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CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

NOV 10 2016

CLERK OF THE SUPERIOR COURT
By JANE THOMAS
JANE THOMAS, Deputy

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

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

14 Plaintiff,)

15 v.)

16 SNIKIDDY, LLC; BRISTOL FARMS;)
17 DIEFFENBACH'S POTATO CHIPS, INC.;)
18 ONE POTATO SNACKS, LLC; DISHAKA)
LLC; THE FRENCH'S FOOD COMPANY,)
19 LLC; GELSON'S MARKETS; GOOD)
HEALTH NATURAL PRODUCTS, INC.;)
20 GREAT AMERICAN FOODS, INC.;)
INVENTURE FOODS, INC.; THE KROGER)
21 CO.; RALPHS GROCERY COMPANY;)
SAFEWAY, INC.; SAVE MART)
22 SUPERMARKETS; SUNFLOWER FARMERS)
MARKETS, LLC; UTZ QUALITY FOODS,)
23 INC.; WAL-MART STORES, INC.; and DOES)
1 through 200, inclusive,)

24 Defendants.)

Case No. RG16838609

**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' fried or baked
9 potato or sweet potato based snack foods (the "Products"). Consumers, including children, are
10 exposed to acrylamide when they consume the Products.

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

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

22 PARTIES

23 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
24 non-profit corporation dedicated to protecting the public from environmental health hazards and
25 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the
26 State of California. CEH is a "person" within the meaning of Health & Safety Code
27 § 25249.11(a) and brings this enforcement action in the public interest pursuant to Health &
28 Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy

1 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
2 cases have resulted in significant public benefit, including the reformulation of thousands of
3 products to remove toxic chemicals and to make them safer. CEH also provides information to
4 Californians about the health risks associated with exposure to hazardous substances, where
5 manufacturers and other responsible parties fail to do so.

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

9 6. Defendant BRISTOL FARMS is a person in the course of doing business
10 within the meaning of Health & Safety Code § 25249.11. Defendant BRISTOL FARMS
11 manufactures, distributes, and/or sells the Products for sale and consumption in California.
12 CEH's claims against Defendant BRISTOL FARMS in this action are limited to Products sold by
13 Defendant INVENTURE FOODS, INC.

14 7. Defendant DIEFFENBACH'S POTATO CHIPS, INC. is a person in the
15 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant
16 DIEFFENBACH'S POTATO CHIPS, INC. manufactures, distributes, and/or sells the Products
17 for sale and consumption in California.

18 8. Defendant ONE POTATO SNACKS, LLC is a person in the course of
19 doing business within the meaning of Health & Safety Code § 25249.11. Defendant ONE
20 POTATO SNACKS, LLC manufactures, distributes, and/or sells the Products for sale and
21 consumption in California.

22 9. Defendant DISHAKA LLC is a person in the course of doing business
23 within the meaning of Health & Safety Code § 25249.11. Defendant DISHAKA LLC
24 manufactures, distributes, and/or sells the Products for sale and consumption in California.

25 10. Defendant THE FRENCH'S FOOD COMPANY, LLC is a person in the
26 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant
27 THE FRENCH'S FOOD COMPANY, LLC manufactures, distributes, and/or sells the Products
28 for sale and consumption in California.

1 11. Defendant GELSON'S MARKETS is a person in the course of doing
2 business within the meaning of Health & Safety Code § 25249.11. Defendant GELSON'S
3 MARKETS manufactures, distributes, and/or sells the Products for sale and consumption in
4 California. CEH's claims against Defendant GELSON'S MARKETS in this action are limited to
5 Products sold by Defendant GOOD HEALTH NATURAL PRODUCTS, INC.

6 12. Defendant GOOD HEALTH NATURAL PRODUCTS, INC. is a person in
7 the course of doing business within the meaning of Health & Safety Code § 25249.11.
8 Defendant GOOD HEALTH NATURAL PRODUCTS, INC. manufactures, distributes, and/or
9 sells the Products for sale and consumption in California.

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

14 14. Defendant INVENTURE FOODS, INC. is a person in the course of doing
15 business within the meaning of Health & Safety Code § 25249.11. Defendant INVENTURE
16 FOODS, INC. manufactures, distributes, and/or sells the Products for sale and consumption in
17 California.

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

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

28 17. Defendant SAFEWAY, INC. is a person in the course of doing business

1 within the meaning of Health & Safety Code § 25249.11. Defendant SAFEWAY, INC.
2 manufactures, distributes, and/or sells the Products for sale and consumption in California.
3 CEH's claims against Defendant SAFEWAY, INC. in this action are limited to Products sold by
4 Defendant GREAT AMERICAN FOODS, INC., and to Products sold under the "Open Nature"
5 brand.

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

12 19. Defendant SUNFLOWER FARMERS MARKETS, LLC is a person in the
13 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant
14 SUNFLOWER FARMERS MARKETS, LLC manufactures, distributes, and/or sells the Products
15 for sale and consumption in California. CEH's claims against Defendant SUNFLOWER
16 FARMERS MARKETS, LLC in this action are limited to Products sold by Defendants
17 SNIKIDDY, LLC; DIEFFENBACH'S POTATO CHIPS, INC.; and ONE POTATO SNACKS,
18 LLC; and to Products sold under the "Sprouts" brand.

