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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.)

RESER'S FINE FOODS, INC.; SAVE MART)
SUPERMARKETS; KF WHOLESALE LLC;)
WAL-MART STORES, INC.; UNIFIED)
GROCERS, INC.; MI PUEBLO, LLC; MR.)
DEE'S, INC.; SMART & FINAL STORES,)
INC.; SMART & FINAL STORES LLC; and)
DOES 1 through 300, inclusive,)

Defendants.)

FILED BY FAX
ALAMEDA COUNTY

April 06, 2017

CLERK OF
THE SUPERIOR COURT
By Burt Moskaira, Deputy

CASE NUMBER:

RG17851466

Case No. RG 17-851466

**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 two types of food products: (i)
9 hash brown potato products, including but not limited to hash browns, hash brown patties, tater
10 tots, and tater puffs (the “Hash Brown Products”); and (ii) french-fried potatoes (the “French Fry
11 Products”). Hash Brown Products and French Fry Products are collectively referred to herein as
12 “Products.” Consumers, including children, are exposed to acrylamide when they consume the
13 Products.

14 2. Under California’s Proposition 65, Health & Safety Code § 25249.5, *et*
15 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
16 to chemicals known to the State to cause cancer, birth defects, or other reproductive harm
17 without providing clear and reasonable warnings to individuals prior to their exposure.
18 Defendants introduce Products contaminated with significant quantities of acrylamide into the
19 California marketplace, thereby exposing consumers of their Products, many of whom are
20 children, to acrylamide.

21 3. Despite the fact that Defendants expose children and other consumers to
22 acrylamide, Defendants provide no warnings whatsoever about the carcinogenic hazards
23 associated with acrylamide exposure. Defendants’ conduct thus violates the warning provision
24 of Proposition 65. Health & Safety Code § 25249.6.

25 **PARTIES**

26 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH (“CEH”) is a
27 non-profit corporation dedicated to protecting the public from environmental health hazards and
28 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the

1 State of California. CEH is a “person” within the meaning of Health & Safety Code
2 § 25249.11(a) and brings this enforcement action in the public interest pursuant to Health &
3 Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
4 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
5 cases have resulted in significant public benefit, including the reformulation of thousands of
6 products to remove toxic chemicals and to make them safer. CEH also provides information to
7 Californians about the health risks associated with exposure to hazardous substances, where
8 manufacturers and other responsible parties fail to do so.

9 5. Defendant RESER’S FINE FOODS, INC. is a person in the course of
10 doing business within the meaning of Health & Safety Code § 25249.11. Defendant RESER’S
11 FINE FOODS, INC. manufactures, distributes, and/or sells Hash Brown Products for sale and
12 consumption in California.

13 6. Defendant SAVE MART SUPERMARKETS is a person in the course of
14 doing business within the meaning of Health & Safety Code § 25249.11. Defendant SAVE
15 MART SUPERMARKETS manufactures, distributes, and/or sells Hash Brown Products for sale
16 and consumption in California. CEH’s allegations and claims against Defendant SAVE MART
17 SUPERMARKETS in this action are limited to Hash Brown Products sold by Defendant
18 RESER’S FINE FOODS, INC.

19 7. Defendant KF WHOLESALE LLC is a person in the course of doing
20 business within the meaning of Health & Safety Code § 25249.11. Defendant KF WHOLESALE
21 LLC manufactures, distributes, and/or sells Hash Brown Products for sale and consumption in
22 California.

23 8. Defendant WAL-MART STORES, INC. is a person in the course of doing
24 business within the meaning of Health & Safety Code § 25249.11. Defendant WAL-MART
25 STORES, INC. manufactures, distributes, and/or sells Hash Brown Products for sale and
26 consumption in California. CEH’s allegations and claims against Defendant WAL-MART
27 STORES, INC. in this action are limited to Hash Brown Products sold by Defendant KF
28 WHOLESALE LLC

1 9. Defendant UNIFIED GROCERS, INC. is a person in the course of doing
2 business within the meaning of Health & Safety Code § 25249.11. Defendant UNIFIED
3 GROCERS, INC. manufactures, distributes, and/or sells French Fry Products for sale and
4 consumption in California.

5 10. Defendant MI PUEBLO, LLC is a person in the course of doing business
6 within the meaning of Health & Safety Code § 25249.11. Defendant MI PUEBLO, LLC
7 manufactures, distributes, and/or sells French Fry Products for sale and consumption in
8 California. CEH's allegations and claims against Defendant MI PUEBLO, LLC in this action are
9 limited to French Fry Products sold by Defendant UNIFIED GROCERS, INC.

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

14 12. Defendant SMART & FINAL STORES, INC. is a person in the course of
15 doing business within the meaning of Health & Safety Code § 25249.11. Defendant SMART &
16 FINAL STORES, INC. manufactures, distributes, and/or sells Hash Brown Products for sale and
17 consumption in California. CEH's allegations and claims against Defendant SMART & FINAL
18 STORES, INC. in this action are limited to Hash Brown Products sold by Defendant MR.
19 DEE'S, INC.

20 13. Defendant SMART & FINAL STORES LLC is a person in the course of
21 doing business within the meaning of Health & Safety Code § 25249.11. Defendant SMART &
22 FINAL STORES LLC manufactures, distributes, and/or sells Hash Brown Products for sale and
23 consumption in California. CEH's allegations and claims against Defendant SMART & FINAL
24 STORES LLC in this action are limited to Hash Brown Products sold by Defendant MR. DEE'S,
25 INC.

26 14. DOES 1 through 100 are each a person in the course of doing business
27 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 100 manufacture,
28 distribute, and/or sell Hash Brown Products for sale and consumption in California. Defendants

1 RESER’S FINE FOODS, INC.; SAVE MART SUPERMARKETS; KF WHOLESALE LLC;
2 WAL-MART STORES, INC.; MR. DEE’S, INC.; SMART & FINAL STORES, INC.; SMART
3 & FINAL STORES LLC; and DOES 1 through 100 are collectively referred to herein as “Hash
4 Brown Products Defendants.”

5 15. DOES 101 through 200 are each a person in the course of doing business
6 within the meaning of Health & Safety Code § 25249.11. DOES 101 through 200 manufacture,
7 distribute, and/or sell French Fry Products for sale and consumption in California. Defendants
8 UNIFIED GROCERS, INC.; MI PUEBLO, LLC; and DOES 101 through 200 are collectively
9 referred to herein as “French Fry Products Defendants.”

10 16. DOES 201 through 300 are each a person in the course of doing business
11 within the meaning of Health & Safety Code § 25249.11. DOES 201 through 300 manufacture,
12 distribute, and/or sell Hash Brown Products and French Fry Products for sale and consumption in
13 California.

14 17. The true names of DOES 1 through 300 are either unknown to CEH at this
15 time or the applicable time period before which CEH may file a Proposition 65 action has not
16 run. When their identities are ascertained or the applicable time period before which CEH may
17 file a Proposition 65 action has run, the Complaint shall be amended to reflect their true names.

18 18. The defendants identified in paragraphs 5 through 13 and DOES 1 through
19 300 are collectively referred to herein as “Defendants.”

20 **JURISDICTION AND VENUE**

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

25 20. This Court has jurisdiction over Defendants because each is a business
26 entity that does sufficient business, has sufficient minimum contacts in California, or otherwise
27 intentionally avails itself of the California market through the sale, marketing, or use of the
28 Products in California and/or by having such other contacts with California so as to render the

1 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
2 play and substantial justice.

3 21. Venue is proper in Alameda County Superior Court because one or more of
4 the violations arise in the County of Alameda.

5 **BACKGROUND FACTS**

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

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

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

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

1 11:83.

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

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

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

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

27 29. More than sixty days prior to naming each Defendant in this lawsuit, CEH
28 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General, to

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

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

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

26 32. Defendants both know and intend that individuals, including children, will
27 consume the Products, thus exposing them to acrylamide.

28 33. Under Proposition 65, an exposure is “knowing” where the party

1 responsible for such exposure has:

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

5 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
6 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
7 § 12601).

8 34. As companies that manufacture, import, distribute, and/or sell the Products
9 for use in the California marketplace, Defendants know or should know that the Products contain
10 acrylamide and that individuals who consume the Products will be exposed to acrylamide. The
11 acrylamide exposures to consumers who consume the Products are a natural and foreseeable
12 consequence of Defendants' placing the Products into the stream of commerce.

13 35. Defendants have been informed of the acrylamide in their Products by the
14 60-Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

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

18 37. Nevertheless, Defendants continue to expose consumers, including
19 children, to acrylamide without prior clear and reasonable warnings regarding the carcinogenic
20 hazards of acrylamide.

21 38. CEH has engaged in good-faith efforts to resolve the claims alleged herein
22 prior to filing this Complaint.

23 39. Any person "violating or threatening to violate" Proposition 65 may be
24 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to
25 violate" is defined to mean "to create a condition in which there is a substantial probability that a
26 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
27 penalties not to exceed \$2,500 per day for each violation of Proposition 65.
28

1 **FIRST CAUSE OF ACTION**
2 **(Violations of Health & Safety Code § 25249.6)**
3 **(Against Hash Brown Products Defendants)**

4 40. CEH realleges and incorporates by reference as if specifically set forth
5 herein Paragraphs 1 through 39, inclusive.

6 41. By placing the Hash Brown Products into the stream of commerce, Hash
7 Brown Products Defendants are each a person in the course of doing business within the meaning
8 of Health & Safety Code § 25249.11.

9 42. Acrylamide is a chemical listed by the State of California as known to
10 cause cancer.

11 43. Each Hash Brown Products Defendant knows that average use of the Hash
12 Brown Products will expose users of its Hash Brown Products to acrylamide. Each Hash Brown
13 Products Defendant intends that its Hash Brown Products be used in a manner that results in
14 exposures to acrylamide from the Hash Brown Products.

15 44. Hash Brown Products Defendants have failed, and continue to fail, to
16 provide clear and reasonable warnings regarding the carcinogenicity of acrylamide to users of the
17 Hash Brown Products.

18 45. By committing the acts alleged above, Hash Brown Products Defendants
19 have at all times relevant to this Complaint violated Proposition 65 by knowingly and
20 intentionally exposing individuals to acrylamide without first giving clear and reasonable
21 warnings to such individuals regarding the carcinogenicity of acrylamide.

22 Wherefore, CEH prays for judgment against Hash Brown Products Defendants, as
23 set forth hereafter.

24 **SECOND CAUSE OF ACTION**
25 **(Violations of Health & Safety Code § 25249.6)**
26 **(Against French Fry Products Defendants)**

27 46. CEH realleges and incorporates by reference as if specifically set forth
28 herein Paragraphs 1 through 45, inclusive.

47. By placing the French Fry Products into the stream of commerce, French

1 Fry Products Defendants are each a person in the course of doing business within the meaning of
2 Health & Safety Code § 25249.11.

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

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

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

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

16 Wherefore, CEH prays for judgment against French Fry Products Defendants, as
17 set forth hereafter.

18 **PRAYER FOR RELIEF**

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

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

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

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

1 of Proposition 65 according to proof;

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

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

6

7 Dated: April 5, 2017

Respectfully submitted,

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LEXINGTON LAW GROUP

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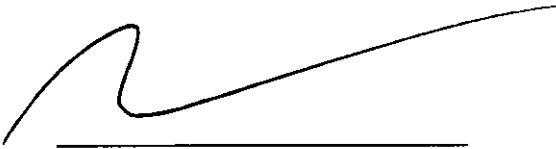
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Howard Hirsch
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CENTER FOR ENVIRONMENTAL HEALTH