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CENTER FOR ENVIRONMENTAL HEALTH  
7  
8

ENDORSED  
FILED  
ALAMEDA COUNTY

NOV 10 2016

CLERK OF THE SUPERIOR COURT  
By   
JAMIE THOMAS, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF ALAMEDA  
11

RG16838610

12 CENTER FOR ENVIRONMENTAL HEALTH, )  
13 a non-profit corporation, )

14 Plaintiff, )

15 v. )

16 CONAGRA FOODS, INC.; BASIC )  
17 AMERICAN, INC.; J.R. SIMPLOT )  
18 COMPANY; THE KROGER CO.; RALPHS )  
19 GROCERY COMPANY; SAFEWAY, INC.; )  
20 SAVE MART SUPERMARKETS; TARGET )  
CORPORATION; WAL-MART STORES, )  
21 INC.; WHOLE FOODS MARKET )  
CALIFORNIA, INC.; MRS. GOOCH'S )  
NATURAL FOOD MARKETS, INC.; and )  
DOES 1 through 200, inclusive, )

22 Defendants. )  
23

Case No. \_\_\_\_\_

**COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES**

Health & Safety Code § 25249.6, *et seq.*

(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on  
2 information and belief and investigation of counsel, except for information based on knowledge,  
3 hereby makes the following allegations:

#### 4 INTRODUCTION

5 1. This Complaint seeks to remedy Defendants' continuing failure to warn  
6 individuals in California that they are being exposed to acrylamide, a chemical known to the  
7 State of California to cause cancer. Such exposures have occurred, and continue to occur,  
8 through the manufacture, distribution, sale, and consumption of Defendants' hash brown potato  
9 products, including but not limited to hash browns, hash brown patties, tater tots, and tater puffs  
10 (the "Products"). Consumers, including children, are exposed to acrylamide when they consume  
11 the Products.

12 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*  
13 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California  
14 to chemicals known to the State to cause cancer, birth defects, or other reproductive harm  
15 without providing clear and reasonable warnings to individuals prior to their exposure.  
16 Defendants introduce Products contaminated with significant quantities of acrylamide into the  
17 California marketplace, exposing consumers of their Products, many of whom are children, to  
18 acrylamide.

19 3. Despite the fact that Defendants expose children and other consumers to  
20 acrylamide, Defendants provide no warnings whatsoever about the carcinogenic hazards  
21 associated with acrylamide exposure. Defendants' conduct thus violates the warning provision  
22 of Proposition 65. Health & Safety Code § 25249.6.

#### 23 PARTIES

24 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a  
25 non-profit corporation dedicated to protecting the public from environmental health hazards and  
26 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the  
27 State of California. CEH is a "person" within the meaning of Health & Safety Code  
28 § 25249.11(a) and brings this enforcement action in the public interest pursuant to Health &

1 Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy  
2 group that has prosecuted a large number of Proposition 65 cases in the public interest. These  
3 cases have resulted in significant public benefit, including the reformulation of thousands of  
4 products to remove toxic chemicals and to make them safer. CEH also provides information to  
5 Californians about the health risks associated with exposure to hazardous substances, where  
6 manufacturers and other responsible parties fail to do so.

7           5. Defendant CONAGRA FOODS, INC. is a person in the course of doing  
8 business within the meaning of Health & Safety Code § 25249.11. Defendant CONAGRA  
9 FOODS, INC. manufactures, distributes, and/or sells the Products for sale and consumption in  
10 California.

11           6. Defendant BASIC AMERICAN, INC. is a person in the course of doing  
12 business within the meaning of Health & Safety Code § 25249.11. Defendant BASIC  
13 AMERICAN, INC. manufactures, distributes, and/or sells the Products for sale and consumption  
14 in California.

15           7. Defendant J.R. SIMPLOT COMPANY is a person in the course of doing  
16 business within the meaning of Health & Safety Code § 25249.11. Defendant J.R. SIMPLOT  
17 COMPANY manufactures, distributes, and/or sells the Products for sale and consumption in  
18 California.

19           8. Defendant THE KROGER CO. is a person in the course of doing business  
20 within the meaning of Health & Safety Code § 25249.11. Defendant THE KROGER CO.  
21 manufactures, distributes, and/or sells the Products for sale and consumption in California.  
22 CEH's claims against Defendant THE KROGER CO. in this action are limited to Products sold  
23 under the "Kroger" brand.

