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2017-11-09 22:00:01 (GMT)

From: Lexington Law Group

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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.)

THINK FOOD GROUP LLC; HAITAI, INC.;)
HAITAI USA, INC.; JET.COM, INC.; KEHE)
DISTRIBUTORS, INC.; KEHE)
DISTRIBUTORS, LLC; KEHE ENTERPRISES,)
LLC; MCCLURE'S PICKLES L.L.C.;)
NUGGET MARKET, INC.; SHEARER'S)
FOODS, LLC; BARREL O'FUN SNACK)
FOODS CO., LLC; WALGREEN CO.; WAL-)
MART STORES, INC.; WAL-MART.COM)
USA LLC; and DOES 1 through 200, inclusive,)

Defendants.)

Case No. _____

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

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

(Other)

FILED BY FAX
ALAMEDA COUNTY

November 09, 2017

CLERK OF
THE SUPERIOR COURT
By Burt Moskaira, Deputy

CASE NUMBER:

RG17881940

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' fried or baked potato or sweet
9 potato based snack foods (the "Products"). Consumers are exposed to acrylamide when they
10 consume the 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 THINK FOOD GROUP LLC is a person in the course of doing
6 business within the meaning of Health & Safety Code § 25249.11. Defendant THINK FOOD
7 GROUP LLC manufactures, distributes, and/or sells Products for sale and consumption in
8 California.

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

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

15 8. Defendant JET.COM, INC. is a person in the course of doing business within the
16 meaning of Health & Safety Code § 25249.11. Defendant JET.COM, INC. manufactures,
17 distributes, and/or sells Products for sale and consumption in California. CEH's allegations and
18 claims against Defendant JET.COM, INC. in this action are limited to Products sold under the
19 "Great Value" brand.

20 9. Defendant KEHE DISTRIBUTORS, INC. is a person in the course of doing
21 business within the meaning of Health & Safety Code § 25249.11. Defendant KEHE
22 DISTRIBUTORS, INC. manufactures, distributes, and/or sells Products for sale and consumption
23 in California. CEH's allegations and claims against Defendant KEHE DISTRIBUTORS, INC. in
24 this action are limited to Products sold under the "Sage Valley" brand.

25 10. Defendant KEHE DISTRIBUTORS, LLC is a person in the course of doing
26 business within the meaning of Health & Safety Code § 25249.11. Defendant KEHE
27 DISTRIBUTORS, LLC manufactures, distributes, and/or sells Products for sale and consumption
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1 in California. CEH’s allegations and claims against Defendant KEHE DISTRIBUTORS, LLC in
2 this action are limited to Products sold under the “Sage Valley” brand.

3 11. Defendant KEHE ENTERPRISES, LLC is a person in the course of doing
4 business within the meaning of Health & Safety Code § 25249.11. Defendant KEHE
5 ENTERPRISES, LLC manufactures, distributes, and/or sells Products for sale and consumption
6 in California. CEH’s allegations and claims against Defendant KEHE ENTERPRISES, LLC in
7 this action are limited to Products sold under the “Sage Valley” brand.

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

12 13. Defendant NUGGET MARKET, INC. is a person in the course of doing business
13 within the meaning of Health & Safety Code § 25249.11. Defendant NUGGET MARKET, INC.
14 manufactures, distributes, and/or sells Products for sale and consumption in California. CEH’s
15 allegations and claims against Defendant NUGGET MARKET, INC. in this action are limited to
16 Products sold by Patatas Fritas Torres S.L. and Defendant THINK FOOD GROUP LLC.

17 14. Defendant SHEARER’S FOODS, LLC is a person in the course of doing business
18 within the meaning of Health & Safety Code § 25249.11. Defendant SHEARER’S FOODS, LLC
19 manufactures, distributes, and/or sells Products for sale and consumption in California.

20 15. Defendant BARREL O’FUN SNACK FOODS CO., LLC is a person in the course
21 of doing business within the meaning of Health & Safety Code § 25249.11. Defendant BARREL
22 O’FUN SNACK FOODS CO., LLC manufactures, distributes, and/or sells Products for sale and
23 consumption in California.

24 16. Defendant WALGREEN CO. is a person in the course of doing business within
25 the meaning of Health & Safety Code § 25249.11. Defendant WALGREEN CO. manufactures,
26 distributes, and/or sells Products for sale and consumption in California. CEH’s allegations and
27 claims against Defendant WALGREEN CO. in this action are limited to Products sold under the
28 “Good & Delish” brand.

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

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

5 **BACKGROUND FACTS**

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

9 26. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals
10 listed by the State of California as known to cause cancer, birth defects, or other reproductive
11 harm above certain levels without a “clear and reasonable warning” unless the business
12 responsible for the exposure can prove that it fits within a statutory exemption. Health & Safety
13 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 state to
16 cause cancer or reproductive toxicity without first giving clear and
reasonable warning to such individual. . .

17 27. 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

1 for children and adults in California: a risk assessment,” *Environmental Health* (2012) Vol.
2 11:83.

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

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

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

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

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

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

22 34. None of the public prosecutors with the authority to prosecute violations of
23 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 35. Defendants both know and intend that individuals will consume the Products, thus
27 exposing them to acrylamide.
28

1 36. Under Proposition 65, an exposure is “knowing” where the party responsible for
2 such exposure has:

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

6 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
7 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
8 § 12601).

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

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

16 39. Defendants also have constructive knowledge that their Products contain
17 acrylamide due to the widespread media coverage concerning the problem of acrylamide in food
18 products in general, and due to published data confirming the presence of high levels of
19 acrylamide in the Products in particular.

20 40. Nevertheless, Defendants continue to expose consumers to acrylamide without
21 prior clear and reasonable warnings regarding the carcinogenic hazards of acrylamide.

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

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

1 **FIRST CAUSE OF ACTION**
2 **(Violations of Health & Safety Code § 25249.6)**

3 43. CEH realleges and incorporates by reference as if specifically set forth herein
4 Paragraphs 1 through 42, inclusive.

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

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

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

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

14 48. 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 Products 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 Products
26 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;

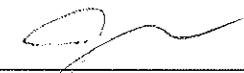
4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

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

Dated: November 9, 2017

Respectfully submitted,

LEXINGTON LAW GROUP



Joseph Mann
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH