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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BC338896

ENVIRONMENTAL LAW
FOUNDATION,
Individually and on Behalf of the General
Public,

Plaintiff,

vs.

LANCE, INC., and DOES 1-50,
Defendants.

CASE NO.

**COMPLAINT FOR CIVIL PENALTIES,
STATUTORY, EQUITABLE AND
INJUNCTIVE RELIEF BASED UPON:**

Violation of Cal. Health & Safety Code
§25249.6 *et seq.*

1 Plaintiff, by its attorneys, brings this action on its own behalf and in the public interest
2 on information and belief, except those allegations which pertain to the named Plaintiff or its
3 attorneys (which are alleged personal knowledge), and hereby alleges as follows:

4 I

5 **Introduction**
6 **(The Hazards of Acrylamide)**

7 1. This action seeks, among other remedies, restitution, civil penalties and
8 injunctive relief to redress the actions of Defendants now resulting in widespread exposure of
9 men and women to acrylamide, a known carcinogen, threatening their health and well being.
10 Specifically, Plaintiff challenges Defendants' manufacture, distribution, promotion and sale
11 of potato chips that contain acrylamide, resulting in human exposure to acrylamide without
12 prior warning, presenting a risk of developing cancer. Defendants' actions, including, but not
13 limited to, their failure to provide prior warnings as required by law, violate California Health
14 & Safety Code §25249.6, *et seq.*

15 2. On January 1, 1990, acrylamide was listed as a known carcinogen pursuant to
16 Proposition 65. Proposition 65 requires that consumers must be warned before they are
17 exposed to chemicals that cause birth defects and/or reproductive harm. (The Safe Drinking
18 Water and Toxic Enforcement Act, California Health and Safety Code §25249.6, *et seq.*, also
19 known as "Proposition 65").

20 3. Research has shown that acrylamide levels in potato chips can be reduced in a
21 number of ways including, but not limited to: (1) choosing different varieties of potatoes; (2)
22 avoiding sugar dips/coatings in partially cooked products; (3) increasing product moisture; (4)
23 lowering pH; (5) storing products at higher temperatures; (6) changing temperature/cooking
24 regimes; (7) cooking products at lower temperatures; (8) adding asparaginase; (9) replacing
25 ammonium; and (10) changing cooking oils.

26 4. By exposing consumers to acrylamide without any warning, Defendants have
27 violated and will continue to violate Proposition 65. Plaintiff is also entitled to injunctive
28 relief to compel Defendants to:

1 (a) Comply with the requirements of Proposition 65 in the sale and distribution
2 of their potato chips, including the requirement that the ultimate consumers of Defendants'
3 potato chips be provided with a clear and reasonable warning that the ingestion of Defendants'
4 products results in exposure to acrylamide, a known carcinogen; and,

5 (b) Undertake an immediate and comprehensive public information program to
6 alert all consumers (past, present, or future) of Defendant's potato chips at issue herein of the
7 inherent risk of acrylamide exposure in these products.

8 Plaintiff is therefore entitled to civil penalties.

9 **Parties**

10 5. Plaintiff ENVIRONMENTAL LAW FOUNDATION ("ELF") is a California
11 nonprofit organization founded on Earth Day in 1991. ELF has a longstanding interest in
12 reducing health hazards to the public posed by acrylamide, and particularly to protect those
13 with the least choice and greatest vulnerability to toxic risks; children, inner city dwellers, and
14 workers. ELF is dedicated to the preservation and enhancement of human health and the
15 environment. ELF brings this action on its own behalf, and pursuant to Health and Safety Code
16 §25249.7(d).

17 6. Lance, Inc. ("Lance") is a North Carolina corporation with its principal place of
18 business located at 8600 South Blvd., Charlotte, NC 28273. Lance sells, manufactures, and/or
19 distributes potato chips including, Cape Cod Classic and Cape Cod Robust Russet.

20 7. Each of the Defendants herein has employed ten (10) or more persons at all
21 times relevant to this action.

22 8. The true names and capacities of Defendants sued herein under California Code
23 of Civil Procedure § 474 as DOES 1 through 50, inclusive, are presently unknown to Plaintiff,
24 who therefore sues these Defendants by such fictitious names. Plaintiff will seek to amend this
25 Complaint and include these Doe Defendants' true names and capacities when they are
26 ascertained. Each of the fictitiously named Defendants is responsible in some manner for the
27 conduct alleged herein and for the injuries suffered by the general public.

