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Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

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

Plaintiff,)

v.)

RESER'S FINE FOODS, INC.; SAVE MART)
SUPERMARKETS; KF WHOLESALE LLC;)
WAL-MART STORES, INC.; UNIFIED)
GROCERS, INC.; MI PUEBLO, LLC; and)
DOES 1 through 300, inclusive,)

Defendants.)

Case No. RG17851466

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

(Other)

ENDORSED
FILED
ALAMEDA COUNTY

MAR 02 2017

CLERK OF THE SUPERIOR COURT
By *Janie Thomas*
JANIE THOMAS, Deputy

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 two types of food products: (i)
9 hash brown potato products, including but not limited to hash browns, hash brown patties, tater
10 tots, and tater puffs (the “Hash Brown Products”); and (ii) french-fried potatoes (the “French Fry
11 Products”). Hash Brown Products and French Fry Products are collectively referred to herein as
12 “Products.” Consumers, including children, are exposed to acrylamide when they consume the
13 Products.

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

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

25 **PARTIES**

26 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH (“CEH”) is a
27 non-profit corporation dedicated to protecting the public from environmental health hazards and
28 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the

1 State of California. CEH is a “person” within the meaning of Health & Safety Code
2 § 25249.11(a) and brings this enforcement action in the public interest pursuant to Health &
3 Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
4 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
5 cases have resulted in significant public benefit, including the reformulation of thousands of
6 products to remove toxic chemicals and to make them safer. CEH also provides information to
7 Californians about the health risks associated with exposure to hazardous substances, where
8 manufacturers and other responsible parties fail to do so.

9 5. Defendant RESER’S FINE FOODS, INC. is a person in the course of
10 doing business within the meaning of Health & Safety Code § 25249.11. Defendant RESER’S
11 FINE FOODS, INC. manufactures, distributes, and/or sells Hash Brown Products for sale and
12 consumption in California.

13 6. Defendant SAVE MART SUPERMARKETS is a person in the course of
14 doing business within the meaning of Health & Safety Code § 25249.11. Defendant SAVE
15 MART SUPERMARKETS manufactures, distributes, and/or sells Hash Brown Products for sale
16 and consumption in California. CEH’s allegations and claims against Defendant SAVE MART
17 SUPERMARKETS in this action are limited to Hash Brown Products sold by Defendant
18 RESER’S FINE FOODS, INC.

19 7. Defendant KF WHOLESALE LLC is a person in the course of doing
20 business within the meaning of Health & Safety Code § 25249.11. Defendant KF WHOLESALE
21 LLC manufactures, distributes, and/or sells Hash Brown Products for sale and consumption in
22 California.

23 8. 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 Hash Brown Products for sale and
26 consumption in California. CEH’s allegations and claims against Defendant WAL-MART
27 STORES, INC. in this action are limited to Hash Brown Products sold by Defendant KF
28 WHOLESALE LLC

1 9. Defendant UNIFIED GROCERS, INC. is a person in the course of doing
2 business within the meaning of Health & Safety Code § 25249.11. Defendant UNIFIED
3 GROCERS, INC. manufactures, distributes, and/or sells French Fry Products for sale and
4 consumption in California.

5 10. Defendant MI PUEBLO, LLC is a person in the course of doing business
6 within the meaning of Health & Safety Code § 25249.11. Defendant MI PUEBLO, LLC
7 manufactures, distributes, and/or sells French Fry Products for sale and consumption in
8 California. CEH’s allegations and claims against Defendant MI PUEBLO, LLC in this action are
9 limited to French Fry Products sold by Defendant UNIFIED GROCERS, INC.

10 11. DOES 1 through 100 are each a person in the course of doing business
11 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 100 manufacture,
12 distribute, and/or sell Hash Brown Products for sale and consumption in California. Defendants
13 RESER’S FINE FOODS, INC.; SAVE MART SUPERMARKETS; KF WHOLESALE LLC;
14 WAL-MART STORES, INC.; and DOES 1 through 100 are collectively referred to herein as
15 “Hash Brown Products Defendants.”

16 12. DOES 101 through 200 are each a person in the course of doing business
17 within the meaning of Health & Safety Code § 25249.11. DOES 101 through 200 manufacture,
18 distribute, and/or sell French Fry Products for sale and consumption in California. Defendants
19 UNIFIED GROCERS, INC.; MI PUEBLO, LLC; and DOES 101 through 200 are collectively
20 referred to herein as “French Fry Products Defendants.”

21 13. DOES 201 through 300 are each a person in the course of doing business
22 within the meaning of Health & Safety Code § 25249.11. DOES 201 through 300 manufacture,
23 distribute, and/or sell Hash Brown Products and French Fry Products for sale and consumption in
24 California.

25 14. The true names of DOES 1 through 300 are either unknown to CEH at this
26 time or the applicable time period before which CEH may file a Proposition 65 action has not
27 run. When their identities are ascertained or the applicable time period before which CEH may
28 file a Proposition 65 action has run, the Complaint shall be amended to reflect their true names.

1 15. The defendants identified in paragraphs 5 through 10 and DOES 1 through
2 300 are collectively referred to herein as “Defendants.”

3 **JURISDICTION AND VENUE**

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

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

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

16 **BACKGROUND FACTS**

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

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

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

21. On January 1, 1990, the State of California officially listed acrylamide as a

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

13 22. Acrylamide is found in cigarette smoke and is produced industrially for
14 use in products such as plastics, grouts, water treatment products, and cosmetics. Acrylamide is
15 also found in certain food products, including the Products at issue. Acrylamide is formed when
16 the Products are cooked at high temperatures. The problem of acrylamide in food products first
17 came to light in 2002 when researchers at the Swedish National Food Agency and Stockholm
18 University reported finding acrylamide in a variety of fried and baked foods. Since then,
19 numerous government reports and academic studies have confirmed the presence of high levels
20 of acrylamide in certain foods, including the Products. *See, e.g.*, U.S. Food and Drug
21 Administration (“FDA”), “Survey Data on Acrylamide in Food: Individual Food Products,”
22 publicly available online at [http://www.fda.gov/food/foodborneillnesscontaminants/
23 chemicalcontaminants/ucm053549.htm](http://www.fda.gov/food/foodborneillnesscontaminants/chemicalcontaminants/ucm053549.htm) (updated July 2006); FDA, “Survey Data on Acrylamide
24 in Food: Total Diet Study Results,” publicly available online at [http://www.fda.gov/
25 food/foodborneillnesscontaminants/chemicalcontaminants/ucm053566.htm](http://www.fda.gov/food/foodborneillnesscontaminants/chemicalcontaminants/ucm053566.htm) (updated October
26 2006).

27 23. Defendants’ Products contain sufficient quantities of acrylamide such that
28 consumers, including children, who consume the Products are exposed to acrylamide. The route

1 of exposure for the violations is direct ingestion when consumers eat the Products. These
2 exposures occur in homes, schools, workplaces, and everywhere else throughout California
3 where the products are consumed.

4 24. No clear and reasonable warning is provided with the Products regarding
5 the carcinogenic hazards of acrylamide.

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

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

20 27. CEH also sent a Certificate of Merit for each Notice to the California
21 Attorney General, to the District Attorneys of every county in California, to the City Attorneys of
22 every California city with a population greater than 750,000, and to each of the named
23 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each
24 Certificate certified that CEH’s counsel: (1) has consulted with one or more persons with
25 relevant and appropriate experience or expertise who reviewed facts, studies, or other data
26 regarding the exposures to acrylamide alleged in each Notice; and (2) based on the information
27 obtained through such consultations, believes that there is a reasonable and meritorious case for a
28 citizen enforcement action based on the facts alleged in each Notice. In compliance with Health

1 & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the Attorney
2 General included factual information – provided on a confidential basis – sufficient to establish
3 the basis for the Certificate, including the identity of the person(s) consulted by CEH’s counsel
4 and the facts, studies, or other data reviewed by such persons.

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

9 29. Defendants both know and intend that individuals, including children, will
10 consume the Products, thus exposing them to acrylamide.

11 30. Under Proposition 65, an exposure is “knowing” where the party
12 responsible for such exposure has:

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

16 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
17 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
18 § 12601).

