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CENTER FOR ENVIRONMENTAL HEALTH

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
THINK FOOD GROUP LLC; HAITAI, INC.; )  
HAITAI USA, INC.; JET.COM, INC.; KEHE )  
DISTRIBUTORS, INC.; KEHE )  
DISTRIBUTORS, LLC; KEHE ENTERPRISES, )  
LLC; MCCLURE'S PICKLES L.L.C.; )  
NUGGET MARKET, INC.; SHEARER'S )  
FOODS, LLC; BARREL O'FUN SNACK )  
FOODS CO., LLC; WALGREEN CO.; WAL- )  
MART STORES, INC.; WAL-MART.COM )  
USA LLC; TARGET CORPORATION; and )  
DOES 1 through 200, inclusive, )  
 )  
Defendants. )

**FILED BY FAX**  
ALAMEDA COUNTY  
December 22, 2017  
CLERK OF  
THE SUPERIOR COURT  
By Burt Moskaira, Deputy  
CASE NUMBER:  
**RG17881940**

Case No. RG 17-881940  
**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 State  
7 of California to cause cancer. Such exposures have occurred, and continue to occur, through the  
8 manufacture, distribution, sale, and consumption of Defendants' fried or baked potato or sweet  
9 potato based snack foods (the "Products"). Consumers are exposed to acrylamide when they  
10 consume the Products.

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

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

#### 21 **PARTIES**

22 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a non-profit  
23 corporation dedicated to protecting the public from environmental health hazards and toxic  
24 exposures. CEH is based in Oakland, California and incorporated under the laws of the State of  
25 California. CEH is a "person" within the meaning of Health & Safety Code § 25249.11(a) and  
26 brings this enforcement action in the public interest pursuant to Health & Safety Code §  
27 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group that has  
28 prosecuted a large number of Proposition 65 cases in the public interest. These cases have

1 resulted in significant public benefit, including the reformulation of thousands of products to  
2 remove toxic chemicals and to make them safer. CEH also provides information to Californians  
3 about the health risks associated with exposure to hazardous substances, where manufacturers and  
4 other responsible parties fail to do so.

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

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

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

15 8. Defendant JET.COM, INC. is a person in the course of doing business within the  
16 meaning of Health & Safety Code § 25249.11. Defendant JET.COM, INC. manufactures,  
17 distributes, and/or sells Products for sale and consumption in California. CEH's allegations and  
18 claims against Defendant JET.COM, INC. in this action are limited to Products sold under the  
19 "Great Value" and "Magic" brands.

20 9. Defendant KEHE DISTRIBUTORS, INC. is a person in the course of doing  
21 business within the meaning of Health & Safety Code § 25249.11. Defendant KEHE  
22 DISTRIBUTORS, INC. manufactures, distributes, and/or sells Products for sale and consumption  
23 in California. CEH's allegations and claims against Defendant KEHE DISTRIBUTORS, INC. in  
24 this action are limited to Products sold under the "Sage Valley" brand.

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

1 in California. CEH’s allegations and claims against Defendant KEHE DISTRIBUTORS, LLC in  
2 this action are limited to Products sold under the “Sage Valley” brand.

3 11. Defendant KEHE ENTERPRISES, LLC is a person in the course of doing  
4 business within the meaning of Health & Safety Code § 25249.11. Defendant KEHE  
5 ENTERPRISES, LLC manufactures, distributes, and/or sells Products for sale and consumption  
6 in California. CEH’s allegations and claims against Defendant KEHE ENTERPRISES, LLC in  
7 this action are limited to Products sold under the “Sage Valley” brand.

8 12. Defendant MCCLURE’S PICKLES L.L.C. is a person in the course of doing  
9 business within the meaning of Health & Safety Code § 25249.11. Defendant MCCLURE’S  
10 PICKLES L.L.C. manufactures, distributes, and/or sells Products for sale and consumption in  
11 California.

12 13. Defendant NUGGET MARKET, INC. is a person in the course of doing business  
13 within the meaning of Health & Safety Code § 25249.11. Defendant NUGGET MARKET, INC.  
14 manufactures, distributes, and/or sells Products for sale and consumption in California. CEH’s  
15 allegations and claims against Defendant NUGGET MARKET, INC. in this action are limited to  
16 Products sold by Patatas Fritas Torres S.L. and Defendant THINK FOOD GROUP LLC.