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1 13. With respect to violations of Health and Safety Code §25249.6, *et seq.*, on June
2 16, 2005, pursuant to Health and Safety Code §25249.7, Plaintiff mailed/served appropriate
3 notices of the violations of §25249.6 of Proposition 65 by Lance, as alleged herein. The
4 "Notices of Violation of Proposition 65" were mailed to each of these Defendants, as well as
5 to the California Attorney General, the District Attorney of every county in California, and the
6 City Attorneys of any cities with populations according to the most recent decennial census
7 of over 750,000 in whose jurisdiction some of the violations of Proposition 65 occurred. Each
8 notice included a certificate of merit executed by Plaintiff's attorneys stating that the person
9 executing the certificate had consulted with one or more persons with relevant and appropriate
10 experience or expertise who has reviewed the facts, studies, or other data regarding exposure
11 to acrylamide, and that, based on that information, the person executing the certificate believes
12 there is a reasonable and meritorious case for this private action. The factual information
13 sufficient to establish the basis of the certificate of merit has been attached to the certificate
14 of merit served on the California Attorney General.

15 14. None of these public prosecutors has commenced or is diligently prosecuting an
16 action against the violations at issue herein, although the notice period provided in §25249.7
17 has elapsed since such notice was provided.

18 15. ELF is a non-profit organization acting as a private attorney general as
19 authorized by Health and Safety Code §25249.7. In this capacity, ELF does not have Article
20 III standing as ELF has not suffered any distinct and/or palpable injury. The statutory right to
21 act as a private attorney general does not confer injury on ELF to satisfy Article III standing.
22 *As You Sow v. The Sherwin-Williams Company* (1993 ND Cal.) Lexis 18310, 6.

23 **STATUTORY AND REGULATORY BACKGROUND**

24 16. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative
25 statute passed as Proposition 65 by a vote of the People in 1986.

26 17. Proposition 65 provides the circumstances under which persons must be warned
27 before they are exposed to chemicals/metals that cause cancer, birth defects, or other
28 reproductive harm. Health and Safety Code §25249.6 states the warning requirement:

1 No person in the course of doing business shall knowingly and intentionally
2 expose any individual to a chemical known to the state to cause cancer or
3 reproductive toxicity without first giving clear and reasonable warning to such
individual, except as provided in section 25249.10.

4 18. Proposition 65 establishes a procedure by which the Governor lists chemicals
5 known to the state to cause cancer. Health and Safety Code §25249.8. Pursuant to this authority,
6 on January 1, 1990, acrylamide was listed as a known carcinogen. The state of California has
7 established the no significant risk level for acrylamide at .2 micrograms/day. Cal. Code Regs.,
8 tit.22 §12705.

9 19. The warning requirement under Proposition 65 for a given chemical goes into
10 effect one year after the Governor places that chemical on the list. Health and Safety Code
11 §25249.10(b). Therefore, acrylamide became subject to a Proposition 65 warning on January
12 1, 1991.

13 FACTS

14 20. Potato chips are a food item consumed regularly by a significant portion of the
15 population. They are a common side item served with a wide variety meals or eaten alone as
16 a snack.

17 21. Defendants manufacture, sell, and/or distribute a variety of potato chips labeled,
18 marketed, and intended for human consumption, including, but not limited to those listed in
19 paragraph 6, *supra*. These potato chips are manufactured, distributed, and/or sold in the State
20 of California for the purpose of distribution and retail in California.

21 22. On or about April 24, 2002, researchers at the Swedish National Food
22 Administration and Stockholm University reported that acrylamide was contained in a variety
23 of fried and/or baked foods including, but not limited to, potato chips and/or crisps.

24 23. On or about 2002, the United States Food and Drug Administration (the "FDA")
25 began conducting public meetings regarding the presence of elevated levels of acrylamide in
26 various foods including, but not limited to potato chips. Also during this period, the FDA
27 released certain information regarding the fact that acrylamide was contained in a variety of
28 foods including, but not limited to, potato chips and, more specifically, contained in brands

1 of Lay's potato chips and/or crisps, Kettle potato chips, and Pringles potato chips and/or
2 crisps.

3 24. Based upon such information and belief, plaintiffs allege that at all relevant time
4 periods, Defendants and each of them possessed information including, but not limited to, the
5 information referenced in paragraphs 22 and 23, *supra*, which confirmed that acrylamide was
6 contained in a variety of foods including potato chips and, more specifically, contained in
7 brands of Lay's potato chips and/or crisps, Kettle potato chips, and Pringles potato chips
8 and/or crisps.

9 25. Based upon such information and belief, plaintiff alleges that at all relevant time
10 periods, Defendants and each of them, knew that acrylamide has been, and continues to be,
11 identified by the State of California as a known carcinogen subject to Proposition 65.

12 26. The potato chips at issue in this Complaint contain acrylamide which results in
13 human exposure to acrylamide upon its consumption and/or ingestion without prior warning.

14 27. Plaintiff is informed and believes and thereon alleges that the Defendants knew
15 that the foreseeable use of their potato chips results in exposure to acrylamide, and that the
16 levels of acrylamide exposed exceed the acrylamide exposure levels (*i.e.*, .2 micrograms per
17 day) which trigger Proposition 65's warning requirements.

