

1 ENVIRONMENTAL LAW FOUNDATION
2 JAMES R. WHEATON (State Bar No. 115230)
3 1736 Franklin Street
4 9th Floor
5 Oakland, California 94612
6 (510) 208-4555
7 (510) 208-4562 Fax

8 ROSE, KLEIN & MARIAS LLP
9 DAVID A. ROSEN (State Bar No. 101287)
10 CHRISTOPHER P. RIDOUT (State Bar No. 143931)
11 TRACY K. SMITH (State Bar No. 185474)
12 801 S. Grand Avenue
13 Eleventh Floor
14 Los Angeles, California 90017-4645
15 (213) 626-0571
16 (213) 623-7755 Fax

17 LAW OFFICE OF GIDEON KRACOV
18 GIDEON KRACOV (State Bar No. 179815)
19 801 S. Grand Avenue
20 Eleventh Floor
21 Los Angeles, California 90017-4645
22 (213) 629-2071
23 (213) 623-7755 Fax

24 Attorneys for Plaintiff ENVIRONMENTAL LAW FOUNDATION

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

19 ENVIRONMENTAL LAW
20 FOUNDATION,
21 Individually and on Behalf of the General
22 Public,

23 Plaintiff,

24 vs.

25 FRITO-LAY, INC. (a subsidiary of PepsiCo,
26 Inc.), and DOES 1-50,

27 Defendants.
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CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

AUG 26 2005

John A. Clarke, Executive Officer/Clerk
By S. Gabb Deputy
S. Gabb

CASE NO. BC338897

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 and/or crisps that contain acrylamide, resulting in human exposure to
12 acrylamide without prior warning, presenting a risk of developing cancer. Defendants' actions,
13 including, but not limited to, their failure to provide prior warnings as required by law, violate
14 California Health & 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 and/or crisps can be
21 reduced in a number of ways including, but not limited to: (1) choosing different varieties of
22 potatoes; (2) avoiding sugar dips/coatings in partially cooked products; (3) increasing product
23 moisture; (4) lowering pH; (5) storing products at higher temperatures; (6) changing
24 temperature/cooking regimes; (7) cooking products at lower temperatures; (8) adding
25 asparaginase; (9) replacing 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 and/or crisps, including the requirement that the ultimate consumers of
3 Defendants' potato chips and/or crisps be provided with a clear and reasonable warning that
4 the ingestion of Defendants' products results in exposure to acrylamide, a known carcinogen;
5 and,

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

9 Plaintiff is therefore entitled to civil penalties.

10 **Parties**

11 5. Plaintiff ENVIRONMENTAL LAW FOUNDATION ("ELF") is a California
12 nonprofit organization founded on Earth Day in 1991. ELF has a longstanding interest in
13 reducing health hazards to the public posed by acrylamide, and particularly to protect those
14 with the least choice and greatest vulnerability to toxic risks; children, inner city dwellers, and
15 workers. ELF is dedicated to the preservation and enhancement of human health and the
16 environment. ELF brings this action on its own behalf, and pursuant to Health and Safety Code
17 §25249.7(d).

18 6. Frito-Lay, Inc. ("Frito Lay") (*a subsidiary of PepsiCo, Inc.*) is a Delaware
19 corporation with its principal place of business located at 7701 Legacy Dr. Plano, TX 75024.
20 Frito Lay sells, manufactures, and/or distributes potato chips including, Lay's Baked! Original,
21 Lay's Baked! KC Masterpiece BBQ, Lay's Light KC Masterpiece BBQ, Lay's Stax KC
22 Masterpiece BBQ and Lay's Natural Country BBQ.

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

25 8. The true names and capacities of Defendants sued herein under California Code
26 of Civil Procedure §474 as DOES 1 through 50, inclusive, are presently unknown to Plaintiff,
27 who therefore sues these Defendants by such fictitious names. Plaintiff will seek to amend this
28 Complaint and include these Doe Defendants' true names and capacities when they are

1 ascertained. Each of the fictitiously named Defendants is responsible in some manner for the
2 conduct alleged herein and for the injuries suffered by the general public.

3 9. At all times herein mentioned in the causes of action into which this paragraph
4 is incorporated by reference, each and every Defendant was an agent or employee of each and
5 every other Defendant. In doing the things alleged in the cause of action into which this
6 paragraph is incorporated by reference, each and every Defendant was acting within the course
7 and scope of this agency or employment, and was acting with the consent, permission, and
8 authorization of each of the remaining Defendants. All actions of each Defendant alleged in
9 the causes of action into which this paragraph is incorporated by reference were ratified and
10 approved by every other Defendant or their officers or managing agents, and by agreeing to
11 actively conceal the true facts as alleged herein. Alternatively, Defendants aided, conspired
12 with and/or facilitated wrongful conduct of other Defendants.

13 JURISDICTION AND VENUE

14 10. This Court has jurisdiction over all causes of action asserted herein pursuant to
15 the California Constitution, Article XI, Section 10, because this case is a cause not given by
16 statute to other trial courts.

17 11. This Court has jurisdiction over Defendants named herein because Defendants
18 either are located in this State or are foreign corporations authorized to do business in
19 California and registered with the California Secretary of State, or who do sufficient business
20 in California, have sufficient minimum contacts with California, or otherwise intentionally
21 avail themselves of the markets within California through the promotion, sale, marketing, and
22 distribution of their products in California to render the exercise of jurisdiction by the
23 California courts permissible under traditional notions of fair play and substantial justice.

24 12. Venue is proper in this Court because the products at issue are advertised,
25 promoted, sold and used in this County, a substantial portion of the transactions complained
26 of herein occurred here, contracts relating to the purchase of these products were entered into,
27 made and were to be performed in this County, and Defendants have received substantial
28

1 compensation from the sale of the products at issue in this County by doing business here and
2 making numerous misrepresentations which have had an effect in this County.

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

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

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

25 STATUTORY AND REGULATORY BACKGROUND

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

28

1 23. On or about 2002, the United States Food and Drug Administration (the "FDA")
2 began conducting public meetings regarding the presence of elevated levels of acrylamide in
3 various foods including, but not limited to potato chips and/or crisps. Also during this period,
4 the FDA released certain information regarding the fact that acrylamide was contained in a
5 variety of foods including, but not limited to, potato chips and/or crisps and, more specifically,
6 contained in brands of Lay's potato chips and/or crisps, Kettle potato chips, and Pringles
7 potato chips and/or crisps.

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

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

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

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

24 28. Nevertheless, and in violation of California Health and Safety Code
25 §25249.6, *et seq.*, Defendants have not labeled, marked or used signs, shelf warnings, or any
26 indicia whatsoever that warns or informs the public that their potato chips and/or crisps
27 contain and expose consumers to acrylamide, a chemical known to the State of California to
28 be a carcinogen. Defendants have, in the course of doing business, knowingly and

1 intentionally, exposed individuals to a chemical known to the State of California to be a
2 carcinogen without first providing a clear and reasonable warning as required by California
3 Health and Safety Code §§25249.6 and 25249.11(f). Defendants have also promoted and
4 marketed their potato chips and/or crisps for sale without any warning regarding the levels of
5 acrylamide exposure. As a direct result of Defendants' acts and omissions, the general public
6 in California is being regularly, unlawfully, and involuntarily exposed to acrylamide, a known
7 carcinogen.

8 **FIRST CAUSE OF ACTION**
9 (California Health and Safety Code §§25249.6 *et seq.*)
10 (Against All Defendants and Does 1-50)

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

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

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

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

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

28 34. Defendants have engaged and continue to engage in conduct which violates
Health and Safety Code §25249.6. This conduct includes the manufacturing, packaging,

1 marketing, distributing and selling of potato chips and/or crisps, the foreseeable use of which
2 results in exposing the public to acrylamide, known to the State of California to be a
3 carcinogen, without first providing a clear and reasonable warning pursuant to Health and
4 Safety Code §§25249.6 and 25249.11(f). Defendants have, therefore, in the course of doing
5 business, knowingly and intentionally exposed individuals to a chemical known to the State
6 of California to cause cancer and/or reproductive toxicity without first providing a clear and
7 reasonable warning. This exposure is intentional because it is the result of deliberate acts of
8 Defendants in arranging the sale of their products to consumers.

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

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

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiff prays for the following relief:

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

23 (1) Selling and distributing their potato chips and/or crisps which contain
24 acrylamide in California, without first providing, to the ultimate consumers and users, a clear
25 and reasonable warning that the foreseeable consumption of such potato chips and/or crisps
26 results in exposure to acrylamide, a chemical known to the State of California to be a
27 carcinogen;

28

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

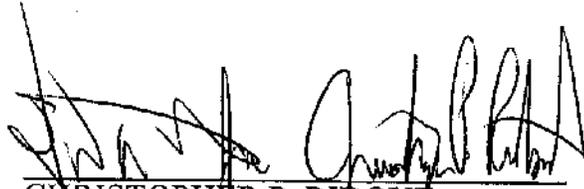
5 B. An award of statutory penalties of \$2,500.00 for each violation of Proposition
6 65 throughout the State of California;

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

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

9
10 DATED: August 25, 2005

ROSE, KLEIN & MARIAS LLP

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13 By: 
14 CHRISTOPHER P. RIDOUT
15 Attorneys for Plaintiff
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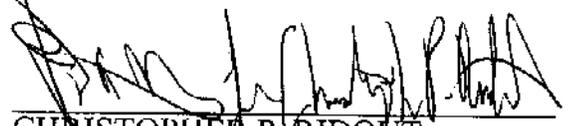
DEMAND FOR JURY TRIAL

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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