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CENTER FOR ENVIRONMENTAL HEALTH

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,

Plaintiff,

v.

AMY'S KITCHEN, INC.; TARGET
CORPORATION; and DOES 1 through 200,
inclusive,

Defendants.

Case No. RG-17872000

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

(Other)

RECEIVED
FILED
ALAMEDA COUNTY
AUG 17 2017
CLERK OF SUPERIOR COURT
By: D. COLIER Dandy

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 Amy's Tofu Scramble (the "Product").
9 Consumers are exposed to acrylamide when they eat the Product.

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

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

20 **PARTIES**

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

1 remove toxic chemicals and to make them safer. CEH also provides information to Californians
2 about the health risks associated with exposure to hazardous substances, where manufacturers and
3 other responsible parties fail to do so.

4 5. Defendant AMY'S KITCHEN, INC. is a person in the course of doing business
5 within the meaning of Health & Safety Code § 25249.11. Defendant AMY'S KITCHEN, INC.
6 manufactures, distributes, and/or sells the Product for sale and consumption in California.

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

10 7. DOES 1 through 200 are each a person in the course of doing business within the
11 meaning of Health & Safety Code § 25249.11. Does 1 through 200 manufacture, distribute,
12 and/or sell the Product for sale and consumption in California.

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

15 9. The defendants identified in paragraphs 5 through 6 and DOES 1 through 200 are
16 collectively referred to herein as "Defendants."

17 **JURISDICTION AND VENUE**

18 10. The Court has jurisdiction over this action pursuant to Health & Safety Code §
19 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
20 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
21 other trial courts.

22 11. This Court has jurisdiction over Defendants because each is a business entity that
23 does sufficient business, has sufficient minimum contacts in California, or otherwise intentionally
24 avails itself of the California market through the sale, marketing, or use of the Product in
25 California and/or by having such other contacts with California so as to render the exercise of
26 jurisdiction over it by the California courts consistent with traditional notions of fair play and
27 substantial justice.

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

16 17. Defendants’ Product contains sufficient quantities of acrylamide such that
17 consumers who eat the Product are exposed to acrylamide. The route of exposure for the
18 violations is direct ingestion when consumers eat the Product. These exposures occur in homes,
19 schools, workplaces, and everywhere else throughout California where the Product is consumed.

20 18. No clear and reasonable warning is provided with the Product regarding the
21 carcinogenic hazards of acrylamide.

22 19. Any person acting in the public interest has standing to enforce violations of
23 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
24 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
25 within such time. Health & Safety Code § 25249.7(d).

26 20. More than sixty days prior to naming each Defendant in this lawsuit, CEH
27 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General, to
28 the District Attorneys of every county in California, to the City Attorneys of every California city

1 with a population greater than 750,000, and to each of the named Defendants. In compliance with
2 Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
3 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
4 time period during which violations occurred; (4) specific descriptions of the violations, including
5 (a) the routes of exposure to acrylamide from the Product, and (b) the name of the Product sold
6 and used in violation of Proposition 65; and (5) the name of the specific Proposition 65-listed
7 chemical that is the subject of the violations described in each Notice.

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

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

25 23. Defendants both know and intend that individuals will consume the Product, thus
26 exposing them to acrylamide.

27 24. Under Proposition 65, an exposure is “knowing” where the party responsible for
28 such exposure has:

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

3 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
4 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
5 § 12601).

6 25. As companies that manufacture, import, distribute, and/or sell the Product for use
7 in the California marketplace, Defendants know or should know that the Product contains
8 acrylamide and that individuals who consume the Product will be exposed to acrylamide. The
9 acrylamide exposures to consumers who consume the Product are a natural and foreseeable
10 consequence of Defendants’ placing the Product into the stream of commerce.

11 26. Defendants have been informed of the acrylamide in the Product by the 60-Day
12 Notice of Violation and accompanying Certificate of Merit served on them by CEH.

13 27. Defendants also have constructive knowledge that the Product contains acrylamide
14 due to the widespread media coverage concerning the problem of acrylamide in food products in
15 general.

16 28. Nevertheless, Defendants continue to expose consumers to acrylamide without
17 prior clear and reasonable warnings regarding the carcinogenic hazards of acrylamide.

18 29. CEH has engaged in good-faith efforts to resolve the claims alleged herein prior to
19 filing this Complaint.

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

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1 **FIRST CAUSE OF ACTION**

2 **(Violations of Health & Safety Code § 25249.6)**

3 31. CEH realleges and incorporates by reference as if specifically set forth herein
4 Paragraphs 1 through 30, inclusive.

5 32. By placing the Product into the stream of commerce, each Defendant is a person in
6 the course of doing business within the meaning of Health & Safety Code § 25249.11.

7 33. Acrylamide is a chemical listed by the State of California as known to cause
8 cancer.

9 34. Each Defendant knows that average use of the Product will expose users of the
10 Product to acrylamide. Each Defendant intends that the Product be used in a manner that results
11 in exposures to acrylamide from the Product.

12 35. Defendants have failed, and continue to fail, to provide clear and reasonable
13 warnings regarding the carcinogenicity of acrylamide to users of the Product.

14 36. By committing the acts alleged above, Defendants have at all times relevant to this
15 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to
16 acrylamide without first giving clear and reasonable warnings to such individuals regarding the
17 carcinogenicity of acrylamide.

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

19 **PRAYER FOR RELIEF**

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

21 1. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and
22 permanently enjoin Defendants from offering the Product for sale in California without providing
23 prior clear and reasonable warnings, as CEH shall specify in further application to the Court;

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

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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: August 17, 2017

Respectfully submitted,

LEXINGTON LAW GROUP



Ryan Berghoff
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH