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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.)
)
GALLERIA MARKET, LP; DICKINSON)
FROZEN FOODS, INC.; MCCAIN FOODS)
USA, INC.; ALDI INC., DOING BUSINESS IN)
CALIFORNIA AS ALDI FOODS INC.; and)
DOES 1 through 700, inclusive,)
)
Defendants.)
)
)

FILED BY FAX
ALAMEDA COUNTY
January 18, 2019
CLERK OF
THE SUPERIOR COURT
By Burt Moskaira, Deputy
CASE NUMBER:
RG18928947

Case No. RG 18-928947
**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 three types of food products: (i) fried or
9 baked potato or sweet potato based snack foods (the “Potato or Sweet Potato Snack Products”);
10 (ii) hash brown potato products, including but not limited to hash browns, hash brown patties,
11 tater tots, and tater puffs (the “Hash Brown Products”); and (iii) french-fried potatoes (the
12 “French Fry Products”). Potato or Sweet Potato Snack Products, Hash Brown Products, and
13 French Fry Products are collectively referred to herein as “Products.” Consumers are exposed to
14 acrylamide when they consume the Products.

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

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

25 **PARTIES**

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

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

9 5. Defendant GALLERIA MARKET, LP is a person in the course of doing business
10 within the meaning of Health & Safety Code § 25249.11. Defendant GALLERIA MARKET, LP
11 manufactures, distributes, and/or sells Potato or Sweet Potato Snack Products for sale and
12 consumption in California. CEH’s allegations and claims against Defendant GALLERIA
13 MARKET, LP in this action are limited to Potato or Sweet Potato Snack Products sold by
14 Mishima Foods U.S.A., Inc. or Shibuya Foods Co., Ltd.

15 6. Defendant DICKINSON FROZEN FOODS, INC. is a person in the course of
16 doing business within the meaning of Health & Safety Code § 25249.11. Defendant
17 DICKINSON FROZEN FOODS, INC. manufactures, distributes, and/or sells Hash Brown
18 Products for sale and consumption in California.

19 7. Defendant MCCAIN FOODS USA, INC. is a person in the course of doing
20 business within the meaning of Health & Safety Code § 25249.11. Defendant MCCAIN FOODS
21 USA, INC. manufactures, distributes, and/or sells French Fry Products for sale and consumption
22 in California. CEH’s allegations and claims against Defendant MCCAIN FOODS USA, INC. in
23 this action are limited to French Fry Products sold under private label brands.

24 8. Defendant ALDI INC., DOING BUSINESS IN CALIFORNIA AS ALDI FOODS
25 INC. is a person in the course of doing business within the meaning of Health & Safety Code §
26 25249.11. Defendant ALDI INC., DOING BUSINESS IN CALIFORNIA AS ALDI FOODS
27 INC. manufactures, distributes, and/or sells Hash Brown Products and French Fry Products for
28 sale and consumption in California. CEH’s allegations and claims against Defendant ALDI INC.,

1 DOING BUSINESS IN CALIFORNIA AS ALDI FOODS INC. in this action are limited to Hash
2 Brown Products and French Fry Products sold under the Season's Choice brand.

3 9. DOES 1 through 100 are each a person in the course of doing business within the
4 meaning of Health & Safety Code § 25249.11. DOES 1 through 100 manufacture, distribute,
5 and/or sell Potato or Sweet Potato Snack Products for sale and consumption in California.
6 Defendant GALLERIA MARKET, LP and DOES 1 through 100 are collectively referred to
7 herein as "Potato or Sweet Potato Snack Products Defendants."

8 10. DOES 101 through 200 are each a person in the course of doing business within
9 the meaning of Health & Safety Code § 25249.11. DOES 101 through 200 manufacture,
10 distribute, and/or sell Hash Brown Products for sale and consumption in California. Defendants
11 DICKINSON FROZEN FOODS, INC.; ALDI INC., DOING BUSINESS IN CALIFORNIA AS
12 ALDI FOODS INC.; and DOES 101 through 200 are collectively referred to herein as "Hash
13 Brown Products Defendants."

