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From: Lexington Law Group

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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.)

SNIKIDDY, LLC; BRISTOL FARMS;)
DIEFFENBACH'S POTATO CHIPS, INC.;)
DISHAKA LLC; THE FRENCH'S FOOD)
COMPANY, LLC; GELSON'S MARKETS;)
GOOD HEALTH NATURAL PRODUCTS,)
INC.; GREAT AMERICAN FOODS, INC.;)
INVENTURE FOODS, INC.; THE KROGER)
CO.; RALPHS GROCERY COMPANY;)
SAFEWAY, INC.; SAVE MART)
SUPERMARKETS; SUNFLOWER FARMERS)
MARKETS, LLC; UTZ QUALITY FOODS,)
INC.; WAL-MART STORES, INC.; SIMPLY 7)
SNACKS, LLC; and DOES 2 through 200,)
inclusive,)

Defendants.)

FILED BY FAX

ALAMEDA COUNTY

April 11, 2017

CLERK OF
THE SUPERIOR COURT
By Alicia Espinoza, Deputy

CASE NUMBER:

RG16838609

Case No. RG 16-838609

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

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

25 10. Defendant GELSON'S MARKETS is a person in the course of doing
26 business within the meaning of Health & Safety Code § 25249.11. Defendant GELSON'S
27 MARKETS manufactures, distributes, and/or sells the Products for sale and consumption in
28 California. CEH's claims against Defendant GELSON'S MARKETS in this action are limited to

1 Products sold by Defendant GOOD HEALTH NATURAL PRODUCTS, INC.

2 11. Defendant GOOD HEALTH NATURAL PRODUCTS, INC. is a person in
3 the course of doing business within the meaning of Health & Safety Code § 25249.11.

4 Defendant GOOD HEALTH NATURAL PRODUCTS, INC. manufactures, distributes, and/or
5 sells the Products for sale and consumption in California.

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

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

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

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

24 16. Defendant SAFEWAY, INC. is a person in the course of doing business
25 within the meaning of Health & Safety Code § 25249.11. Defendant SAFEWAY, INC.
26 manufactures, distributes, and/or sells the Products for sale and consumption in California.
27 CEH's claims against Defendant SAFEWAY, INC. in this action are limited to Products sold by
28 Defendants GREAT AMERICAN FOODS, INC. and SIMPLY 7 SNACKS, LLC, and to

1 Products sold under the “Open Nature” brand.

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

8 18. Defendant SUNFLOWER FARMERS MARKETS, LLC is a person in the
9 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant
10 SUNFLOWER FARMERS MARKETS, LLC manufactures, distributes, and/or sells the Products
11 for sale and consumption in California. CEH’s claims against Defendant SUNFLOWER
12 FARMERS MARKETS, LLC in this action are limited to Products sold by Defendants
13 SNIKIDDY, LLC and DIEFFENBACH’S POTATO CHIPS, INC., and to Products sold under
14 the “Sprouts” brand.

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

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

24 21. Defendant SIMPLY 7 SNACKS, LLC is a person in the course of doing
25 business within the meaning of Health & Safety Code § 25249.11. Defendant SIMPLY 7
26 SNACKS, LLC manufactures, distributes, and/or sells the Products for sale and consumption in
27 California.

28 22. DOES 2 through 200 are each a person in the course of doing business

1 business responsible for the exposure can prove that it fits within a statutory exemption. Health
2 & Safety Code § 25249.6 states, in pertinent part:

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

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

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

1 [ChemicalContaminants/ucm053549.htm](http://www.fda.gov/ChemicalContaminants/ucm053549.htm) (updated July 2006); FDA, “Survey Data on Acrylamide
2 in Food: Total Diet Study Results,” publicly available online at [http://www.fda.gov/Food/
3 FoodborneIllnessContaminants/ChemicalContaminants/ucm053566.htm](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053566.htm) (updated October
4 2006).

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

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

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

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

26 36. CEH also sent a Certificate of Merit for each Notice to the California
27 Attorney General, the District Attorneys of every county in California, the City Attorneys of
28 every California city with a population greater than 750,000, and to each of the named

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

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

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

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

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

22 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
23 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
24 § 12601).

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