18 28. Nevertheless, and in violation of California Health and Safety Code §25249.6,
19 *et seq.*, the Defendants have not labeled, marked or used signs, shelf warnings, or any indicia
20 whatsoever that warns or informs the public that their potato chips contain and expose
21 consumers to acrylamide, a chemical known to the State of California to be a carcinogen.
22 Defendants have in the course of doing business, knowingly and intentionally, exposed
23 individuals to a chemical known to the State of California to be a carcinogen without first
24 providing a clear and reasonable warning as required by California Health and Safety Code
25 §§25249.6 and 25249.11(f). Defendants have also promoted and marketed its potato chips for
26 sale without any warning regarding the levels of acrylamide exposure. As a direct result of
27 Defendants' act and omissions, the general public in California is being regularly, unlawfully,
28 and involuntarily exposed to acrylamide, a known carcinogen.

1 **FIRST CAUSE OF ACTION**

2 (California Health and Safety Code §§25249.6 *et seq.*)
3 (Against All Defendants and DOES 1-50)

4 29. Plaintiff incorporates by reference paragraphs 1 through 28 as if fully set forth
5 herein.

6 30. The people of the State of California have declared in Proposition 65 their right
7 “[t]o be informed about exposure to chemicals that cause cancer, birth defects or other
8 reproductive harm.” Proposition 65, §1(b).

9 31. To carry out those statutory purposes, Proposition 65 requires that a clear and
10 reasonable warning be given by persons who, in the course of doing business, knowingly and
11 intentionally expose any individual to a chemical known to the State of California to be a
12 carcinogen.

13 32. On January 1, 1990, acrylamide was listed as a chemical known to the State of
14 California to be a carcinogen. No warning need be given concerning a chemical so listed until
15 one year after the chemical first appears on the list. §25249.10(b). Acrylamide, therefore, one
16 year later became subject to the warning requirements of Proposition 65.

17 33. Proposition 65 provides that any person “that violates or threatens to violate” the
18 statute may be enjoined in any court of competent jurisdiction. §25249.7. In addition, violators
19 are liable for civil penalties of up to \$2,500.00 per day per violation, recoverable in a civil
20 action. §25249.7(b).

21 34. Defendants have engaged and continue to engage in conduct which violates
22 Health and Safety Code §25249.6. This conduct includes the manufacturing, packaging,
23 marketing, distributing and selling of potato chips the foreseeable use of which results in
24 exposing the public to acrylamide, known to the State of California to be a carcinogen, without
25 first providing a clear and reasonable warning pursuant to Health and Safety Code §§25249.6
26 and 25249.11(f). Defendants have, therefore, in the course of doing business, knowingly and
27 intentionally exposed individuals to a chemical known to the State of California to be a
28 carcinogen without first providing a clear and reasonable warning. This exposure is

1 intentional because it is the result of deliberate acts of Defendants in arranging the sale of their
2 products to consumers.

3 35. By the above described acts, Defendants are liable, pursuant to Health and
4 Safety Code §25249.7(b), for a civil penalty of up to \$2,500.00 per day per individual
5 exposure to acrylamide through Defendants potato chips listed in paragraph 6, *supra*.

6 36. By committing the acts alleged herein, the Defendants have caused irreparable
7 harm for which there is no plain, speedy, or adequate remedy at law. In the absence of
8 equitable relief, the general public will continue to be involuntarily exposed to acrylamide
9 which is contained in Defendants' potato chips listed in paragraph 6, *supra*, creating
10 substantial risk of irreparable harm.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff prays for the following relief:

13 A. A temporary restraining order, preliminary and permanent injunction enjoining
14 the Defendants, their agents, employees, assigns, and all persons acting in concert or
15 participating with them from:

16 (1) Selling and distributing their potato chips which contain acrylamide in
17 California, without first providing, to the ultimate consumers and users, a clear and reasonable
18 warning that the foreseeable consumption of such potato chips results in exposure to
19 acrylamide, a chemical known to the State of California to be a carcinogen;

20 (2) Failing to undertake a court-approved public information campaign to
21 warn and inform the general public that consumption of Defendants' potato chips which
22 contain acrylamide results in exposure to acrylamide, a chemical known to the State of
23 California to be a carcinogen and identifying steps that may be taken to reduce such exposure;

24 B. An award of statutory penalties of \$2,500.00 for each violation of Proposition
25 65 throughout the State of California;

26 C. Reasonable attorneys' fees and costs; and,

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D. Such other and further relief as this Court may deem necessary and proper.

DATED: August 25, 2005

ROSE, KLEIN & MARIAS LLP

By:



CHRISTOPHER P. RIDOUT
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on each and every cause of action.

DATED: August 25, 2005

ROSE, KLEIN & MARIAS LLP

By: 

CHRISTOPHER P. RIDOUT
Attorneys for Plaintiff

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