17 14. Defendant SHEARER’S FOODS, LLC is a person in the course of doing business  
18 within the meaning of Health & Safety Code § 25249.11. Defendant SHEARER’S FOODS, LLC  
19 manufactures, distributes, and/or sells Products for sale and consumption in California.

20 15. Defendant BARREL O’FUN SNACK FOODS CO., LLC is a person in the course  
21 of doing business within the meaning of Health & Safety Code § 25249.11. Defendant BARREL  
22 O’FUN SNACK FOODS CO., LLC manufactures, distributes, and/or sells Products for sale and  
23 consumption in California.

24 16. Defendant WALGREEN CO. is a person in the course of doing business within  
25 the meaning of Health & Safety Code § 25249.11. Defendant WALGREEN CO. manufactures,  
26 distributes, and/or sells Products for sale and consumption in California. CEH’s allegations and  
27 claims against Defendant WALGREEN CO. in this action are limited to Products sold under the  
28 “Good & Delish” brand.

1           17. Defendant WAL-MART STORES, INC. is a person in the course of doing  
2 business within the meaning of Health & Safety Code § 25249.11. Defendant WAL-MART  
3 STORES, INC. manufactures, distributes, and/or sells Products for sale and consumption in  
4 California. CEH’s allegations and claims against Defendant WAL-MART STORES, INC. in this  
5 action are limited to Products sold under the “Great Value” brand.

6           18. Defendant WAL-MART.COM USA LLC is a person in the course of doing  
7 business within the meaning of Health & Safety Code § 25249.11. Defendant WAL-  
8 MART.COM USA LLC manufactures, distributes, and/or sells Products for sale and consumption  
9 in California. CEH’s allegations and claims against Defendant WAL-MART.COM USA LLC in  
10 this action are limited to Products sold by Defendants HAITAI, INC. and HAITAI USA, INC.

11           19. Defendant TARGET CORPORATION is a person in the course of doing business  
12 within the meaning of Health & Safety Code § 25249.11. Defendant TARGET CORPORATION  
13 manufactures, distributes, and/or sells Products for sale and consumption in California. CEH’s  
14 allegations and claims against Defendant TARGET CORPORATION in this action are limited to  
15 Products sold under the “Sage Valley” brand.

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

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

23           22. The defendants identified in paragraphs 5 through 19 and DOES 1 through 200 are  
24 collectively referred to herein as “Defendants.”

### **JURISDICTION AND VENUE**

25  
26           23. The Court has jurisdiction over this action pursuant to Health & Safety Code §  
27 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to  
28

1 California Constitution Article VI, Section 10, because this case is a cause not given by statute to  
2 other trial courts.

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

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

### 11 **BACKGROUND FACTS**

12 26. The People of the State of California have declared by initiative under Proposition  
13 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or  
14 other reproductive harm.” Proposition 65, § 1(b).

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

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

23 28. On January 1, 1990, the State of California officially listed acrylamide as a  
24 chemical known to cause cancer. On January 1, 1991, one year after it was listed as a chemical  
25 known to cause cancer, acrylamide became subject to the clear and reasonable warning  
26 requirement regarding carcinogens under Proposition 65. 27 California Code of Regulations  
27 (“C.C.R.”) § 27001(b); Health & Safety Code § 25249.10(b). Acrylamide’s listing as a known  
28 carcinogen is well supported by numerous scientific studies establishing a link between

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

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

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

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

28

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

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

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

28



1           35.     None of the public prosecutors with the authority to prosecute violations of  
2 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           36.     Defendants both know and intend that individuals will consume the Products, thus  
6 exposing them to acrylamide.

7           37.     Under Proposition 65, an exposure is "knowing" where the party responsible for  
8 such exposure has:

9                     knowledge of the fact that a[n] . . . exposure to a chemical listed pursuant  
10                     to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that  
11                     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           38.     As companies that manufacture, import, distribute, and/or sell the Products for use  
16 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 eat the Products are a natural and foreseeable  
19 consequence of Defendants' placing the Products into the stream of commerce.

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

22           40.     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, and due to published data confirming the presence of high levels of  
25 acrylamide in the Products in particular.

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

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



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

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

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

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

Dated: December 22, 2017

Respectfully submitted,

LEXINGTON LAW GROUP



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Joseph Mann  
Attorneys for Plaintiff  
CENTER FOR ENVIRONMENTAL HEALTH