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CENTER FOR ENVIRONMENTAL HEALTH

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

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

Plaintiff,)

v.)

SNACK INNOVATIONS INC.; BFY)
BRANDS, INC.; MEDORA SNACKS, LLC;)
BIG LOTS, INC.; BIG LOTS STORES, INC.;)
HOMEGOODS, INC.; NATUREBOX, INC.;)
HERR FOODS INC.; JET.COM, INC.;)
TARGET CORPORATION; WISE FOODS,)
INC.; WARNOCK FOOD PRODUCTS, INC.;)
POPPY INDUSTRIES CANADA INC.;)
RALEY'S; THE H.T. HACKNEY CO.; UNCLE)
RAYS, LLC; and DOES 1 through 200,)
inclusive,)

Defendants.)

FILED BY FAX
ALAMEDA COUNTY

April 03, 2017

CLERK OF
THE SUPERIOR COURT
By Burt Moskaira, Deputy

CASE NUMBER:

RG17851470

Case No. RG 17-851470

**FIRST AMENDED 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, thereby exposing consumers of their Products, many of whom are
17 children, to 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 SNACK INNOVATIONS INC. is a person in the course of
7 doing business within the meaning of Health & Safety Code § 25249.11. Defendant SNACK
8 INNOVATIONS INC. manufactures, distributes, and/or sells the Products for sale and
9 consumption in California.

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

13 7. Defendant MEDORA SNACKS, LLC is a person in the course of doing
14 business within the meaning of Health & Safety Code § 25249.11. Defendant MEDORA
15 SNACKS, LLC manufactures, distributes, and/or sells the Products for sale and consumption in
16 California.

17 8. Defendant BIG LOTS, INC. is a person in the course of doing business
18 within the meaning of Health & Safety Code § 25249.11. Defendant BIG LOTS, INC.
19 manufactures, distributes, and/or sells the Products for sale and consumption in California.
20 CEH's allegations and claims against Defendant BIG LOTS, INC. in this action are limited to
21 Products sold by Defendants BFY BRANDS, INC., MEDORA SNACKS, LLC, and SNACK
22 INNOVATIONS INC., and to Products sold under the "Fresh Finds" brand.

23 9. Defendant BIG LOTS STORES, INC. is a person in the course of doing
24 business within the meaning of Health & Safety Code § 25249.11. Defendant BIG LOTS
25 STORES, INC. manufactures, distributes, and/or sells the Products for sale and consumption in
26 California. CEH's allegations and claims against Defendant BIG LOTS STORES, INC. in this
27 action are limited to Products sold by Defendants BFY BRANDS, INC., MEDORA SNACKS,
28 LLC, and SNACK INNOVATIONS INC., and to Products sold under the "Fresh Finds" brand.

1 10. Defendant HOMEGOODS, INC. is a person in the course of doing
2 business within the meaning of Health & Safety Code § 25249.11. Defendant HOMEGOODS,
3 INC. manufactures, distributes, and/or sells the Products for sale and consumption in California.
4 CEH’s allegations and claims against Defendant HOMEGOODS, INC. in this action are limited
5 to Products sold by Defendant SNACK INNOVATIONS INC.

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

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

12 13. Defendant JET.COM, INC. is a person in the course of doing business
13 within the meaning of Health & Safety Code § 25249.11. Defendant JET.COM, INC.
14 manufactures, distributes, and/or sells the Products for sale and consumption in California.
15 CEH’s allegations and claims against Defendant JET.COM, INC. in this action are limited to
16 Products sold by Snikiddy, LLC, Utz Quality Foods, Inc., and Defendants HERR FOODS INC.,
17 THE H.T. HACKNEY CO., and UNCLE RAYS, LLC.

18 14. Defendant TARGET CORPORATION is a person in the course of doing
19 business within the meaning of Health & Safety Code § 25249.11. Defendant TARGET
20 CORPORATION manufactures, distributes, and/or sells the Products for sale and consumption
21 in California. CEH’s allegations and claims against Defendant TARGET CORPORATION in
22 this action are limited to Products sold by Defendant WISE FOODS, INC. and to Products sold
23 under the “Archer Farms” and “Simply Balanced” brands.

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

27 16. Defendant WARNOCK FOOD PRODUCTS, INC. is a person in the
28 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant

1 WARNOCK FOOD PRODUCTS, INC. manufactures, distributes, and/or sells the Products for
2 sale and consumption in California.

3 17. Defendant POPPY INDUSTRIES CANADA INC. is a person in the
4 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant
5 POPPY INDUSTRIES CANADA INC. manufactures, distributes, and/or sells the Products for
6 sale and consumption in California.

7 18. Defendant RALEY’S is a person in the course of doing business within the
8 meaning of Health & Safety Code § 25249.11. Defendant RALEY’S manufactures, distributes,
9 and/or sells the Products for sale and consumption in California. CEH’s allegations and claims
10 against Defendant RALEY’S in this action are limited to Products under the “Raley’s” brand.

11 19. Defendant THE H.T. HACKNEY CO. is a person in the course of doing
12 business within the meaning of Health & Safety Code § 25249.11. Defendant THE H.T.
13 HACKNEY CO. manufactures, distributes, and/or sells the Products for sale and consumption in
14 California.

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

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

21 22. The true names of DOES 1 through 200 are either unknown to CEH at this
22 time or the applicable time period before which CEH may file a Proposition 65 action has not
23 run. When their identities are ascertained or the applicable time period before which CEH may
24 file a Proposition 65 action has run, the Complaint shall be amended to reflect their true names.

25 23. The defendants identified in paragraphs 5 through 20 and DOES 1 through
26 200 are collectively referred to herein as “Defendants.”

27 **JURISDICTION AND VENUE**

28 24. The Court has jurisdiction over this action pursuant to Health & Safety

1 carcinogen is well supported by numerous scientific studies establishing a link between
2 acrylamide exposure and cancer. *See generally* Beland, F., *et al.*, “Carcinogenicity of acrylamide
3 in B6C3F1 mice and F344/N rats from a 2-year drinking water exposure,” *Food & Chemical*
4 *Toxicology* (2013) Vol 51:149; World Health Organization International Agency for Research
5 on Cancer, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans* (1994) Vol.
6 60:389; Vogt, R., *et al.*, “Cancer and non-cancer health effects from food contaminant exposures
7 for children and adults in California: a risk assessment,” *Environmental Health* (2012) Vol.
8 11:83.

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

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

28 32. No clear and reasonable warning is provided with the Products regarding

1 the carcinogenic hazards of acrylamide.

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

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

16 35. CEH also sent a Certificate of Merit for each Notice to the California
17 Attorney General, to the District Attorneys of every county in California, to the City Attorneys of
18 every California city with a population greater than 750,000, and to each of the named
19 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each
20 Certificate certified that CEH’s counsel: (1) has consulted with one or more persons with
21 relevant and appropriate experience or expertise who reviewed facts, studies, or other data
22 regarding the exposures to acrylamide alleged in each Notice; and (2) based on the information
23 obtained through such consultations, believes that there is a reasonable and meritorious case for a
24 citizen enforcement action based on the facts alleged in each Notice. In compliance with Health
25 & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the Attorney
26 General included factual information – provided on a confidential basis – sufficient to establish
27 the basis for the Certificate, including the identity of the person(s) consulted by CEH’s counsel
28 and the facts, studies, or other data reviewed by such persons.

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

5 37. Defendants both know and intend that individuals, including children, will
6 consume the Products, thus exposing them to acrylamide.

7 38. Under Proposition 65, an exposure is “knowing” where the party
8 responsible for such exposure has:

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

12 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
13 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
14 § 12601).

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

20 40. Defendants have been informed of the acrylamide in their Products by the
21 60-Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

22 41. Defendants also have constructive knowledge that their Products contain
23 acrylamide due to the widespread media coverage concerning the problem of acrylamide in food
24 products in general.

25 42. Nevertheless, Defendants continue to expose consumers, including
26 children, to acrylamide without prior clear and reasonable warnings regarding the carcinogenic
27 hazards of acrylamide.

28 43. CEH has engaged in good-faith efforts to resolve the claims alleged herein
prior to filing this Complaint.

1 application to the Court;

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

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

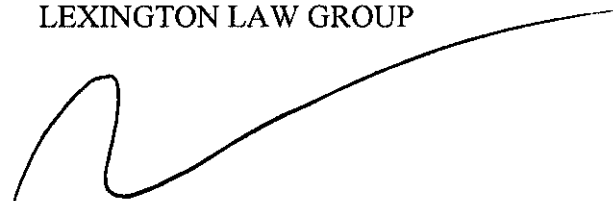
8 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
9 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

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

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13 Dated: April 3, 2017

Respectfully submitted,

14 LEXINGTON LAW GROUP



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17 _____
18 Howard Hirsch
19 Attorneys for Plaintiff
20 CENTER FOR ENVIRONMENTAL HEALTH
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