7 black letter law that, when a federal action has been filed covering the same subject matter as is
8 involved in a California action, the California court has the discretion" to say the state court
9 action. *Caifa Prof'l Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal. App. 4th 800, 804.
10 When exercising this discretion, "the [C]ourt should consider the importance of discouraging
11 multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts
12 with the courts of other jurisdictions." *Id.* The Court "should also consider whether the rights of
13 the parties can best be determined by the court of the other jurisdiction because of the nature of
14 the subject matter, the availability of witnesses, or the state to which the proceedings in the other
15 court have already advanced." *Id.*

16 Among the factors a court must consider when exercising its discretion to stay include: (1)
17 which action was filed first, (2) whether the parties and subject matter are substantially the same
18 as those in the pending federal action, (3) the importance of discouraging multiple litigation
19 designed solely to harass an adverse party, (4) "the importance ... of avoiding unseemly conflicts
20 with" the federal court, (5) "whether the rights of the parties can be best determined by" the
21 federal court "because of the nature of the subject matter," (6) "the stage to which the proceedings
22 in the [federal] court have already advanced," and (7) whether "the Federal action is pending in
23 California[,] not another state. *Farmland Irrigation Co. v. Dopplmaier* (1947) 48 Cal. 2d 208,
24 215; *Caiafa*, 15 Cal. App. 4th at 804; *Mave Enters., Inc. v. Travelers Indem. Co. of Conn.* (2013)
25 219 Cal. App. 4th 1408, 1423-24.

26 As noted by the Second District, the last "factor is one which the Supreme Court found so
27 important it accounted for the several earlier California decisions which appeared to make a stay
28 of state court proceedings a matter of right not merely a matter of discretion." *Caiafa*, 15 Cal.

1 App. 4th. at 807. It is an abuse of discretion to deny a stay where, as here, the *Caiafa* factors are
2 met. *See id.* at 807 (explaining that “it is difficult for us to see how the trial court could have
3 exercised its discretion in any other way but to grant [the defendant’s] request for a stay”).

4 **1. This case and B&G Foods’ (dismissed, pending appeal) retaliatory suit**
5 **were filed after *Cal Chamber*.**

6 In October 2019, the Chamber filed the *Cal. Chamber* action against the California
7 Attorney General in the Eastern District of California. *See* Complaint for Declaratory and
8 Injunctive Relief (“Chamber Compl.”), attached to RJN as Ex. E. Embry filed this state court
9 action in March 2020. *See* Complaint attached as Ex. 1 to Schulte Decl. B&G Foods filed its
10 retaliatory suit (dismissed, pending appeal) on the same day that Embry filed her state court
11 action. *See* B&G Compl., attached to RJN as Ex. B.

12 **2. The parties to this case are similar, and the subject matter is**
13 **substantially the same.**

14 Here, the parties and their interests are similar. The Chamber (the plaintiff in *Cal.*
15 *Chamber*) “is a nonprofit business association with over 13,000 members, both individual and
16 corporate, representing virtually ever economic interest in the State of California, including
17 among others food producers, suppliers, and retailers.” Chamber Compl., ¶ 12, attached to RJN
18 as Ex. E. The Chamber “acts on behalf of the business community to improve the state’s
19 economic and employment climate by representing business on a broad range of legislative,
20 regulatory, and legal issues.” *Id.* “Because so many of its members are directly impacted by
21 Proposition 65, [the Chamber] has historically been and continues to be deeply involved in a
22 variety of Proposition 65-related regulatory and litigation matters.” *Id.* B&G Foods is a
23 Delaware corporation with its principal place of business in New Jersey. B&G Compl, ¶ 6,
24 attached to RJN as Ex. B. Irrespective of whether B&G Foods is a member of the Chamber (a
25 fact unknown to Embry), the Chamber represents the interests of B&G Foods as a food
26 manufacturer doing business in California.

27 The Attorney General of the State of California (the defendant in *Cal. Chamber*,
28 sometimes referred herein as the “AG”) is “the highest-ranking officer in the California

1 Department of Justice.” Chamber Compl., ¶ 13, attached to RJN as Ex. E. The AG “is
2 specifically empowered to enforce the provisions of Proposition 65.” *Id.* In bringing suit, the
3 Chamber sought to enjoin the AG “and those in privity with and/or acting in concert with [the
4 AG] (including Proposition 65 private enforcers) from enforcing the Proposition 65 warning
5 requirement as applied to acrylamide in food products.” *Id.* Embry is a private of enforcer of
6 Proposition 65 who has been enjoined from filing new acrylamide-based Proposition 65 actions
7 due to the *Cal. Chamber* injunction. See Order at p. 31, attached to RJN as Ex. A.

8 The two cases present indistinguishable factual and legal issues, and the same question
9 will be addressed in each case – whether a Proposition 65 warning for acrylamide in food
10 products violates the First Amendment. Compare, e.g., B&G Foods’ Answer (17th Affirmative
11 Defense) attached as Ex. 2 to Schulte Decl with Order at p. 12, 16, attached to RJN as Ex. A (the
12 district court found the Chamber is “likely to succeed on the merits of its First Amendment
13 claims” because it “is likely to show the acrylamide warning required by Proposition 65 is
14 controversial and not purely factual.”).

15 Adjudication of the earlier-filed *Cal. Chamber* action will likely require substantially
16 similar – if not identical – legal analysis. This factor on its own warrants a stay. Cf. *Caifa*, 15
17 Cal. App. 4th at 806 (holding that the trial court properly granted a stay when the state-court
18 claim would require “resolving the threshold issues raised in the federal ... action”); see also
19 *Gauthier v. Apple, Inc.* (Santa Clara Cnty. Super. Ct. 2014, No. 1-13-cv-254557) 2014 WL
20 19998003, at * 2 (order granting motion to stay where “it is clear that the Federal Action and the
21 instant action arise out of the same set of acts over the same general time period...”). Even when
22 an “action is not precisely identical to ... other [earlier-filed] actions,” a stay is appropriate when
23 “[i]t is likely ... that the [other] cases will determine at least some key issues among the parties.”
24 *Berg v. MTC Elecs. Techs. Co.* (1998) 61 Cal. App. 4th 349, 363. Here, *Cal. Chamber* will
25 determine whether acrylamide-related Proposition 65 actions, such as the case at bar, are
26 unconstitutional. Therefore, this factor weighs strongly in favor of a stay.

27 ///

28 ///

1 3. Allowing this case to go forward could needlessly waste party and
2 judicial resources.

3 A denial of a stay could result in substantial waste of time and money. If the injunction in
4 *Cal. Chamber* becomes final, it would moot Embry’s entire case as B&G Foods’ constitutional
5 affirmative defense would prevail. There would be no public benefit in proceeding in this action
6 since B&G Foods would not be required to reformulate its Cookie Cakes or place Proposition 65
7 warnings. Furthermore, little harm would result from granting a stay. Now that the *Cal.*
8 *Chamber* injunction has adopted the same affirmative defense theory sought by B&G Foods,
9 there is no urgency to this state court action. The parties should not waste time and money,
10 including judicial resources, pursuing this matter which may be mooted by the ultimate outcome
11 of the *Chamber* case. Whatever minor inconvenience that could result from a stay – B&G Foods
12 failed to articulate any rational basis to continue the litigation during the meet and confer process
13 – is substantially outweighed by the time and expense that the parties and this Court will save by
14 staying this case.

15 4. This case poses a high risk of “unseemly conflict” with the district
16 court.

17 This Court has a compelling interest in granting a stay to avoid “unseemly conflicts”
18 caused by the potential for inconsistent adjudications, as well as an interest in conserving judicial
19 resources. Prevention of unnecessary or duplicative litigation is a fundamental interest of the
20 superior courts. As explained by the Second District Court of Appeal: “Equity abhors a
21 multiplicity of actions. It is the policy of the law to reduce to the minimum the number of actions
22 which may subsist between the same parties.” *Simmons v. Super. Ct. in & for Los Angeles Cty.*
23 (1950) 96 Cal. App. 2d 119, 130. Equally important, trial courts are cautioned to avoid situations
24 that create a risk of conflicting adjudications of fact or law. Therefore, if this case proceeds,
25 “[t]he potential for ‘unseemly conflict’ is great, unless both forums should reach the exact same
26 resolution of the issues.” *Caifa*, 15 Cal. App. 4th at 807. If the *Cal. Chamber* injunction becomes
27 permanent, Embry would be required to ask this Court for a determination at trial wholly
28 inconsistent with the *Cal. Chamber* outcome. B&G Foods seeks to put this Court on a collision

1 course with the *Cal. Chamber* injunction for no apparent purpose. As such, this case should be
2 stayed to avoid unseemly – and unnecessary – conflict and to serve the interest of judicial
3 economy. *See Caiifa*, 15 Cal. App. 4th at 807.

4 **5. The federal court is equally positioned to determine the rights of the**
5 **parties.**

6 Federal courts sitting in California (including the Eastern District) are undoubtedly well-
7 qualified to adjudicate California health and safety laws. Unlike the judgment of a court in
8 another state, or another country, there is no concern about the abilities of a federal court (and
9 indeed, the Ninth Circuit when it reviews the injunction) to issue a sound and enforceable
10 judgment on the same set of facts and legal issues with regards to the rights of the parties.
11 Accordingly, this factor is neutral.

12 **6. This case should not make an end-run around *Cal. Chamber*.**

13 In evaluating a stay, the California Supreme Court has directed lower courts to give
14 deference to the action that has proceeded further in the litigation process. *Thomson*, 66 Cal. 2d
15 at 747 (the court should consider “the stage to which the proceedings in the other court have
16 already advanced”). This factor weighs in favor of a stay because, as shown above, *Cal.*
17 *Chamber* predates this case and has already (preliminarily) adjudicated the constitutionality of
18 Proposition 65 enforcement related to acrylamide.

19 **7. *Cal. Chamber* is pending in California.**

20 The final, and most important, criterion favoring a stay is the fact that “the Federal action
21 is pending in California[,] not some other state.” *Caiifa*, 15 Cal. App. 4th at 804. As the Court
22 of Appeal noted in *Caiifa*, “[t]his factor is one which the Supreme Court found so important it
23 accounted for the several earlier California decisions which appeared to make a stay of state court
24 proceedings a matter of right[,] not merely a matter of discretion.” *Id.* at 807. Here, *Cal.*
25 *Chamber* is pending in federal court in California. When taken together, the factors heavily tip in
26 favor of a stay.

27 ///

28 ///

1 **B. The Court Should Exercise Its Inherent Authority to Stay This Action.**

2 The same policy concerns advancing federal comity animate a superior court's inherent
3 authority to manage its docket and control duplicative litigation. All superior courts are imbued
4 with this "inherent power [that] includes 'fundamental inherent equity, supervisory, and
5 administrative powers, as well as inherent power to control litigation.'" *Stephen Slesinger, Inc. v.*
6 *Walt Disney Co.* (2007) 155 Cal. App. 4th 736, 758 (quoting *Rutherford v. Owens-Illinois, Inc.*
7 (1997) 16 Cal. 4th 953, 967). The exercise of a court's inherent authority is particularly justified
8 where, as here, a superior court is managing one or more cases that is brought on a representative
9 basis. *See, e.g.,* Compl., ¶ 1, attached as Ex. 1 to Schulte Decl. ("This Complaint is a
10 representative action brought by [Embry] in the public interest of the State of California.")

11 Staying this later-filed action will advance judicial economy, preventing this Court from
12 expending resources on a legal issue already overseen and long underway in federal court.
13 Abatement of this action will excuse the parties from having to incur significant costs litigating
14 the science around dietary acrylamide and B&G Foods' constitutional affirmative defense,
15 consuming many days of court time in that bench trial. Consequently, this later-filed action
16 should be stayed consistent with the Court's inherent authority to control its docket.

17 **IV. CONCLUSION**

18 A stay of this action is warranted for several reasons, including: (1) *Cal. Chamber* was
19 filed first, (2) if the *Cal. Chamber* injunction becomes final, it would moot this entire action, (3)
20 there is potential for "unseemly conflict" between the forums, and (4) most importantly, the *Cal.*
21 *Chamber* action is in California. As the court explained in *Caiafa* under similar circumstances,
22 "it is difficult for us to see how the trial court could have exercised its discretion in any other way
23 but to grant [the defendant's] request for a stay of the state court proceedings... pending the
24 outcome of the Federal ... action." 15 Cal. App. 4th. at 807. So too here. This Court should stay
25 these proceedings pending final resolution of *Cal. Chamber*.

26 *[Signature of counsel appears on the following page]*

27
28

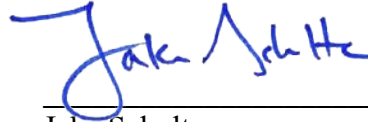
1 Dated: April 20, 2021

NICHOLAS & TOMASEVIC, LLP.

2

3

By:



Jake Schulte
Craig M. Nicholas

5

6

GLICK LAW GROUP, P.C.

Noam Glick

7

8

Attorneys for Plaintiff
Kim Embry

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

EXHIBIT J

ENDORSED
FILED
ALAMEDA COUNTY
APR 30 2021
CLERK OF THE SUPERIOR COURT
By Ellen Romero Deputy

1 J. Noah Hagey, Esq. (SBN: 262331)
hagey@braunhagey.com
2 Matthew Borden, Esq. (SBN: 214323)
borden@braunhagey.com
3 David H. Kwasniewski, Esq. (SBN: 281985)
kwasniewski@braunhagey.com
4 J. Tobias Rowe, Esq. (SBN: 305596)
rowe@braunhagey.com
5 BRAUNHAGEY & BORDEN LLP
351 California Street, 10th Floor
6 San Francisco, CA 94104
Telephone: (415) 599-0210
7 Facsimile: (415) 599-0210

8 ATTORNEYS FOR DEFENDANT
B&G FOODS NORTH AMERICA, INC.
9

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA
13

14 KIM EMBRY, an individual,
15 Plaintiff,
16 v.
17 B&G FOODS NORTH AMERICA, INC., a
Delaware corporation, RALPHS GROCERY
18 COMPANY, an Ohio corporation, and DOES 1
through 100, inclusive,
19 Defendants.
20

Case No.: RG20057491

**DECLARATION OF DAVID H.
KWASNIEWSKI IN SUPPORT OF
DEFENDANT B&G FOODS NORTH
AMERICA, INC.'S MOTION FOR
TERMINATING SANCTIONS DUE TO
SPOILIATION**

Assigned for All Purposes to: The Hon. Julia Spain

Reservation No.: R-2257611

Date: June 4, 2021
Time: 2:00 PM
Judge: Julia Spain
Dept: 520

Case Filed: March 6, 2020
Trial Date: November 19, 2021

1 I, David H. Kwasniewski, declare:

2 1. I am an attorney at the law firm of BraunHagey & Borden LLP, and a member in
3 good standing of the Bar of the State of California. We are counsel of record for Defendant B&G
4 Foods North America, Inc. (“B&G Foods”) in this action. All of the matters set forth below are true
5 based on my personal knowledge. If called upon as a witness in this case, I could and would testify
6 competently and truthfully to the matters set forth herein.

7 2. **Exhibit 1** is a true and correct copy of the Plaintiff’s April 22, 2019 Notice of
8 Violation in this case.

9 3. **Exhibit 2** is a true and correct copy of the transcript of Plaintiff’s November 13,
10 2020 deposition.

11 4. **Exhibit 3** is a true and correct copy of a February 9, 2021 email I sent to Plaintiff’s
12 lawyers.

13 5. **Exhibit 4** is a true and correct copy of an April 1, 2021 letter I received from IEH
14 Laboratory and Consulting Group.

15 6. **Exhibit 5** is a true and correct copy of an April 6, 2021 letter I received from IEH
16 Laboratory and Consulting Group.

17 7. **Exhibit 6** is a true and correct copy of an April 6, 2021 letter B&G Foods sent to
18 Plaintiff.

19 8. **Exhibit 7** is a true and correct copy of an April 7, 2021 letter I received from
20 Plaintiff’s lawyers.

21 9. **Exhibits 8-10** are true and correct copies of publicly available letters sent from the
22 Attorney General to Plaintiff’s lawyers regarding their illegal Proposition 65 enforcement
23 activities.

24 10. I am familiar with my firm’s billing practices and its billing in this matter. As
25 detailed below, my firm incurred at least \$18,960 in attorney fees in connection with this motion.

26 11. Our firm is a boutique in San Francisco that routinely handles high-profile litigation.
27 Two years ago, we obtained the largest anti-trust verdict in recent history, which exceeded
28

1 \$50,000,000. Being a small firm of less than 40 lawyers, we run our cases as leanly and efficiently
2 as possible.

3 12. I graduated from Cornell Law School in 2011. I clerked for the Honorable Curtis V.
4 Gómez, Chief Judge of the District Court of the United States Virgin Islands. Prior to joining my
5 current firm, I practiced at Steptoe & Johnson LLP. I have tried cases in state and federal court and
6 argued appeals before the Ninth Circuit. I have prosecuted high-stakes litigation against entities
7 such as Sandisk, LG, Vizio, Adobe, and MillerCoors. My standard hourly billing rate is \$675. I
8 spent 26.5 efficient billable hours on the instant Motion for Terminating Sanctions.

9 13. Pursuant to the standard practice of my firm, all of the time spent by our attorneys
10 was recorded on an hourly basis in 6-minute intervals.

11 14. In accordance with our firm's standard practice, I wrote off any time that I believed
12 was not efficiently spent, including time I believe was spent unnecessarily or duplicatively. I also
13 wrote off time spent by lawyers that might be considered administrative.

14 15. Samuel Ridge is a paralegal at my firm. His standard billing rate is \$195/hour. He
15 spent 5.5 efficient billable hours on the instant Motion for Terminating Sanctions.

16 I declare under penalty of perjury under the laws of the State of California that the
17 foregoing is true and correct.

18 Executed on: April 29, 2021

19 By: _____


David H. Kwasniewski

EXHIBIT 4



April 1, 2021

Braunhagey & Borden, LLP
Attn: David H. Kwasniewski
351 California St., 10th Floor
San Francisco, CA 94104
Email: Kwasniewski@braunhagey.com

Glick Law Group
Attn: Noam Glick
225 Broadway, Suite 1900
San Diego, California 9210
Email: noam@glicklawgroup.com

RE: *Embry v. B&G Foods North America, et al.*, Superior Court of CA, County of Alameda, Case No. RG20057491, Deposition Subpoena for Production of Business Records

Counsel of Record:

Institute for Environmental Health, Inc. d/b/a IEH Laboratories & Consulting Group (IEH) received the subject revised subpoena February 16, 2021 demanding certain business records. IEH followed its standard internal process of identifying and holding potentially responsive records. As part of IEH's standard process, we notified those customers whose records IEH considered potentially responsive and may be included in the production.

IEH discovered counsel of record disagree over what constitutes a 'consumer record' and how notice to a consumer is given during the subpoena process. After careful review and consideration, IEH has produced several responsive documents to the subpoena, however IEH has not produced the documents which are in dispute as to their status as a 'consumer record'. IEH has determined it should not produce the disputed documents until attorneys of record resolve the dispute or otherwise confirm there are no objections.

If IEH is mistaken as to the status of the dispute or there is no possible objection by either party to IEH's production of the disputed documents, please provide such notice to IEH.

Sincerely,

s/ Beau Backman

Beau Backman
Junior Corporate Counsel

cc: Craig Nicholas, Esq (**Email**)

EXHIBIT 7



April 7, 2021

VIA E-MAIL ONLY

Noah Hagey
David Kwasniewski
Tobias Rowe
BraunHagey & Borden, LLP.
351 California Street, 10th Floor
San Francisco, CA 94104
hagey@braunhagey.com
kwasniewski@braunhagey.com
borden@braunhagey.com

Re: *Embry v. B&G Foods North America, Inc., et al.*, Case No. RG20057491
(Alameda County Sup. Ct.)- Settlement Privileged under Evidence Code § 1152

Dear Counsel:

This letter is in response to your garbage letter threatening terminating sanctions. Since embarking on your client's malicious lawsuit in federal court, your firm has amassed quite an impressive string of losses – including two motions to transfer to more favorable forums, the dismissal of the entire federal case, and two motions to compel with an award of sanctions.

With so much billing for these successive losses,¹ we understand your firm's disappointment by the federal court's recent granting of a preliminary injunction motion. That decision, if upheld on appeal and if carried through to a permanent injunction, has the obvious potential to moot the entire federal case and to have potentially significant implications for the First Amendment defense in the state case.

Alas, not to miss an opportunity to further bill the file, you have now (1) refused to stay the federal appeal; (2) refused to stay the state court case; and (3) threatened to file an absurd "spoliation" motion based on the notion that the IEH lab was somehow legally required to preserve its original test sample.²

¹ Your letter acknowledges as such, claiming that \$75,000 is a "small fraction" of what your firm has billed B&G Foods.

² The spoliation argument will go nowhere, since IEH maintained a chain of custody and tested the product in accordance with standard industry practice. To the extent there is a dispute over IEH's testing methods (which, incidentally, were identical to those employed by your client's lab), that is a dispute that can be adjudicated at trial with the assistance of expert witnesses.

Noah Hagey
David Kwasniewski
J. Tobias Rowe
Re: Plaintiff's Response to Defendant's April 6th Letter
April 7, 2021
Page 2

Please advise your client that the First Amendment defense, which was the entire basis of your federal lawsuit, and yet which you casually raise as the *last* of the three points in your letter, has at least temporarily been adjudicated in your client's favor. If this decision holds and is adopted by the superior court, the case goes away. This is precisely why we suggested a stay of litigation. I appreciate your desire to keep this case alive through meritless spoliation motions, but I doubt the Court will be much interested in helping your firm continue to bilk its client.

Finally, your settlement proposal is rejected. We offer to settle this case for payment to plaintiff of \$500,000, inclusive of penalties and fees.

Since the foregoing is a settlement offer, you are ethically obligated to share this letter with your client. However, knowing how your firm practices law, we expect you will not.

Very truly yours,

GLICK LAW GROUP, P.C.



Noam Glick

Cc: Craig M. Nicholas, Esq.
Jake Schulte, Esq.