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5  
6 **UNITED STATES DISTRICT COURT**  
7 **NORTHERN DISTRICT OF CALIFORNIA**  
8

9 AARON CLARKE and MICHELLE DEVERA,  
individually and on behalf of all others similarly  
10 situated,

11 Plaintiffs,

12 v.

13 THE KRAFT HEINZ COMPANY,

14 Defendant.

Case No.

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

1 Plaintiffs Aaron Clarke and Michelle deVera (“Plaintiffs”) bring this action on behalf of  
2 themselves and all others similarly situated against Defendant The Kraft Heinz Company (“Kraft”  
3 or “Defendant”) for making, marketing, and distributing its Kraft® Macaroni & Cheese products  
4 (hereinafter, the “Products”). Plaintiffs make the following allegations pursuant to the  
5 investigation of their counsel and based upon information and belief, except as to the allegations  
6 specifically pertaining to themselves, which are based on personal knowledge.

7 **NATURE OF ACTION**

8 1. This is a class action lawsuit concerning the presence of harmful chemicals known  
9 as ortho-phthalates (“phthalates”) in Defendant’s popular Macaroni & Cheese products (the  
10 “Products”). For years, Defendant has been aware that its Products contain phthalates but has  
11 refused to take steps to remove these chemicals from the Products. Instead, Defendant has chosen  
12 to prioritize profits over the safety of the consuming public.

13 2. Plaintiffs bring claims individually and on behalf of a class of all other similarly  
14 situated purchasers of the Products for breach of implied warranty and fraud.

15 **PARTIES**

16 3. Plaintiff Aaron Clarke is, and at all times relevant to this action has been, a resident  
17 of San Francisco, California. Within the last four months, Mr. Clarke purchased Kraft Macaroni &  
18 Cheese from a Safeway store located in San Francisco, California. Had Defendant disclosed on the  
19 label that the Product contained phthalates, and the harms that phthalates can cause, Mr. Clarke  
20 would have been aware of those facts and would not have purchased the products, or at the very  
21 least, would have paid significantly less for them. After learning of the presence of phthalates in  
22 the Product, Mr. Clarke stopped purchasing the Product. However, Mr. Clarke regularly visits  
23 stores where Defendant’s products are sold and remains interested in purchasing safe macaroni and  
24 cheese products. He would consider purchasing Defendant’s Product in the future if Defendant  
25 removed the phthalates.

26 4. Plaintiff Michelle deVera, is, and at all times relevant to this action has been, a  
27 resident of Fremont, California. Within the last six months, Ms. deVera purchased Kraft Macaroni  
28 & Cheese from Walmart and Safeway stores located in Union City and Fremont, California. Had

1 Defendant disclosed on the label that the Product contained phthalates, and the harms that  
2 phthalates can cause, Ms. deVera would have been aware of those facts and would not have  
3 purchased the products, or at the very least, would have paid significantly less for them. After  
4 learning of the presence of phthalates in the Product, Ms. deVera stopped purchasing the Product.  
5 However, Ms. deVera regularly visits stores where Defendant's products are sold and remains  
6 interested in purchasing safe macaroni and cheese products. She would consider purchasing  
7 Defendant's Product in the future if Defendant removed the phthalates.

8 5. Defendant The Kraft Heinz Company is a Pennsylvania corporation with its  
9 principal place of 1 PPG Place, Suite 3400, Pittsburgh, PA. Defendant manufactures, markets, and  
10 distributes the Products throughout the United States.

11 **JURISDICTION AND VENUE**

12 6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §  
13 1332(d) because there are more than 100 class members and the aggregate amount in controversy  
14 exceeds \$5,000,000, exclusive of interest, fees, and costs, and at least one Class member is a  
15 citizen of a state different from Defendant.

16 7. This Court has personal jurisdiction over Defendant because Defendant conducts  
17 substantial business within California such that Defendant has significant, continuous, and  
18 pervasive contacts with the State of California.

19 8. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendant  
20 does substantial business in this District, a substantial part of the events giving rise to Plaintiffs'  
21 claims took place within this District because Plaintiffs purchased the Products in this District and  
22 were therefore injured in this District.

23 **COMMON FACTUAL ALLEGATIONS**

24 **A. Background on Phthalates**

25 9. Phthalates are synthetic chemicals used to make plastics flexible. Phthalates have  
26 powerful defenders, including Exxon Mobil, a leading producer of the chemical.

27 10. Phthalates can migrate into food products during processing, packaging, and  
28 preparation. Although not intentionally added to food, phthalates are "indirect" food additives

1 because they escape from food contact materials, including processing equipment, such as plastic  
2 tubing, conveyor belts or gloves, as well as food packaging materials. When added to these  
3 materials as plasticizers, phthalates make up 30-50% of the composite material, but they  
4 continually shed onto anything that they touch, such as food products because they are not  
5 chemically bound to the plastics and vinyl.

6 11. Because phthalates bind with fats, they tend to be found at higher levels in highly  
7 processed or fatty foods, such as the Products.

8 12. Within the scientific community, phthalates are called “endocrine disruptors”  
9 because they affect the body’s hormones by mimicking them or blocking them. Specifically, they  
10 interfere with the body’s natural levels of estrogen, testosterone, and other hormones, which is why  
11 they are called “disruptors.”

12 13. Unfortunately, researchers have proved that, unlike other chemicals, phthalates  
13 appear to have more serious effects at lower levels than at higher levels. Although it is typically  
14 assumed that the higher the dose or exposure, the greater the harm, endocrine disruptors play by  
15 different rules.

16 14. Indeed, the director of the National Institute of Environmental Health Sciences,  
17 Linda Birnbaum, stated that chemical manufacturers are asking “old questions” when they test for  
18 safety even though “science has moved on.”

19 15. The problem posed by phthalates is that hormones can increase the risk of some  
20 cancers, regardless of whether those hormones are natural or synthetic. Too much or too little of a  
21 hormone can be harmful. By way of example, research shows that animals exposed to phthalates  
22 are more likely to develop liver cancer, kidney cancer, and male reproductive organ damage.  
23 Studies also show associations between children’s exposure to phthalates and the risk of asthma,  
24 allergies and bronchial obstruction.

25 16. Researchers at Mount Sinai also found a link between obesity and phthalates. They  
26 found that among overweight girls ages 6 to 8, the higher the concentration of certain phthalates in  
27 their urine, the higher their body mass index (BMI). A study among Danish children ages 4 to 9  
28 found that the higher the concentration of phthalates, the shorter the child.

1           17. Even short-term exposure to phthalates has now been linked to developmental  
2 deficits. Researchers found that children in intensive care units who were exposed to the phthalates  
3 through plastic tubing and catheters had 18 times as much of the chemicals in their blood compared  
4 to children who had not spent time in the ICU. Four years later, the children who had been  
5 exposed to the phthalates had more problems with attention and motor coordination. The  
6 researchers found that the phthalates caused these problems regardless of medical complications or  
7 treatments.

8           18. Parents must also be wary of prenatal exposure to phthalates. Several studies that  
9 have tested phthalate levels in women in their third trimester of pregnancy have found health  
10 effects in the infants, toddlers, and older children of the mothers with the highest levels. A 2011  
11 study found that six-month-old boys whose mothers had the highest phthalate levels scored lower  
12 on brain and motor development tests.

13           19. Research suggests that boys exposed to phthalates while in the womb may be more  
14 likely to develop smaller genitals and incomplete descent of the testicles. Boys who are born with  
15 undescended testicles are 2-8 times more likely to develop testicular cancer later on than men born  
16 with both testicles descended. Studies by Harvard researchers have shown phthalates may alter  
17 human sperm DNA and semen quality.