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

24 32. Defendants have been informed of the acrylamide in their Products by the
25 60-Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

26 33. Defendants also have constructive knowledge that their Products contain
27 acrylamide due to the widespread media coverage concerning the problem of acrylamide in food
28 products in general.

 34. Nevertheless, Defendants continue to expose consumers, including

1 children, to acrylamide without prior clear and reasonable warnings regarding the carcinogenic
2 hazards of acrylamide.

3 35. CEH has engaged in good-faith efforts to resolve the claims alleged herein
4 prior to filing this Complaint.

5 36. Any person “violating or threatening to violate” Proposition 65 may be
6 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. “Threaten to
7 violate” is defined to mean “to create a condition in which there is a substantial probability that a
8 violation will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
9 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

10 **FIRST CAUSE OF ACTION**
11 **(Violations of Health & Safety Code § 25249.6)**
12 **(Against Hash Brown Products Defendants)**

13 37. CEH realleges and incorporates by reference as if specifically set forth
14 herein Paragraphs 1 through 36, inclusive.

15 38. By placing the Hash Brown Products into the stream of commerce, Hash
16 Brown Products Defendants are each a person in the course of doing business within the meaning
17 of Health & Safety Code § 25249.11.

18 39. Acrylamide is a chemical listed by the State of California as known to
19 cause cancer.

20 40. Each Hash Brown Products Defendant knows that average use of the Hash
21 Brown Products will expose users of its Hash Brown Products to acrylamide. Each Hash Brown
22 Products Defendant intends that its Hash Brown Products be used in a manner that results in
23 exposures to acrylamide from the Hash Brown Products.

24 41. Hash Brown Products Defendants have failed, and continue to fail, to
25 provide clear and reasonable warnings regarding the carcinogenicity of acrylamide to users of the
26 Hash Brown Products.

27 42. By committing the acts alleged above, Hash Brown Products Defendants
28 have at all times relevant to this Complaint violated Proposition 65 by knowingly and
intentionally exposing individuals to acrylamide without first giving clear and reasonable

1 warnings to such individuals regarding the carcinogenicity of acrylamide.

2 Wherefore, CEH prays for judgment against Hash Brown Products Defendants, as
3 set forth hereafter.

4 **SECOND CAUSE OF ACTION**
5 **(Violations of Health & Safety Code § 25249.6)**
6 **(Against French Fry Products Defendants)**

7 43. CEH realleges and incorporates by reference as if specifically set forth
8 herein Paragraphs 1 through 42, inclusive.

9 44. By placing the French Fry Products into the stream of commerce, French
10 Fry Products Defendants are each a person in the course of doing business within the meaning of
11 Health & Safety Code § 25249.11.

12 45. Acrylamide is a chemical listed by the State of California as known to
13 cause cancer.

14 46. Each French Fry Products Defendant knows that average use of the French
15 Fry Products will expose users of its French Fry Products to acrylamide. Each French Fry
16 Products Defendant intends that its French Fry Products be used in a manner that results in
17 exposures to acrylamide from the French Fry Products.

18 47. French Fry Products Defendants have failed, and continue to fail, to
19 provide clear and reasonable warnings regarding the carcinogenicity of acrylamide to users of the
20 French Fry Products.

21 48. By committing the acts alleged above, French Fry Products Defendants
22 have at all times relevant to this Complaint violated Proposition 65 by knowingly and
23 intentionally exposing individuals to acrylamide without first giving clear and reasonable
24 warnings to such individuals regarding the carcinogenicity of acrylamide.

25 Wherefore, CEH prays for judgment against French Fry Products Defendants, as
26 set forth hereafter.

27 **PRAYER FOR RELIEF**

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

1. That the Court, pursuant to Health & Safety Code § 25249.7(a),

1 preliminarily and permanently enjoin Defendants from offering Products for sale in
2 California without providing prior clear and reasonable warnings, as CEH shall specify in further
3 application to the Court;

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

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

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

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

14
15 Dated: March 2, 2017

Respectfully submitted,

LEXINGTON LAW GROUP

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20 Howard Hirsch
21 Attorneys for Plaintiff
22 CENTER FOR ENVIRONMENTAL HEALTH
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