24           9. Defendant RALPHS GROCERY COMPANY is a person in the course of  
25 doing business within the meaning of Health & Safety Code § 25249.11. Defendant RALPHS  
26 GROCERY COMPANY manufactures, distributes, and/or sells the Products for sale and  
27 consumption in California. CEH's claims against Defendant RALPHS GROCERY COMPANY  
28 in this action are limited to Products sold under the "Kroger" brand.

1           10. Defendant SAFEWAY, INC. is a person in the course of doing business  
2 within the meaning of Health & Safety Code § 25249.11. Defendant SAFEWAY, INC.  
3 manufactures, distributes, and/or sells the Products for sale and consumption in California.  
4 CEH's claims against Defendant SAFEWAY, INC. in this action are limited to Products sold by  
5 Defendant CONAGRA FOODS, INC., and to Products sold under the "Signature Kitchens"  
6 brand.

7           11. Defendant SAVE MART SUPERMARKETS is a person in the course of  
8 doing business within the meaning of Health & Safety Code § 25249.11. Defendant SAVE  
9 MART SUPERMARKETS manufactures, distributes, and/or sells the Products for sale and  
10 consumption in California. CEH's claims against Defendant SAVE MART SUPERMARKETS  
11 in this action are limited to Products sold by Defendant J.R. SIMPLOT COMPANY.

12           12. Defendant TARGET CORPORATION is a person in the course of doing  
13 business within the meaning of Health & Safety Code § 25249.11. Defendant TARGET  
14 CORPORATION manufactures, distributes, and/or sells the Products for sale and consumption  
15 in California. CEH's claims against Defendant TARGET CORPORATION in this action are  
16 limited to Products sold under the "Market Pantry" brand.

17           13. Defendant WAL-MART STORES, INC. is a person in the course of doing  
18 business within the meaning of Health & Safety Code § 25249.11. Defendant WAL-MART  
19 STORES, INC. manufactures, distributes, and/or sells the Products for sale and consumption in  
20 California. CEH's claims against Defendant WAL-MART STORES, INC. in this action are  
21 limited to Products sold by Defendant BASIC AMERICAN, INC.

22           14. Defendant WHOLE FOODS MARKET CALIFORNIA, INC. is a person  
23 in the course of doing business within the meaning of Health & Safety Code § 25249.11.  
24 Defendant WHOLE FOODS MARKET CALIFORNIA, INC. manufactures, distributes, and/or  
25 sells the Products for sale and consumption in California. CEH's claims against Defendant  
26 WHOLE FOODS MARKET CALIFORNIA, INC. in this action are limited to Products sold  
27 under the "365 Everyday Value" brand.

28           15. Defendant MRS. GOOCH'S NATURAL FOOD MARKETS, INC. is a

1 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.  
2 Defendant MRS. GOOCH'S NATURAL FOOD MARKETS, INC. manufactures, distributes,  
3 and/or sells the Products for sale and consumption in California. CEH's claims against  
4 Defendant MRS. GOOCH'S NATURAL FOOD MARKETS, INC. in this action are limited to  
5 Products sold under the "365 Everyday Value" brand.

6 16. DOES 1 through 200 are each a person in the course of doing business  
7 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 200 manufacture,  
8 distribute, and/or sell the Products for sale and consumption in California.

9 17. The true names of DOES 1 through 200 are unknown to CEH at this time.  
10 When their identities are ascertained, the Complaint shall be amended to reflect their true names.

11 18. The defendants identified in paragraphs 5 through 15 and DOES 1 through  
12 200 are collectively referred to herein as "Defendants."

### 13 JURISDICTION AND VENUE

14 19. The Court has jurisdiction over this action pursuant to Health & Safety  
15 Code § 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant  
16 to California Constitution Article VI, Section 10, because this case is a cause not given by statute  
17 to other trial courts.

18 20. This Court has jurisdiction over Defendants because each is a business  
19 entity that does sufficient business, has sufficient minimum contacts in California, or otherwise  
20 intentionally avails itself of the California market through the sale, marketing, or use of the  
21 Products in California and/or by having such other contacts with California so as to render the  
22 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair  
23 play and substantial justice.

24 21. Venue is proper in Alameda County Superior Court because one or more of  
25 the violations arise in the County of Alameda.

### 26 BACKGROUND FACTS

27 22. The People of the State of California have declared by initiative under  
28 Proposition 65 their right "[t]o be informed about exposures to chemicals that cause cancer, birth

1 defects, or other reproductive harm.” Proposition 65, § 1(b).

2           23. To effectuate this goal, Proposition 65 prohibits exposing people to  
3 chemicals listed by the State of California as known to cause cancer, birth defects, or other  
4 reproductive harm above certain levels without a “clear and reasonable warning” unless the  
5 business responsible for the exposure can prove that it fits within a statutory exemption. Health  
6 & Safety Code § 25249.6 states, in pertinent part:

7                   No person in the course of doing business shall knowingly and  
8 intentionally expose any individual to a chemical known to the  
9 state to cause cancer or reproductive toxicity without first giving  
clear and reasonable warning to such individual. . .

10           24. On January 1, 1990, the State of California officially listed acrylamide as a  
11 chemical known to cause cancer. On January 1, 1991, one year after it was listed as a chemical  
12 known to cause cancer, acrylamide became subject to the clear and reasonable warning  
13 requirement regarding carcinogens under Proposition 65. 27 California Code of Regulations  
14 (“C.C.R.”) § 27001(b); Health & Safety Code § 25249.10(b). Acrylamide’s listing as a known  
15 carcinogen is well supported by numerous scientific studies establishing a link between  
16 acrylamide exposure and cancer. *See generally* Beland, F., *et al.*, “Carcinogenicity of acrylamide  
17 in B6C3F1 mice and F344/N rats from a 2-year drinking water exposure,” *Food & Chemical*  
18 *Toxicology* (2013) Vol 51:149; World Health Organization International Agency for Research  
19 on Cancer, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans* (1994) Vol.  
20 60:389; Vogt, R., *et al.*, “Cancer and non-cancer health effects from food contaminant exposures  
21 for children and adults in California: a risk assessment,” *Environmental Health* (2012) Vol.  
22 11:83.

23           25. Acrylamide is found in cigarette smoke and is produced industrially for  
24 use in products such as plastics, grouts, water treatment products, and cosmetics. Acrylamide is  
25 also found in certain food products, including the Products at issue. Acrylamide is formed when  
26 the Products are cooked at high temperatures. The problem of acrylamide in food products first  
27 came to light in 2002 when researchers at the Swedish National Food Agency and Stockholm  
28 University reported finding acrylamide in a variety of fried and baked foods. Since then,

1 numerous government reports and academic studies have confirmed the presence of high levels  
2 of acrylamide in certain foods, including the Products. *See, e.g.*, U.S. Food and Drug  
3 Administration (“FDA”), “Survey Data on Acrylamide in Food: Individual Food Products,”  
4 publicly available online at [http://www.fda.gov/Food/  
5 FoodborneIllnessContaminants/ChemicalContaminants/ucm053549.htm](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053549.htm) (updated July 2006);  
6 FDA, “Survey Data on Acrylamide in Food: Total Diet Study Results,” publicly available online  
7 at [http://www.fda.gov/Food/FoodborneIllnessContaminants/  
8 ucm053566.htm](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053566.htm) (updated October 2006).

9           26. Defendants’ Products contain sufficient quantities of acrylamide such that  
10 consumers, including children, who consume the Products are exposed to acrylamide. The route  
11 of exposure for the violations is direct ingestion when consumers eat the Products. These  
12 exposures occur in homes, schools, workplaces, and everywhere else throughout California  
13 where the products are consumed.

14           27. No clear and reasonable warning is provided with the Products regarding  
15 the carcinogenic hazards of acrylamide.

16           28. Any person acting in the public interest has standing to enforce violations  
17 of Proposition 65 provided that such person has supplied the requisite public enforcers with a  
18 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the  
19 action within such time. Health & Safety Code § 25249.7(d).

20           29. More than sixty days prior to naming each Defendant in this lawsuit, CEH  
21 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General,  
22 the District Attorneys of every county in California, the City Attorneys of every California city  
23 with a population greater than 750,000, and to each of the named Defendants. In compliance  
24 with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the  
25 following information: (1) the name and address of each violator; (2) the statute violated; (3) the  
26 time period during which violations occurred; (4) specific descriptions of the violations,  
27 including (a) the routes of exposure to acrylamide from the Products, and (b) the specific type of  
28 Products sold and used in violation of Proposition 65; and (5) the name of the specific

1 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

2           30. CEH also sent a Certificate of Merit for each Notice to the California  
3 Attorney General, the District Attorneys of every county in California, the City Attorneys of  
4 every California city with a population greater than 750,000, and to each of the named  
5 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each  
6 Certificate certified that CEH's counsel: (1) has consulted with one or more persons with  
7 relevant and appropriate experience or expertise who reviewed facts, studies, or other data  
8 regarding the exposures to acrylamide alleged in each Notice; and (2) based on the information  
9 obtained through such consultations, believes that there is a reasonable and meritorious case for a  
10 citizen enforcement action based on the facts alleged in each Notice. In compliance with Health  
11 & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the Attorney  
12 General included factual information – provided on a confidential basis – sufficient to establish  
13 the basis for the Certificate, including the identity of the person(s) consulted by CEH's counsel  
14 and the facts, studies, or other data reviewed by such persons.