18           20. Columbia University researchers discovered that three-year-olds with high prenatal  
19 exposure to two types of phthalates were more likely to have motor delays. They also reported that  
20 three phthalates were linked to certain behavior problems in three-year-olds. One phthalate in the  
21 study was linked to lower mental development in girls.

22           21. It therefore comes as no surprise that, as of February 2009, children's toys and child  
23 care products sold in the U.S (such as teething rings and plastic books) cannot contain certain  
24 phthalates. The ban on those phthalates is the result of a law passed in 2008, the Consumer  
25 Product Safety Improvement Act. The law permanently banned these phthalates.

26           22. A few months before the 2008 bill passed, major retailers such as Wal-Mart, Target,  
27 and Babies "R" Us promised to remove or severely restrict children's products containing  
28

1 phthalates by the end of 2008. That provided added incentives for major companies making  
2 teething rings and other soft plastic products to stop using phthalates.

3 23. The ban in the U.S. followed similar bans in other countries. In 2006, the European  
4 Union banned the use of certain phthalates in toys that may be placed in the mouth by children  
5 younger than 3 years old. Fourteen other countries, including Japan, Argentina, and Mexico, had  
6 also banned phthalates from children’s toys prior to the U.S.

7 24. According to scientists, “[t]here is strong evidence that phthalates block the  
8 production of the hormone testosterone. ‘That means there is less testosterone available to the  
9 developing male fetus, and since testosterone is absolutely vital to build his reproductive organs,  
10 the worry is that you will get malformations and other kinds of problems that translate to health  
11 effects later,’ Dr. Patisaul said. Those include ‘infertility, low sperm counts, altered male  
12 reproductive behavior and changes in the area of the brain that are important for sex differences  
13 between men and women,’ as well as a heightened risk of testicular cancer later on, she said.” *Id.*

14 25. “‘If you asked most scientists about the top 10 or 20 endocrine-disrupting chemicals  
15 they worry about, phthalates would be on that list,’ Dr. Patisaul said. ‘We have an enormous  
16 amount of data.’” *Id.*

#### 17 **B. Defendant’s Macaroni & Cheese Products Contain Phthalates**

18 26. Independent testing commissioned by the Coalition for Safer Food Processing &  
19 Packaging showed that, among 30 total products tested, 29 out of the 30 cheese products contained  
20 a form of phthalates—and that eight of the nine Kraft Macaroni & Cheese products tested  
21 contained phthalates.

22 27. In particular, average phthalate levels were more than four times higher in macaroni  
23 and cheese powder samples than in hard blocks and other natural cheese. DEHP, the most widely  
24 restricted phthalate, was found more often and at a much higher average concentration than any  
25 other phthalate, among all the cheese products tested.

26 28. According to Environmental Health News (ehn.org), “Phthalate concentrations in  
27 Kraft products like mac and cheese powder and processed cheese range from 0.2 mg/kg (or parts  
28

1 per million, ppm) to 2.5 ppm. The US Environmental Protection Agency estimates that a safe dose  
2 for phthalates is between 0.1 and 0.01 ppm...”<sup>1</sup>

3 29. For years, Kraft has known about the presence of phthalates in its Products. Since  
4 at least 2017, consumer advocacy groups have called on Kraft to take steps to remove these  
5 chemicals from its Products, yet Kraft has steadfastly refused to do so.

6 30. Instead, in 2017, Kraft responded that it does not purposely add phthalates to the  
7 Products and that any phthalates found in its Macaroni & Cheese is merely present in “trace”  
8 amounts. These comments, while inaccurately downplaying the significance of the phthalates  
9 found in the Products, demonstrate that, at minimum, Kraft has known about this issue since 2017.

10 31. Acknowledging the harmfulness of phthalates, one of Defendant’s main competitors  
11 in the Macaroni & Cheese industry—Annie’s—has pledged to take steps to remove these harmful  
12 chemicals from its macaroni & cheese products.<sup>2</sup> In other words, the inclusion of phthalates in the  
13 products is entirely preventable. And yet, putting its profits above the health of its customers,  
14 Defendant has refused to take steps to prevent the adulteration of its products with phthalates.

15 **CLASS REPRESENTATION ALLEGATIONS**

16 32. Plaintiffs seek to represent a class defined as all persons in the United States who  
17 purchased the Products (the “Class”). Excluded from the Class are persons who made such  
18 purchases for purpose of resale.

19 33. Plaintiffs also seek to represent a subclass of all Class Members who purchased the  
20 Products in California (the “California Subclass”).

21 34. At this time, Plaintiffs do not know the exact number of members of the  
22 aforementioned Class and Subclasses (“Class Members” and “Subclass Members,” respectively);  
23 however, given the nature of the claims and the number of retail stores in the United States selling  
24 the Products, Plaintiffs believe that Class and Subclass members are so numerous that joinder of all  
25 members is impracticable.

26  
27  
28 <sup>1</sup> <https://www.ehn.org/phthalates-in-macaroni-and-cheese-2640037202.html>

<sup>2</sup> <https://www.nytimes.com/2021/02/19/business/annies-mac-cheese-plastic-phthalates.html>





1           42. Under the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1790, *et seq.*,  
2 and California Commercial Code § 2314, every sale of consumer goods in this State is  
3 accompanied by both a manufacturer’s and retail seller’s implied warranty that the goods are  
4 merchantable, as defined in that Act. In addition, every sale of consumer goods in this State is  
5 accompanied by both a manufacturer’s and retail seller’s implied warranty of fitness when the  
6 manufacturer or retailer has reason to know that the goods as represented have a particular purpose  
7 and that the buyer is relying on the manufacturer’s or retailer’s skill or judgment to furnish suitable  
8 goods consistent with that represented purpose.

9           43. The Products at issue here are “consumer goods” within the meaning of Cal. Civ.  
10 Code § 1791(a).

11           44. Plaintiffs and the Class members who purchased one or more of the Products are  
12 “retail buyers” within the meaning of Cal. Civ. Code § 1791.

13           45. Defendant is in the business of manufacturing, assembling, producing and/or selling  
14 the Products to retail buyers, and is therefore a “manufacturer” and “seller” within the meaning of  
15 Cal. Civ. Code § 1791.

16           46. Defendant impliedly warranted to retail buyers that the Products were merchantable  
17 in that they would: (a) pass without objection in the trade or industry under the contract  
18 description, and (b) were fit for the ordinary purposes for which the Products are used. For a  
19 consumer good to be “merchantable” under the Act, it must satisfy both of those elements.  
20 Defendant breached the implied warranties because the Products were unsafe and defective.  
21 Therefore, the Products would not pass without objection in the trade or industry and were not fit  
22 for the ordinary purpose for which they are used.

23           47. Plaintiffs and Class members purchased the Products in reliance upon Defendant’s  
24 skill and judgment in properly packaging and labeling the Products.

25           48. The Products were not altered by Plaintiff or Class members.

26           49. The Products were defective at the time of sale when they left the exclusive control  
27 of Defendant. The defect described in this complaint was latent in the product and not  
28 discoverable at the time of sale.





CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

AARON CLARKE and MICHELLE DEVERA, individually and on behalf of all others similarly situated,

(b) County of Residence of First Listed Plaintiff San Francisco (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) L. Timothy Fisher, Bursor & Fisher, P.A. 1990 N. California Blvd., Suite 940 Walnut Creek, CA 94596 Tel.: (925) 300-4455

DEFENDANTS

THE KRAFT HEINZ COMPANY,

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party) 2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns PTF and DEF for Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, HABEAS CORPUS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation-Transfer 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. 1332(d)

Brief description of cause: Fraud, breach of implied warranty.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ 5,000,000.00

CHECK YES only if demanded in complaint: JURY DEMAND: X Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) X SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE 04/05/2021

SIGNATURE OF ATTORNEY OF RECORD

/s/ L. Timothy Fisher