19 20. Defendant UTZ QUALITY FOODS, INC. is a person in the course of
20 doing business within the meaning of Health & Safety Code § 25249.11. Defendant UTZ
21 QUALITY FOODS, INC. manufactures, distributes, and/or sells the Products for sale and
22 consumption in California.

23 21. Defendant WAL-MART STORES, INC. is a person in the course of doing
24 business within the meaning of Health & Safety Code § 25249.11. Defendant WAL-MART
25 STORES, INC. manufactures, distributes, and/or sells the Products for sale and consumption in
26 California. CEH's claims against Defendant WAL-MART STORES, INC. in this action are
27 limited to Products sold by Defendant UTZ QUALITY FOODS, INC.

28 22. DOES 1 through 200 are each a person in the course of doing business

1 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 200 manufacture,
2 distribute, and/or sell the Products for sale and consumption in California.

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

5 24. The defendants identified in paragraphs 5 through 21 and DOES 1 through
6 200 are collectively referred to herein as “Defendants.”

7 JURISDICTION AND VENUE

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

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

18 27. Venue is proper in Alameda County Superior Court because one or more of
19 the violations arise in the County of Alameda.

20 BACKGROUND FACTS

21 28. The People of the State of California have declared by initiative under
22 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
23 defects, or other reproductive harm.” Proposition 65, § 1(b).

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

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

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

18 31. Acrylamide is found in cigarette smoke and is produced industrially for
19 use in products such as plastics, grouts, water treatment products, and cosmetics. Acrylamide is
20 also found in certain food products, including the Products at issue. Acrylamide is formed during
21 the manufacturing process when the Products are cooked at high temperatures. The problem of
22 acrylamide in food products first came to light in 2002 when researchers at the Swedish National
23 Food Agency and Stockholm University reported finding acrylamide in a variety of fried and
24 baked foods. Since then, numerous government reports and academic studies have confirmed the
25 presence of high levels of acrylamide in certain foods, including the Products. *See, e.g.*, U.S.
26 Food and Drug Administration (“FDA”), “Survey Data on Acrylamide in Food: Individual Food
27 Products,” publicly available online at [http://www.fda.gov/Food/
28 FoodborneIllnessContaminants/ChemicalContaminants/ucm053549.htm](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053549.htm) (updated July 2006);
FDA, “Survey Data on Acrylamide in Food: Total Diet Study Results,” publicly available online

1 at [http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053566.htm)
2 [ucm053566.htm](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053566.htm) (updated October 2006).

3 32. Defendants' Products contain sufficient quantities of acrylamide such that
4 consumers, including children, who consume the Products are exposed to acrylamide. The route
5 of exposure for the violations is direct ingestion when consumers eat the Products. These
6 exposures occur in homes, schools, workplaces, and everywhere else throughout California
7 where the products are consumed.

8 33. No clear and reasonable warning is provided with the Products regarding
9 the carcinogenic hazards of acrylamide.

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

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

24 36. CEH also sent a Certificate of Merit for each Notice to the California
25 Attorney General, the District Attorneys of every county in California, the City Attorneys of
26 every California city with a population greater than 750,000, and to each of the named
27 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each
28 Certificate certified that CEH's counsel: (1) has consulted with one or more persons with

1 relevant and appropriate experience or expertise who reviewed facts, studies, or other data
2 regarding the exposures to acrylamide alleged in each Notice; and (2) based on the information
3 obtained through such consultations, believes that there is a reasonable and meritorious case for a
4 citizen enforcement action based on the facts alleged in each Notice. In compliance with Health
5 & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the Attorney
6 General included factual information – provided on a confidential basis – sufficient to establish
7 the basis for the Certificate, including the identity of the person(s) consulted by CEH’s counsel
8 and the facts, studies, or other data reviewed by such persons.

9 37. None of the public prosecutors with the authority to prosecute violations
10 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
11 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each
12 of CEH’s Notices.

13 38. Defendants both know and intend that individuals, including children, will
14 consume the Products, thus exposing them to acrylamide.

15 39. Under Proposition 65, an exposure is “knowing” where the party
16 responsible for such exposure has:

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

20 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
21 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
22 § 12601).

23 40. As companies that manufacture, import, distribute, and/or sell the Products
24 for use in the California marketplace, Defendants know or should know that the Products contain
25 acrylamide and that individuals who consume the Products will be exposed to acrylamide. The
26 acrylamide exposures to consumers who consume the Products are a natural and foreseeable
27 consequence of Defendants’ placing the Products into the stream of commerce.

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

1 individuals to acrylamide without first giving clear and reasonable warnings to such individuals
2 regarding the carcinogenicity of acrylamide.

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

4 **PRAYER FOR RELIEF**

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

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

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

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

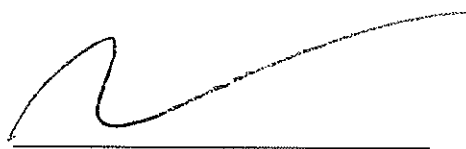
16 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
17 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

18 5. That the Court grant such other and further relief as may be just and
19 proper.

20
21 Dated: November 10, 2016

Respectfully submitted,

22 LEXINGTON LAW GROUP

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26 Howard Hirsch
27 Attorneys for Plaintiff
28 CENTER FOR ENVIRONMENTAL HEALTH