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ALAMEDA COUNTY

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CLERK OF
THE SUPERIOR COURT
By Cheryl Clark, Deputy

CASE NUMBER:

RG17881940

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 13 CENTER FOR ENVIRONMENTAL HEALTH

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

14	CENTER FOR ENVIRONMENTAL HEALTH,)	Case No. RG 17-881940
15)	
16	Plaintiff,)	
17)	SECOND AMENDED COMPLAINT
18	v.)	FOR INJUNCTIVE RELIEF AND
19)	CIVIL PENALTIES
20	THINK FOOD GROUP LLC, <i>et al.</i> ,)	
21)	Health & Safety Code § 25249.6, <i>et seq.</i>
22	Defendants.)	
23)	(Other)
24)	
25)	
26)	
27)	
28)	

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

10 6. Defendant SHEARER'S FOODS, LLC is a person in the course of doing business
11 within the meaning of Health & Safety Code § 25249.11. Defendant SHEARER'S FOODS, LLC
12 manufactures, distributes, and/or sells Products for sale and consumption in California. CEH's
13 allegations and claims against Defendant SHEARER'S FOODS, LLC in this action are limited to
14 Products sold under the "Great Value" brand.

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

21 8. Defendant WAL-MART STORES, INC. is a person in the course of doing
22 business within the meaning of Health & Safety Code § 25249.11. Defendant WAL-MART
23 STORES, INC. manufactures, distributes, and/or sells Products for sale and consumption in
24 California. CEH's allegations and claims against Defendant WAL-MART STORES, INC. in this
25 action are limited to Products sold under the "Great Value" brand.

26 9. Defendant SARATOGA POTATO CHIPS, LLC is a person in the course of doing
27 business within the meaning of Health & Safety Code § 25249.11. Defendant SARATOGA
28

1 POTATO CHIPS, LLC manufactures, distributes, and/or sells Products for sale and consumption
2 in California.

3 10. DOES 2 through 200 are each a person in the course of doing business within the
4 meaning of Health & Safety Code § 25249.11. DOES 2 through 200 manufacture, distribute,
5 and/or sell Products for sale and consumption in California.

6 11. The true names of DOES 2 through 200 are either unknown to CEH at this time or
7 the applicable time period before which CEH may file a Proposition 65 action has not run. When
8 their identities are ascertained or the applicable time period before which CEH may file a
9 Proposition 65 action has run, the Complaint shall be amended to reflect their true names.

10 12. The defendants identified in paragraphs 5 through 9 and DOES 2 through 200 are
11 collectively referred to herein as “Defendants.”

12 **JURISDICTION AND VENUE**

13 13. The Court has jurisdiction over this action pursuant to Health & Safety Code §
14 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
15 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
16 other trial courts.

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

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

25 **BACKGROUND FACTS**

26 16. The People of the State of California have declared by initiative under Proposition
27 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
28 other reproductive harm.” Proposition 65, § 1(b).

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

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

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

22 19. Acrylamide is found in cigarette smoke and is produced industrially for use in
23 products such as plastics, grouts, water treatment products, and cosmetics. Acrylamide is also
24 found in certain food products, including the Products at issue. Acrylamide is formed during the
25 manufacturing process when the Products are cooked at high temperatures. The problem of
26 acrylamide in food products first came to light in 2002 when researchers at the Swedish National
27 Food Agency and Stockholm University reported finding acrylamide in a variety of fried and
28 baked foods. Since then, numerous government reports and academic studies have confirmed the

1 presence of high levels of acrylamide in certain foods, including the Products. *See, e.g.*, U.S.
2 Food and Drug Administration (“FDA”), “Survey Data on Acrylamide in Food: Individual Food
3 Products,” publicly available online at [http://www.fda.gov/Food/FoodborneIllnessContaminants/](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053549.htm)
4 [ChemicalContaminants/ucm053549.htm](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053549.htm) (updated July 2006); FDA, “Survey Data on Acrylamide
5 in Food: Total Diet Study Results,” publicly available online at [http://www.fda.gov/Food/](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053566.htm)
6 [FoodborneIllnessContaminants/ChemicalContaminants/ucm053566.htm](http://www.fda.gov/Food/FoodborneIllnessContaminants/ChemicalContaminants/ucm053566.htm) (updated October 2006).

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

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

14 22. Any person acting in the public interest has standing to enforce violations of
15 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
16 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
17 within such time. Health & Safety Code § 25249.7(d).

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

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

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

18 26. Defendants both know and intend that individuals will consume the Products, thus
19 exposing them to acrylamide.

20 27. Under Proposition 65, an exposure is “knowing” where the party responsible for
21 such exposure has:

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

24 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
25 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
26 § 12601).

27 28. As companies that manufacture, import, distribute, and/or sell the Products for use
28 in the California marketplace, Defendants know or should know that the Products contain

1 acrylamide and that individuals who consume the Products will be exposed to acrylamide. The
2 acrylamide exposures to consumers who eat the Products are a natural and foreseeable
3 consequence of Defendants' placing the Products into the stream of commerce.

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

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

10 31. Nevertheless, Defendants continue to expose consumers to acrylamide without
11 prior clear and reasonable warnings regarding the carcinogenic hazards of acrylamide.

12 32. CEH has engaged in good-faith efforts to resolve the claims alleged herein prior to
13 filing this Complaint.

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

19 **FIRST CAUSE OF ACTION**
20 **(Violations of Health & Safety Code § 25249.6)**

21 34. CEH realleges and incorporates by reference as if specifically set forth herein
22 Paragraphs 1 through 33, inclusive.

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

25 36. Acrylamide is a chemical listed by the State of California as known to cause
26 cancer.

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

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

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

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

PRAYER FOR RELIEF

Wherefore, CEH prays for judgment against Defendants as follows:

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

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

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

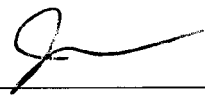
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5. That the Court grant such other and further relief as may be just and proper.

Dated: September 24, 2019

Respectfully submitted,

LEXINGTON LAW GROUP



Joseph Mann
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH