

ENDORSED
FILED
ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By CHERYL CLARK Deputy

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13 CENTER FOR ENVIRONMENTAL HEALTH

14
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF ALAMEDA

17 CENTER FOR ENVIRONMENTAL HEALTH,

18 Plaintiff,

19 v.

20 ENJOY LIFE NATURAL BRANDS, LLC;
21 ALBERTSON'S LLC; THE KROGER CO.;
22 MARY'S GONE CRACKERS, INC.;
23 MONDELEZ INTERNATIONAL, INC.; MRS.
24 GOOCH'S NATURAL FOOD MARKETS, INC.;
25 NATURE'S PATH FOODS, INC.; PAK N'
26 SAVE, INC.; PEPPERIDGE FARM,
27 INCORPORATED; SAFEWAY INC.; SF
28 MARKETS, LLC; WHOLE FOODS MARKET
CALIFORNIA, INC.; J & J SNACK FOODS
SALES CORP.; J & J SNACK FOODS CORP.
OF CALIFORNIA; KELLOGG USA INC.;
KELLOGG SALES COMPANY; MURRAY
BISCUIT COMPANY, L.L.C.; WINCO FOODS,
LLC; and DOES 1 through 200, inclusive,

Defendants.

Case No. RG 17-872866

**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’ ginger snap cookies (the
9 “Products”). Consumers are exposed to acrylamide when they eat the Products.

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 Products into the California marketplace knowing that consumers of the Products, including
15 children, will be 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 ENJOY LIFE NATURAL BRANDS, LLC is a person in the course of
5 doing business within the meaning of Health & Safety Code § 25249.11. Defendant ENJOY
6 LIFE NATURAL BRANDS, LLC manufactures, distributes, and/or sells the Products for sale
7 and consumption in California.

8 6. Defendant ALBERTSON'S LLC is a person in the course of doing business within
9 the meaning of Health & Safety Code § 25249.11. Defendant ALBERTSON'S LLC
10 manufactures, distributes, and/or sells the Products for sale and consumption in California.
11 CEH's claims against Defendant ALBERTSON'S LLC in this action are limited to Products sold
12 by Defendants MARY'S GONE CRACKERS, INC. or MONDELEZ INTERNATIONAL, INC.,
13 or to Products sold under the "Signature Kitchens" brand.

14 7. Defendant THE KROGER CO. is a person in the course of doing business within
15 the meaning of Health & Safety Code § 25249.11. Defendant THE KROGER CO. manufactures,
16 distributes, and/or sells the Products for sale and consumption in California. CEH's claims
17 against Defendant THE KROGER CO. in this action are limited to Products sold under the
18 "Kroger" brand.

19 8. Defendant MARY'S GONE CRACKERS, INC. is a person in the course of doing
20 business within the meaning of Health & Safety Code § 25249.11. Defendant MARY'S GONE
21 CRACKERS, INC. manufactures, distributes, and/or sells the Products for sale and consumption
22 in California.

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

27 10. Defendant MRS. GOOCH'S NATURAL FOOD MARKETS, INC. is a person in
28 the course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant

1 MRS. GOOCH'S NATURAL FOOD MARKETS, INC. manufactures, distributes, and/or sells
2 the Products for sale and consumption in California. CEH's claims against Defendant MRS.
3 GOOCH'S NATURAL FOOD MARKETS, INC. in this action are limited to Products sold by
4 Defendant NATURE'S PATH FOODS, INC.

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

9 12. Defendant PAK N' SAVE, INC. is a person in the course of doing business within
10 the meaning of Health & Safety Code § 25249.11. Defendant PAK N' SAVE, INC.
11 manufactures, distributes, and/or sells the Products for sale and consumption in California.
12 CEH's claims against Defendant PAK N' SAVE, INC. in this action are limited to Products sold
13 by Defendant PEPPERIDGE FARM, INCORPORATED.

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

18 14. Defendant SAFEWAY INC. is a person in the course of doing business within the
19 meaning of Health & Safety Code § 25249.11. Defendant SAFEWAY INC. manufactures,
20 distributes, and/or sells the Products for sale and consumption in California. CEH's claims
21 against Defendant SAFEWAY INC. in this action are limited to Products sold by Defendants
22 MARY'S GONE CRACKERS, INC., MONDELEZ INTERNATIONAL, INC., or PEPPERIDGE
23 FARM, INCORPORATED, or to Products sold under the "Signature Kitchens" brand.

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

1 by Defendants MONDELEZ INTERNATIONAL, INC. or ENJOY LIFE NATURAL BRANDS,
2 LLC

3 16. Defendant WHOLE FOODS MARKET CALIFORNIA, INC. is a person in the
4 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant
5 WHOLE FOODS MARKET CALIFORNIA, INC. manufactures, distributes, and/or sells the
6 Products for sale and consumption in California. CEH's claims against Defendant WHOLE
7 FOODS MARKET CALIFORNIA, INC. in this action are limited to Products sold by Defendant
8 NATURE'S PATH FOODS, INC.

9 17. Defendant J & J SNACK FOODS SALES CORP. is a person in the course of
10 doing business within the meaning of Health & Safety Code § 25249.11. Defendant J & J
11 SNACK FOODS SALES CORP. manufactures, distributes, and/or sells the Products for sale and
12 consumption in California.

13 18. Defendant J & J SNACK FOODS CORP. OF CALIFORNIA is a person in the
14 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant J
15 & J SNACK FOODS CORP. OF CALIFORNIA manufactures, distributes, and/or sells the
16 Products for sale and consumption in California.

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

20 20. Defendant KELLOGG SALES COMPANY is a person in the course of doing
21 business within the meaning of Health & Safety Code § 25249.11. Defendant KELLOGG
22 SALES COMPANY manufactures, distributes, and/or sells the Products for sale and consumption
23 in California.

24 21. Defendant MURRAY BISCUIT COMPANY, L.L.C. is a person in the course of
25 doing business within the meaning of Health & Safety Code § 25249.11. Defendant MURRAY
26 BISCUIT COMPANY, L.L.C. manufactures, distributes, and/or sells the Products for sale and
27 consumption in California.

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1 **BACKGROUND FACTS**

2 29. The People of the State of California have declared by initiative under Proposition
3 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
4 other reproductive harm.” Proposition 65, § 1(b).

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

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

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

26 32. Acrylamide is found in cigarette smoke and is produced industrially for use in
27 products such as plastics, grouts, water treatment products, and cosmetics. Acrylamide is also
28 found in certain food products, including the Products at issue. Acrylamide is formed during the

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

11 33. Defendants’ Products contain sufficient quantities of acrylamide such that
12 consumers who eat the Products are exposed to acrylamide. The route of exposure for the
13 violations is direct ingestion when consumers eat the Products. These exposures occur in homes,
14 schools, workplaces, and everywhere else throughout California where the Products are
15 consumed.

16 34. No clear and reasonable warning is provided with the Products regarding the
17 carcinogenic hazards of acrylamide.

18 35. Any person acting in the public interest has standing to enforce violations of
19 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
20 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
21 within such time. Health & Safety Code § 25249.7(d).

22 36. More than sixty days prior to naming each Defendant in this lawsuit, CEH
23 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General, to
24 the District Attorneys of every county in California, to the City Attorneys of every California city
25 with a population greater than 750,000, and to each of the named Defendants. In compliance with
26 Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
27 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
28 time period during which violations occurred; (4) specific descriptions of the violations, including

1 (a) the routes of exposure to acrylamide from the Products, and (b) the specific type of the
2 Products sold and used in violation of Proposition 65; and (5) the name of the specific Proposition
3 65-listed chemical that is the subject of the violations described in each Notice.

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

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

21 39. Defendants both know and intend that individuals will consume the Products, thus
22 exposing them to acrylamide.

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

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

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

1 § 12601).

2 41. As companies that manufacture, import, distribute, and/or sell the Products for use
3 in the California marketplace, Defendants know or should know that the Products contain
4 acrylamide and that individuals who consume the Products will be exposed to acrylamide. The
5 acrylamide exposures to consumers who eat the Products are a natural and foreseeable
6 consequence of Defendants' placing the Products into the stream of commerce.

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

9 43. Defendants also have constructive knowledge that the Products contain acrylamide
10 due to the widespread media coverage concerning the problem of acrylamide in food products in
11 general, and due to published data confirming the presence of high levels of acrylamide in the
12 Products in particular.

13 44. Nevertheless, Defendants continue to expose consumers to acrylamide without
14 prior clear and reasonable warnings regarding the carcinogenic hazards of acrylamide.

15 45. CEH has engaged in good-faith efforts to resolve the claims alleged herein prior to
16 filing this Complaint.

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

22 **FIRST CAUSE OF ACTION**

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

24 47. CEH realleges and incorporates by reference as if specifically set forth herein
25 Paragraphs 1 through 46, inclusive.

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

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1 49. Acrylamide is a chemical listed by the State of California as known to cause
2 cancer.

3 50. Each Defendant knows that average use of the Products will expose users of the
4 Products to acrylamide. Each Defendant intends that the Products be used in a manner that
5 results in exposures to acrylamide from the Products.

6 51. Defendants have failed, and continue to fail, to provide clear and reasonable
7 warnings regarding the carcinogenicity of acrylamide to users of the Products.

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

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

13 **PRAYER FOR RELIEF**

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

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

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

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

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

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

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Dated: October 18, 2017

Respectfully submitted,

LEXINGTON LAW GROUP



Joseph Mann
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH