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ENDORSED
FILED
ALAMEDA COUNTY

MAY 22 2018

SUE PESKO

7 Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

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

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

15 Plaintiff,)

16 v.)

17 SNIKIDDY, LLC; BRISTOL FARMS;)
18 DISHAKA LLC; THE FRENCH'S FOOD)
COMPANY, LLC; GELSON'S MARKETS;)
19 GOOD HEALTH NATURAL PRODUCTS,)
LLC; INVENTURE FOODS, INC.; THE)
20 KROGER CO.; RALPHS GROCERY)
COMPANY; SAFEWAY, INC.; SAVE MART)
21 SUPERMARKETS; SUNFLOWER FARMERS)
MARKETS, LLC; UTZ QUALITY FOODS,)
22 LLC; WAL-MART STORES, INC.; SIMPLY 7)
SNACKS, LLC; R.W. GARCIA CO., INC.;)
23 VITACOST.COM, INC.; and DOES 3 through)
200, inclusive,)

24 Defendants.)
25
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27
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Case No. RG 16-838609

**SECOND 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 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, exposing consumers of their Products, many of whom are children, to
17 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 SNIKIDDY, LLC is a person in the course of doing business
7 within the meaning of Health & Safety Code § 25249.11. Defendant SNIKIDDY, LLC
8 manufactures, distributes, and/or sells the Products for sale and consumption in California.

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

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

17 8. Defendant THE FRENCH'S FOOD COMPANY, LLC is a person in the
18 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant
19 THE FRENCH'S FOOD COMPANY, LLC manufactures, distributes, and/or sells the Products
20 for sale and consumption in California.

21 9. Defendant GELSON'S MARKETS is a person in the course of doing
22 business within the meaning of Health & Safety Code § 25249.11. Defendant GELSON'S
23 MARKETS manufactures, distributes, and/or sells the Products for sale and consumption in
24 California. CEH's claims against Defendant GELSON'S MARKETS in this action are limited to
25 Products sold by Defendant GOOD HEALTH NATURAL PRODUCTS, LLC.

26 10. Defendant GOOD HEALTH NATURAL PRODUCTS, LLC is a person in
27 the course of doing business within the meaning of Health & Safety Code § 25249.11.
28 Defendant GOOD HEALTH NATURAL PRODUCTS, LLC manufactures, distributes, and/or

1 sells the Products for sale and consumption in California.

2 11. Defendant INVENTURE FOODS, INC. is a person in the course of doing
3 business within the meaning of Health & Safety Code § 25249.11. Defendant INVENTURE
4 FOODS, INC. manufactures, distributes, and/or sells the Products for sale and consumption in
5 California.

6 12. Defendant THE KROGER CO. is a person in the course of doing business
7 within the meaning of Health & Safety Code § 25249.11. Defendant THE KROGER CO.
8 manufactures, distributes, and/or sells the Products for sale and consumption in California.
9 CEH's claims against Defendant THE KROGER CO. in this action are limited to Products sold
10 under the "Simple Truth" brand.

11 13. Defendant RALPHS GROCERY COMPANY is a person in the course of
12 doing business within the meaning of Health & Safety Code § 25249.11. Defendant RALPHS
13 GROCERY COMPANY manufactures, distributes, and/or sells the Products for sale and
14 consumption in California. CEH's claims against Defendant RALPHS GROCERY COMPANY
15 in this action are limited to Products sold under the "Simple Truth" brand.

16 14. Defendant SAFEWAY, INC. is a person in the course of doing business
17 within the meaning of Health & Safety Code § 25249.11. Defendant SAFEWAY, INC.
18 manufactures, distributes, and/or sells the Products for sale and consumption in California.
19 CEH's claims against Defendant SAFEWAY, INC. in this action are limited to Products sold by
20 Defendant SIMPLY 7 SNACKS, LLC.

21 15. Defendant SAVE MART SUPERMARKETS is a person in the course of
22 doing business within the meaning of Health & Safety Code § 25249.11. Defendant SAVE
23 MART SUPERMARKETS manufactures, distributes, and/or sells the Products for sale and
24 consumption in California. CEH's claims against Defendant SAVE MART SUPERMARKETS
25 in this action are limited to Products sold by Defendant GOOD HEALTH NATURAL
26 PRODUCTS, LLC.

