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ENDORSED
FILED
ALAMEDA COUNTY

MAR 02 2017

CLERK OF THE SUPERIOR COURT
By Janet Thomas
JANET THOMAS, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11

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

14 Plaintiff,)

15 v.)

16 SNACK INNOVATIONS INC.; BFY)
17 BRANDS, INC.; MEDORA SNACKS, LLC;)
18 BIG LOTS, INC.; BIG LOTS STORES, INC.;)
19 HOMEGOODS, INC.; NATUREBOX, INC.;)
and DOES 1 through 200, inclusive,)

20 Defendants.)
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Case No. RG17851470

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

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

16 14. The defendants identified in paragraphs 5 through 11 and DOES 1 through
17 200 are collectively referred to herein as “Defendants.”

18 **JURISDICTION AND VENUE**

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

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

1 17. Venue is proper in Alameda County Superior Court because one or more of
 2 the violations arise in the County of Alameda.

3 **BACKGROUND FACTS**

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

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

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

15 20. On January 1, 1990, the State of California officially listed acrylamide as a
 16 chemical known to cause cancer. On January 1, 1991, one year after it was listed as a chemical
 17 known to cause cancer, acrylamide became subject to the clear and reasonable warning
 18 requirement regarding carcinogens under Proposition 65. 27 California Code of Regulations
 19 (“C.C.R.”) § 27001(b); Health & Safety Code § 25249.10(b). Acrylamide’s listing as a known
 20 carcinogen is well supported by numerous scientific studies establishing a link between
 21 acrylamide exposure and cancer. *See generally* Beland, F., *et al.*, “Carcinogenicity of acrylamide
 22 in B6C3F1 mice and F344/N rats from a 2-year drinking water exposure,” *Food & Chemical*
 23 *Toxicology* (2013) Vol 51:149; World Health Organization International Agency for Research
 24 on Cancer, *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans* (1994) Vol.
 25 60:389; Vogt, R., *et al.*, “Cancer and non-cancer health effects from food contaminant exposures
 26 for children and adults in California: a risk assessment,” *Environmental Health* (2012) Vol.
 27 11:83.

28 21. Acrylamide is found in cigarette smoke and is produced industrially for

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

14 22. Defendants’ Products contain sufficient quantities of acrylamide such that
15 consumers, including children, who consume the Products are exposed to acrylamide. The route
16 of exposure for the violations is direct ingestion when consumers eat the Products. These
17 exposures occur in homes, schools, workplaces, and everywhere else throughout California
18 where the products are consumed.

19 23. No clear and reasonable warning is provided with the Products regarding
20 the carcinogenic hazards of acrylamide.

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

25 25. More than sixty days prior to naming each Defendant in this lawsuit, CEH
26 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General, to
27 the District Attorneys of every county in California, to the City Attorneys of every California city
28 with a population greater than 750,000, and to each of the named Defendants. In compliance

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

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

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

24 28. Defendants both know and intend that individuals, including children, will
25 consume the Products, thus exposing them to acrylamide.

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

28 knowledge of the fact that a[n] . . . exposure to a chemical listed

1 pursuant to [Health & Safety Code § 25249.8(a)] is occurring. No
2 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 30. As companies that manufacture, import, distribute, and/or sell the Products
7 for use in the California marketplace, Defendants know or should know that the Products contain
8 acrylamide and that individuals who consume the Products will be exposed to acrylamide. The
9 acrylamide exposures to consumers who consume the Products are a natural and foreseeable
10 consequence of Defendants’ placing the Products into the stream of commerce.

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

13 32. Defendants also have constructive knowledge that their Products contain
14 acrylamide due to the widespread media coverage concerning the problem of acrylamide in food
15 products in general.

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

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

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

26 **FIRST CAUSE OF ACTION**

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

28 36. CEH realleges and incorporates by reference as if specifically set forth

1 herein Paragraphs 1 through 35, inclusive.

2 37. By placing the Products into the stream of commerce, each Defendant is a
3 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.

4 38. Acrylamide is a chemical listed by the State of California as known to
5 cause cancer.

6 39. Each Defendant knows that average use of the Products will expose users
7 of its Products to acrylamide. Each Defendant intends that its Products be used in a manner that
8 results in exposures to acrylamide from the Products.

9 40. Defendants have failed, and continue to fail, to provide clear and
10 reasonable warnings regarding the carcinogenicity of acrylamide to users of the Products.

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

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

16 **PRAYER FOR RELIEF**

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

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

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

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

28 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other

1 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

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

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5 Dated: March 2, 2017

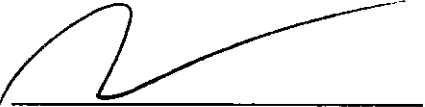
Respectfully submitted,

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LEXINGTON LAW GROUP

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Howard Hirsch
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

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