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Attorneys for Plaintiff  
CENTER FOR ENVIRONMENTAL HEALTH

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,

Plaintiff,

v.

BISCOMERICA CORP.; D.F. STAUFFER  
BISCUIT CO. INC.; DOLLAR TREE STORES,  
INC.; GREENBRIER INTERNATIONAL, INC.;  
INTERAMERICAN FOODS CORPORATION;  
PRODUCTOS ALIMENTICIOS LA MODERNA,  
S.A DE C.V.; INTERMEX FOODS  
CORPORATION; PAGASA, S.A. DE C.V.;  
KELLOGG USA INC.; KELLOGG SALES  
COMPANY; ORIENTAL TRADING  
COMPANY, INC.; OTC DIRECT, INC.;  
SAFEWAY INC.; VALLARTA FOOD  
ENTERPRISES, INC.; WAL-MART STORES,  
INC.; WAL-MART.COM USA LLC; and DOES  
I through 200, inclusive,

Defendants.

**FILED BY FAX**  
ALAMEDA COUNTY

November 09, 2017

CLERK OF  
THE SUPERIOR COURT  
By Alicia Espinoza, Deputy

CASE NUMBER:  
**RG17881931**

Case No. \_\_\_\_\_

**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' animal crackers (the  
9 "Products"). Consumers, including children, are exposed to acrylamide when they eat the  
10 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 BISCOMERICA CORP. is a person in the course of doing business  
6 within the meaning of Health & Safety Code § 25249.11. Defendant BISCOMERICA CORP.  
7 manufactures, distributes, and/or sells the Products for sale and consumption in California.

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

12         7. Defendant DOLLAR TREE STORES, INC. is a person in the course of doing  
13 business within the meaning of Health & Safety Code § 25249.11. Defendant DOLLAR TREE  
14 STORES, INC. manufactures, distributes, and/or sells the Products for sale and consumption in  
15 California. CEH's claims against Defendant DOLLAR TREE STORES, INC. in this action are  
16 limited to Products sold by Defendants INTERMEX FOODS CORPORATION and PAGASA,  
17 S.A. DE C.V.

18         8. Defendant GREENBRIER INTERNATIONAL, INC. is a person in the course of  
19 doing business within the meaning of Health & Safety Code § 25249.11. Defendant  
20 GREENBRIER INTERNATIONAL, INC. manufactures, distributes, and/or sells the Products for  
21 sale and consumption in California. CEH's claims against Defendant GREENBRIER  
22 INTERNATIONAL, INC. in this action are limited to Products sold by Defendants INTERMEX  
23 FOODS CORPORATION and PAGASA, S.A. DE C.V.

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

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1           10. Defendant PRODUCTOS ALIMENTICIOS LA MODERNA, S.A DE C.V. is a  
2 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.  
3 Defendant PRODUCTOS ALIMENTICIOS LA MODERNA, S.A DE C.V. manufactures,  
4 distributes, and/or sells the Products for sale and consumption in California.

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

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

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

15           14. Defendant KELLOGG SALES COMPANY is a person in the course of doing  
16 business within the meaning of Health & Safety Code § 25249.11. Defendant KELLOGG  
17 SALES COMPANY manufactures, distributes, and/or sells the Products for sale and consumption  
18 in California.

19           15. Defendant ORIENTAL TRADING COMPANY, INC. is a person in the course of  
20 doing business within the meaning of Health & Safety Code § 25249.11. Defendant ORIENTAL  
21 TRADING COMPANY, INC. manufactures, distributes, and/or sells the Products for sale and  
22 consumption in California. CEH's claims against Defendant ORIENTAL TRADING  
23 COMPANY, INC. in this action are limited to Products sold by Jewel Confections LLC.

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

1           17. Defendant SAFEWAY INC. is a person in the course of doing business within the  
2 meaning of Health & Safety Code § 25249.11. Defendant SAFEWAY INC. manufactures,  
3 distributes, and/or sells the Products for sale and consumption in California. CEH's claims  
4 against Defendant SAFEWAY INC. in this action are limited to Products sold by Defendants  
5 KELLOGG USA INC. and KELLOGG SALES COMPANY.

6           18. Defendant VALLARTA FOOD ENTERPRISES, INC. is a person in the course of  
7 doing business within the meaning of Health & Safety Code § 25249.11. Defendant  
8 VALLARTA FOOD ENTERPRISES, INC. manufactures, distributes, and/or sells the Products  
9 for sale and consumption in California. CEH's claims against Defendant VALLARTA FOOD  
10 ENTERPRISES, INC. in this action are limited to Products sold by Defendants  
11 INTERAMERICAN FOODS CORPORATION and PRODUCTOS ALIMENTICIOS LA  
12 MODERNA, S.A DE C.V.

13           19. Defendant WAL-MART STORES, INC. is a person in the course of doing  
14 business within the meaning of Health & Safety Code § 25249.11. Defendant WAL-MART  
15 STORES, INC. manufactures, distributes, and/or sells the Products for sale and consumption in  
16 California. CEH's claims against Defendant WAL-MART STORES, INC. in this action are  
17 limited to Products sold by Defendant D.F. STAUFFER BISCUIT CO. INC.

18           20. Defendant WAL-MART.COM USA, LLC is a person in the course of doing  
19 business within the meaning of Health & Safety Code § 25249.11. Defendant WAL-  
20 MART.COM USA LLC manufactures, distributes, and/or sells the Products for sale and  
21 consumption in California. CEH's claims against Defendant WAL-MART.COM USA LLC in  
22 this action are limited to Products sold by Sam Mills USA, LLC.

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

26           22. The true names of DOES 1 through 200 are either unknown to CEH at this time or  
27 the applicable time period before which CEH may file a Proposition 65 action has not run. When  
28

1 their identities are ascertained or the applicable time period before which CEH may file a  
2 Proposition 65 action has run, the Complaint shall be amended to reflect their true names.

3 23. The defendants identified in paragraphs 5 through 20 and DOES 1 through 200 are  
4 collectively referred to herein as "Defendants."

### 5 JURISDICTION AND VENUE

6 24. The Court has jurisdiction over this action pursuant to Health & Safety Code §  
7 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to  
8 California Constitution Article VI, Section 10, because this case is a cause not given by statute to  
9 other trial courts.

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

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

### 18 BACKGROUND FACTS

19 27. The People of the State of California have declared by initiative under Proposition  
20 65 their right "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or  
21 other reproductive harm." Proposition 65, § 1(b).

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

27 No person in the course of doing business shall knowingly and  
28 intentionally expose any individual to a chemical known to the state to

1                   cause cancer or reproductive toxicity without first giving clear and  
2                   reasonable warning to such individual. . .

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

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

1           31. Defendants' Products contain sufficient quantities of acrylamide such that  
2 consumers who eat the Products are thereby exposed to acrylamide. The route of exposure for the  
3 violations is direct ingestion when consumers eat the Products. These exposures occur in homes,  
4 schools, workplaces, and everywhere else throughout California where the Products are  
5 consumed.

6           32. No clear and reasonable warning is provided with the Products regarding the  
7 carcinogenic hazards of acrylamide.

8           33. Any person acting in the public interest has standing to enforce violations of  
9 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid  
10 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action  
11 within such time. Health & Safety Code § 25249.7(d).

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

22           35. CEH also sent a Certificate of Merit for each Notice to the California Attorney  
23 General, to the District Attorneys of every county in California, to the City Attorneys of every  
24 California city with a population greater than 750,000, and to each of the named Defendants. In  
25 compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate  
26 certified that CEH's counsel: (1) has consulted with one or more persons with relevant and  
27 appropriate experience or expertise who reviewed facts, studies, or other data regarding the  
28 exposures to acrylamide alleged in each Notice; and (2) based on the information obtained



1 through such consultations, believes that there is a reasonable and meritorious case for a citizen  
2 enforcement action based on the facts alleged in each Notice. In compliance with Health &  
3 Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the Attorney General  
4 included factual information – provided on a confidential basis – sufficient to establish the basis  
5 for the Certificate, including the identity of the person(s) consulted by CEH’s counsel and the  
6 facts, studies, or other data reviewed by such persons.

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

11 37. Defendants both know and intend that individuals will consume the Products, thus  
12 exposing them to acrylamide.

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

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

17 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final  
18 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,  
19 § 12601).

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

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

27 41. Defendants also have constructive knowledge that the Products contain acrylamide  
28 due to the widespread media coverage concerning the problem of acrylamide in food products in

1 general, and due to published data confirming the presence of high levels of acrylamide in the  
2 Products in particular.

3 42. Nevertheless, Defendants continue to expose consumers to acrylamide without  
4 prior clear and reasonable warnings regarding the carcinogenic hazards of acrylamide.

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

7 44. Any person "violating or threatening to violate" Proposition 65 may be enjoined in  
8 any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is  
9 defined to mean "to create a condition in which there is a substantial probability that a violation  
10 will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not  
11 to exceed \$2,500 per day for each violation of Proposition 65.

#### 12 **FIRST CAUSE OF ACTION**

##### 13 **(Violations of Health & Safety Code § 25249.6)**

14 45. CEH realleges and incorporates by reference as if specifically set forth herein  
15 Paragraphs 1 through 44, inclusive.

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

18 47. Acrylamide is a chemical listed by the State of California as known to cause  
19 cancer.

20 48. Each Defendant knows that average use of the Products will expose users of the  
21 Products to acrylamide. Each Defendant intends that the Products be used in a manner that  
22 results in exposures to acrylamide from the Products.

23 49. Defendants have failed, and continue to fail, to provide clear and reasonable  
24 warnings regarding the carcinogenicity of acrylamide to users of the Products.

25 50. By committing the acts alleged above, Defendants have at all times relevant to this  
26 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to  
27 acrylamide without first giving clear and reasonable warnings to such individuals regarding the  
28 carcinogenicity of acrylamide.

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

**PRAYER FOR RELIEF**

Wherefore, CEH prays for judgment against Defendants as follows:

- 1. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin Defendants from offering the Products for sale in California without providing prior clear and reasonable warnings, as CEH shall specify in further application to the Court;
- 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 the 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: November 9, 2017

Respectfully submitted,

LEXINGTON LAW GROUP

  
 \_\_\_\_\_  
 Joseph Mann  
 Attorneys for Plaintiff  
 CENTER FOR ENVIRONMENTAL HEALTH