14 11. DOES 201 through 300 are each a person in the course of doing business within
15 the meaning of Health & Safety Code § 25249.11. DOES 201 through 300 manufacture,
16 distribute, and/or sell French Fry Products for sale and consumption in California. Defendants
17 MCCAIN FOODS USA, INC.; ALDI INC., DOING BUSINESS IN CALIFORNIA AS ALDI
18 FOODS INC.; and DOES 201 through 300 are collectively referred to herein as "French Fry
19 Products Defendants."

20 12. DOES 301 through 400 are each a person in the course of doing business within
21 the meaning of Health & Safety Code § 25249.11. DOES 301 through 400 manufacture,
22 distribute, and/or sell both Potato or Sweet Potato Snack Products and Hash Brown Products for
23 sale and consumption in California.

24 13. DOES 401 through 500 are each a person in the course of doing business within
25 the meaning of Health & Safety Code § 25249.11. DOES 401 through 500 manufacture,
26 distribute, and/or sell both Potato or Sweet Potato Snack Products and French Fry Products for
27 sale and consumption in California.

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1 14. DOES 501 through 600 are each a person in the course of doing business within
2 the meaning of Health & Safety Code § 25249.11. DOES 501 through 600 manufacture,
3 distribute, and/or sell both Hash Brown Products and French Fry Products for sale and
4 consumption in California.

5 15. DOES 601 through 700 are each a person in the course of doing business within
6 the meaning of Health & Safety Code § 25249.11. DOES 601 through 700 manufacture,
7 distribute, and/or sell Potato or Sweet Potato Snack Products, Hash Brown Products, and French
8 Fry Products for sale and consumption in California.

9 16. The true names of DOES 1 through 700 are either unknown to CEH at this time or
10 the applicable time period before which CEH may file a Proposition 65 action has not run. When
11 their identities are ascertained or the applicable time period before which CEH may file a
12 Proposition 65 action has run, the Complaint shall be amended to reflect their true names.

13 17. The defendants identified in paragraphs 5 through 8 and DOES 1 through 700 are
14 collectively referred to herein as “Defendants.”

15 **JURISDICTION AND VENUE**

16 18. The Court has jurisdiction over this action pursuant to Health & Safety Code §
17 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
18 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
19 other trial courts.

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

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

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1 **BACKGROUND FACTS**

2 21. 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 22. 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 23. 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 24. 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 when the

1 Products are cooked at high temperatures. The problem of acrylamide in food products first came
2 to light in 2002 when researchers at the Swedish National Food Agency and Stockholm
3 University reported finding acrylamide in a variety of fried and baked foods. Since then,
4 numerous government reports and academic studies have confirmed the presence of high levels of
5 acrylamide in certain foods, including the Products. *See, e.g.*, U.S. Food and Drug
6 Administration (“FDA”), “Survey Data on Acrylamide in Food: Individual Food Products,”
7 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 25. Defendants’ Products contain sufficient quantities of acrylamide such that
12 consumers who eat the Products are thereby 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 26. No clear and reasonable warning is provided with the Products regarding the
17 carcinogenic hazards of acrylamide.

18 27. 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 28. 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 Products
2 sold and used in violation of Proposition 65; and (5) the name of the specific Proposition 65-listed
3 chemical that is the subject of the violations described in each Notice.

4 29. 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 30. 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 31. Defendants both know and intend that individuals will consume the Products, thus
22 exposing them to acrylamide.

23 32. 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 33. 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 34. Defendants have also been informed of the acrylamide in their Products by the 60-
8 Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

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

13 36. Defendant GALLERIA MARKET, LP also should reasonably have known about
14 the presence of acrylamide in Potato or Sweet Potato Snack Products sold by Mishima Foods
15 U.S.A., Inc. or Shibuya Foods Co., Ltd. from receiving an earlier CEH Proposition 65 Notice of
16 Violation in October 2016 regarding acrylamide in Potato or Sweet Potato Snack Products sold
17 by other entities, from being named as a defendant in a CEH Proposition 65 enforcement action in
18 2017 regarding acrylamide in such other Potato or Sweet Potato Snack Products, and from
19 entering into a settlement with CEH in 2017 to resolve those claims regarding acrylamide in
20 certain Potato or Sweet Potato Snack Products.

21 37. Defendant ALDI INC., DOING BUSINESS IN CALIFORNIA AS ALDI FOODS
22 INC. also should reasonably have known about the presence of acrylamide in Hash Brown
23 Products and French Fry Products sold under the Season's Choice brand from receiving an earlier
24 CEH Proposition 65 Notice of Violation in June 2018 regarding acrylamide in Potato or Sweet
25 Potato Snack Products sold by other entities.

26 38. Nevertheless, Defendants continue to expose consumers to acrylamide without
27 prior clear and reasonable warnings regarding the carcinogenic hazards of acrylamide.

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1 39. CEH has engaged in good-faith efforts to resolve the claims alleged herein prior to
2 filing this Complaint.

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

8 **FIRST CAUSE OF ACTION**
9 **(Violations of Health & Safety Code § 25249.6)**
10 **(Against Potato or Sweet Potato Snack Products Defendants)**

11 41. CEH realleges and incorporates by reference as if specifically set forth herein
12 Paragraphs 1 through 40, inclusive.

13 42. By placing the Potato or Sweet Potato Snack Products into the stream of
14 commerce, Potato or Sweet Potato Snack Products Defendants are each a person in the course of
15 doing business within the meaning of Health & Safety Code § 25249.11.

16 43. Acrylamide is a chemical listed by the State of California as known to cause
17 cancer.

18 44. Each Potato or Sweet Potato Snack Products Defendant knows that average use of
19 the Potato or Sweet Potato Snack Products will expose users of its Potato or Sweet Potato Snack
20 Products to acrylamide. Each Potato or Sweet Potato Snack Products Defendant intends that its
21 Potato or Sweet Potato Snack Products be used in a manner that results in exposures to
22 acrylamide from the Potato or Sweet Potato Snack Products.

23 45. Potato or Sweet Potato Snack Products Defendants have failed, and continue to
24 fail, to provide clear and reasonable warnings regarding the carcinogenicity of acrylamide to
25 users of the Potato or Sweet Potato Snack Products.

26 46. By committing the acts alleged above, Potato or Sweet Potato Snack Products
27 Defendants have at all times relevant to this Complaint violated Proposition 65 by knowingly and
28

1 intentionally exposing individuals to acrylamide without first giving clear and reasonable
2 warnings to such individuals regarding the carcinogenicity of acrylamide.

3 Wherefore, CEH prays for judgment against Potato or Sweet Potato Snack
4 Products Defendants, as set forth hereafter.

5 **SECOND CAUSE OF ACTION**
6 **(Violations of Health & Safety Code § 25249.6)**
7 **(Against Hash Brown Products Defendants)**

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

10 48. By placing the Hash Brown Products into the stream of commerce, Hash Brown
11 Products Defendants are each a person in the course of doing business within the meaning of
12 Health & Safety Code § 25249.11.

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

15 50. Each Hash Brown Products Defendant knows that average use of the Hash Brown
16 Products will expose users of its Hash Brown Products to acrylamide. Each Hash Brown
17 Products Defendant intends that its Hash Brown Products be used in a manner that results in
18 exposures to acrylamide from the Hash Brown Products.

19 51. Hash Brown Products Defendants have failed, and continue to fail, to provide clear
20 and reasonable warnings regarding the carcinogenicity of acrylamide to users of the Hash Brown
21 Products.

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

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

1 **THIRD CAUSE OF ACTION**
2 **(Violations of Health & Safety Code § 25249.6)**
3 **(Against French Fry Products Defendants)**

4 53. CEH realleges and incorporates by reference as if specifically set forth herein
5 Paragraphs 1 through 52, inclusive.

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

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

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

15 57. French Fry Products Defendants have failed, and continue to fail, to provide clear
16 and reasonable warnings regarding the carcinogenicity of acrylamide to users of the French Fry
17 Products.

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

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

24 **PRAYER FOR RELIEF**

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

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

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

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

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

9 5. That the Court grant such other and further relief as may be just and proper.
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11 Dated: January 18, 2019

Respectfully submitted,

LEXINGTON LAW GROUP

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15 _____
16 Joseph Mann
17 Attorneys for Plaintiff
18 CENTER FOR ENVIRONMENTAL HEALTH
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