15           31. None of the public prosecutors with the authority to prosecute violations  
16 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against  
17 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each  
18 of CEH's Notices.

19           32. Defendants both know and intend that individuals, including children, will  
20 consume the Products, thus exposing them to acrylamide.

21           33. Under Proposition 65, an exposure is “knowing” where the party  
22 responsible for such exposure has:

23                   knowledge of the fact that a[n] . . . exposure to a chemical listed  
24                   pursuant to [Health & Safety Code § 25249.8(a)] is occurring. No  
25                   knowledge that the . . . exposure is unlawful is required.

26 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final  
27 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,  
28 § 12601).

34. As companies that manufacture, import, distribute, and/or sell the Products



1 for use in the California marketplace, Defendants know or should know that the Products contain  
2 acrylamide and that individuals who consume the Products will be exposed to acrylamide. The  
3 acrylamide exposures to consumers who consume the Products are a natural and foreseeable  
4 consequence of Defendants' placing the Products into the stream of commerce.

5 35. Defendants have been informed of the acrylamide in their Products by the  
6 60-Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

7 36. Defendants also have constructive knowledge that their Products contain  
8 acrylamide due to the widespread media coverage concerning the problem of acrylamide in food  
9 products in general.

10 37. Nevertheless, Defendants continue to expose consumers, including  
11 children, to acrylamide without prior clear and reasonable warnings regarding the carcinogenic  
12 hazards of acrylamide.

13 38. CEH has engaged in good-faith efforts to resolve the claims alleged herein  
14 prior to filing this Complaint.

15 39. Any person "violating or threatening to violate" Proposition 65 may be  
16 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to  
17 violate" is defined to mean "to create a condition in which there is a substantial probability that a  
18 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil  
19 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

20 **FIRST CAUSE OF ACTION**

21 **(Violations of the Health & Safety Code § 25249.6)**

22 40. CEH realleges and incorporates by reference as if specifically set forth  
23 herein Paragraphs 1 through 39, inclusive.

24 41. By placing the Products into the stream of commerce, each Defendant is a  
25 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.

26 42. Acrylamide is a chemical listed by the State of California as known to  
27 cause cancer.

28 43. Each Defendant knows that average use of the Products will expose users

1 of its Products to acrylamide. Each Defendant intends that its Products be used in a manner that  
2 results in exposures to acrylamide from the Products.

3 44. Defendants have failed, and continue to fail, to provide clear and  
4 reasonable warnings regarding the carcinogenicity of acrylamide to users of the Products.

5 45. By committing the acts alleged above, Defendants have at all times  
6 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing  
7 individuals to acrylamide without first giving clear and reasonable warnings to such individuals  
8 regarding the carcinogenicity of acrylamide.

9 Wherefore, CEH prays for judgment against Defendants, as set forth hereafter.

10 **PRAYER FOR RELIEF**

11 Wherefore, CEH prays for judgment against Defendants as follows:

12 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess  
13 civil penalties against each of the Defendants in the amount of \$2,500 per day for each violation  
14 of Proposition 65 according to proof;

15 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),  
16 preliminarily and permanently enjoin Defendants from offering Products for sale in  
17 California without providing prior clear and reasonable warnings, as CEH shall specify in further  
18 application to the Court;

19 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order  
20 Defendants to take action to stop ongoing unwarned exposures to acrylamide resulting from use  
21 of Products sold by Defendants, as CEH shall specify in further application to the Court;

22 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other  
23 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and  
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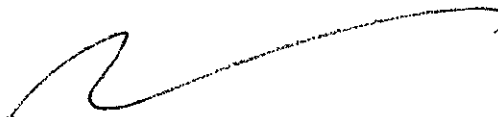
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5. That the Court grant such other and further relief as may be just and proper.

Dated: November 10, 2016

Respectfully submitted,

LEXINGTON LAW GROUP



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Howard Hirsch  
Attorneys for Plaintiff  
CENTER FOR ENVIRONMENTAL HEALTH