27 16. Defendant SUNFLOWER FARMERS MARKETS, LLC is a person in the
28 course of doing business within the meaning of Health & Safety Code § 25249.11. Defendant

1 SUNFLOWER FARMERS MARKETS, LLC manufactures, distributes, and/or sells the Products
2 for sale and consumption in California. CEH's claims against Defendant SUNFLOWER
3 FARMERS MARKETS, LLC in this action are limited to Products sold by Defendant
4 SNIKIDDY, LLC and to Products sold under the "Sprouts" brand.

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

9 18. Defendant WAL-MART STORES, INC. is a person in the course of doing
10 business within the meaning of Health & Safety Code § 25249.11. Defendant WAL-MART
11 STORES, INC. manufactures, distributes, and/or sells the Products for sale and consumption in
12 California. CEH's claims against Defendant WAL-MART STORES, INC. in this action are
13 limited to Products sold by Defendant UTZ QUALITY FOODS, LLC.

14 19. Defendant SIMPLY 7 SNACKS, LLC is a person in the course of doing
15 business within the meaning of Health & Safety Code § 25249.11. Defendant SIMPLY 7
16 SNACKS, LLC manufactures, distributes, and/or sells the Products for sale and consumption in
17 California.

18 20. Defendant R.W. GARCIA CO., INC. is a person in the course of doing
19 business within the meaning of Health & Safety Code § 25249.11. Defendant R.W. GARCIA
20 CO., INC. manufactures, distributes, and/or sells the Products for sale and consumption in
21 California.

22 21. Defendant VITACOST.COM, INC. is a person in the course of doing
23 business within the meaning of Health & Safety Code § 25249.11. Defendant
24 VITACOST.COM, INC. manufactures, distributes, and/or sells the Products for sale and
25 consumption in California. CEH's claims against Defendant VITACOST.COM, INC. in this
26 action are limited to Products sold under the "Simple Truth" brand.

27 22. DOES 3 through 200 are each a person in the course of doing business
28 within the meaning of Health & Safety Code § 25249.11. DOES 3 through 200 manufacture,

1 & Safety Code § 25249.6 states, in pertinent part:

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

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

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

1 FDA, “Survey Data on Acrylamide in Food: Total Diet Study Results,” publicly available online
2 at [http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/
3 ucm053566.htm](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053566.htm) (updated October 2006).

4 32. Defendants’ Products contain sufficient quantities of acrylamide such that
5 consumers, including children, who consume the Products are exposed to acrylamide. The route
6 of exposure for the violations is direct ingestion when consumers eat the Products. These
7 exposures occur in homes, schools, workplaces, and everywhere else throughout California
8 where the products are consumed.

9 33. No clear and reasonable warning is provided with the Products regarding
10 the carcinogenic hazards of acrylamide.

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

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

25 36. CEH also sent a Certificate of Merit for each Notice to the California
26 Attorney General, the District Attorneys of every county in California, the City Attorneys of
27 every California city with a population greater than 750,000, and to each of the named
28 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each

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

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

14 38. Defendants both know and intend that individuals, including children, will
15 consume the Products, thus exposing them to acrylamide.

16 39. Under Proposition 65, an exposure is “knowing” where the party
17 responsible for such exposure has:

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

21 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
22 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
23 § 12601).

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

 41. Defendants have been informed of the acrylamide in their Products by the

1 60-Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

2 42. Defendants also have constructive knowledge that their Products contain
3 acrylamide due to the widespread media coverage concerning the problem of acrylamide in food
4 products in general.

5 43. Nevertheless, Defendants continue to expose consumers, including
6 children, to acrylamide without prior clear and reasonable warnings regarding the carcinogenic
7 hazards of acrylamide.

8 44. CEH has engaged in good-faith efforts to resolve the claims alleged herein
9 prior to filing this Complaint.

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

15 **FIRST CAUSE OF ACTION**

16 **(Violations of the Health & Safety Code § 25249.6)**

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

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

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

23 49. Each Defendant knows that average use of the Products will expose users
24 of its Products to acrylamide. Each Defendant intends that its Products be used in a manner that
25 results in exposures to acrylamide from the Products.

26 50. Defendants have failed, and continue to fail, to provide clear and
27 reasonable warnings regarding the carcinogenicity of acrylamide to users of the Products.

28 51. By committing the acts alleged above, Defendants have at all times

1 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
2 individuals to acrylamide without first giving clear and reasonable warnings to such individuals
3 regarding the carcinogenicity of acrylamide.

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

5 **PRAYER FOR RELIEF**

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

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

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

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

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

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

21
22 Dated: May 22, 2018

Respectfully submitted,

23 LEXINGTON LAW GROUP

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27 Howard Hirsch
28 Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH