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Attorneys for Plaintiff
Environmental Health Advocates, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ENVIRONMENTAL HEALTH ADVOCATES,
INC., a California organization,

Plaintiff,

v.

KENOVER MARKETING CORPORATION,
a New Jersey corporation, WHOLE FOODS
MARKET, a California corporation, DOES 1
through 100, inclusive,

Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code § 25249.6 et seq.)

FILED BY FAX

ALAMEDA COUNTY

August 06, 2020

CLERK OF
THE SUPERIOR COURT
By Gina Fu, Deputy

CASE NUMBER:

RG20070024

I.
INTRODUCTION

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2 1. This Complaint is a representative action brought by Environmental Health Advocates,
3 Inc. (“Plaintiff”) in the public interest of the citizens of the State of California (“the People”). Plaintiff
4 seeks to remedy Defendants’ failure to inform the People of exposure to acrylamide, a known
5 carcinogen. Defendants expose consumers to acrylamide by manufacturing, importing, selling, and/or
6 distributing Absolutely Gluten Free Crackers and Absolutely Gluten Free Everything Flatbread
7 (“Products”). Defendants know and intend that customers will ingest Products containing acrylamide.

8 2. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986, California
9 Health and Safety Code, section 25249.6 et seq. (“Proposition 65”), “[n]o person in the course of doing
10 business shall knowingly and intentionally expose any individual to a chemical known to the state to
11 cause cancer or reproductive toxicity without first giving clear and reasonable warning to such
12 individual. . . .” (Health & Safety Code, § 25249.6.)

13 3. California identified and listed acrylamide as a chemical known to cause cancer as early
14 as January 1, 1990, and as a chemical known to cause developmental/reproductive toxicity in February
15 of 2011.

16 4. Defendants failed to sufficiently warn consumers and individuals in California about
17 potential exposure to acrylamide in connection with Defendants’ manufacture, import, sale, or
18 distribution of Products. This is a violation of Proposition 65.

19 5. Plaintiff seeks injunctive relief compelling Defendants to sufficiently warn consumers
20 in California before exposing them to acrylamide in Products. (Health & Safety Code, § 25249.7(a).)
21 Plaintiff also seeks civil penalties against Defendants for their violations of Proposition 65 along with
22 attorney’s fees and costs. (Health & Safety Code, § 25249.7(b).)

II.
PARTIES

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25 6. Plaintiff ENVIRONMENTAL HEALTH ADVOCATES, INC. (“Plaintiff”) is an
26 organization in the State of California dedicated to protecting the health of California citizens through
27 the elimination or reduction of toxic exposure from consumer products. It brings this action in the public
28 interest pursuant to Health and Safety Code, section 25249.7.

1 7. Defendant KENOVER MARKETING CORPORATION (“KMC”) is a corporation
2 organized and existing under the laws of New Jersey. KMC is registered to do business in California,
3 and does business in the County of Alameda, within the meaning of Health and Safety Code, section
4 25249.11. KMC manufactures, imports, sells, or distributes the Products in California and Alameda
5 County.

6 8. Defendant WHOLE FOODS MARKET (“Whole Foods”) is a corporation organized
7 and existing under the laws of California. Whole Foods is registered to do business in California, and
8 does business in the County of Alameda, within the meaning of Health and Safety Code, section
9 25249.11. Whole Foods manufactures, imports, sells, or distributes the Products in California and
10 Alameda County.

11 9. Plaintiff does not know the true names and/or capacities, whether individual, partners,
12 or corporate, of the defendants sued herein as DOES 1 through 100, inclusive, and for that reason sues
13 said defendants under fictitious names. Plaintiff will seek leave to amend this Complaint when the true
14 names and capacities of these defendants have been ascertained. Plaintiff is informed and believes and
15 thereon alleges that these defendants are responsible in whole or in part for Plaintiff’s alleged damages.

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17 **III.**
18 **VENUE AND JURISDICTION**

19 10. California Constitution Article VI, Section 10 grants the Superior Court original
20 jurisdiction in all cases except those given by statute to other trial courts. The Health and Safety Code
21 statute upon which this action is based does not give jurisdiction to any other court. As such, this Court
22 has jurisdiction.

23 11. Venue is proper in Alameda County Superior Court pursuant to Code of Civil
24 Procedure, sections 394, 395, and 395.5. Wrongful conduct occurred and continues to occur in this
25 County. Defendants conducted and continue to conduct business in this County as it relates to Products.

26 12. Defendants have sufficient minimum contacts in the State of California or otherwise
27 purposefully avails themselves of the California market. Exercising jurisdiction over Defendants would
28 be consistent with traditional notions of fair play and substantial justice.

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IV.
CAUSES OF ACTION

FIRST CAUSE OF ACTION
(Violation of Proposition 65 – Against all Defendants)

13. Plaintiff incorporates by reference each and every allegation contained above.

14. Proposition 65 mandates that citizens be informed about exposures to chemicals that cause cancer, birth defects, and other reproductive harm.

15. Defendants manufactured, imported, sold, and/or distributed Products containing acrylamide in violation of Health and Safety Code, section 25249.6 et seq. Plaintiff is informed and believes such violations have continued after receipt of the Notices (defined *infra*) and will continue to occur into the future.

16. In manufacturing, importing, selling, and/or distributing Products, Defendants failed to provide a clear and reasonable warning to consumers and individuals in California who may be exposed to acrylamide through reasonably foreseeable use of the Products.

17. Products expose individuals to acrylamide through direct ingestion. This exposure is a natural and foreseeable consequence of Defendants placing Products into the stream of commerce. As such, Defendants intend that consumers will ingest Products, exposing them to acrylamide.

18. Defendants knew or should have known that the Products contained acrylamide and exposed individuals to acrylamide in the ways provided above. The Notices informed Defendants of the presence of acrylamide in the Products. Likewise, media coverage concerning acrylamide and related chemicals in consumer products provided constructive notice to Defendants.

19. Defendants' action in this regard were deliberate and not accidental.

20. More than sixty days prior to naming each defendant in this lawsuit, Plaintiff issued 60-Day Notices of Violation ("Notices") as required by and in compliance with Proposition 65. Plaintiff provided the Notices to the various required public enforcement agencies along with a certificate of merit. The Notices alleged that Defendants violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated with exposures to acrylamide contained in the Products.

1 21. The appropriate public enforcement agencies provided with the Notices failed to
2 commence and diligently prosecute a cause of action against Defendants.

3 22. Individuals exposed to acrylamide contained in Products through direct ingestion
4 resulting from reasonably foreseeable use of the Products have suffered and continue to suffer
5 irreparable harm. There is no other plain, speedy, or adequate remedy at law.

6 23. Defendants are liable for a maximum civil penalty of \$2,500 per day for each violation
7 of Proposition 65 pursuant to Health and Safety Code, section 252497(b). Injunctive relief is also
8 appropriate pursuant to Health and Safety Code, section 25249.7(a).

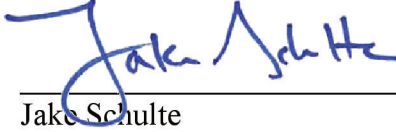
9 **PRAYER FOR RELIEF**

10 Wherefore, Plaintiff prays for judgment against Defendants, and each of them, as follows:

- 11 1. Civil penalties in the amount of \$2,500 per day for each violation;
- 12 2. A preliminary and permanent injunction against Defendants from manufacturing,
13 importing, selling, and/or distributing Products in California without providing a clear and reasonable
14 warning as required by Proposition 65 and related Regulations;
- 15 3. Reasonable attorney’s fees and costs of suit; and
- 16 4. Such other and further relief as may be just and proper.

17 Respectfully submitted:

18 Dated: August 5, 2020 **NICHOLAS AND TOMASEVIC, LLP**

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21 By: 
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Jake Schulte
23 Attorney for Plaintiff
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