

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS

AGNES MERCADO,

Plaintiff,

v.

CONAGRA FOODS, INC.; BERJE INC.; CHEMTURA
CANADA CO./C.I.E. f/k/a CROMPTON
COMPANY/C.I.E. f/k/a UNIROYAL CHEMICAL CO.
LIMITED/C.I.E. f/k/a UNIROYAL LTD.; CITRUS AND
ALLIED ESSENCES LTD.; DSM FOOD SPECIALTIES
USA, INC.; FLEURCHEM, INC.; GIVAUDAN
FLAVORS CORP.; O'LAUGHLIN INDUSTRIES, INC.;
PHOENIX AROMAS & ESSENTIAL OILS, INC.;
POLAROME INTERNATIONAL, INC.; and JOHN DOE
DEFENDANTS 1-100,

Defendants.

INDEX NO.

COMPLAINT

JURY TRIAL DEMAND

CIVIL ACTION COMPLAINT

I. INTRODUCTION

1. Plaintiff, Agnes Mercado (hereinafter "Plaintiff"), upon personal knowledge, information and belief and investigative efforts brings this Complaint against ConAgra Foods, Inc. (hereinafter "ConAgra"), Givaudan Flavors Corp. (hereinafter "Givaudan"), Berje Inc. (hereinafter "Berje"), Chemtura Canada Company (hereinafter "Chemtura"), Citrus & Allied Essences, Ltd. (hereinafter "Citrus & Allied"), DSM Food Specialties USA, Inc. (hereinafter "DSM"), FleurChem, Inc. (hereinafter "FleurChem"), O'Laughlin Industries Inc. (hereinafter "O'Laughlin Industries"), Phoenix Aromas & Essential Oils, Inc. (hereinafter "Phoenix Aromas"), Polarome International, Inc. (hereinafter "Polarome") and John Doe Defendants 1-100 ("Doe Defendants") (hereinafter all defendants so named are collectively referred to as

“Defendants”, unless otherwise referred to by name) for personal injuries, including serious and permanent lung disease, suffered as a direct result of her use of (preparing and consuming) microwave popcorn designed, developed, manufactured, tested, packaged, promoted, marketed, distributed, labeled and/or sold by ConAgra which contained butter flavorings with added diacetyl.

PARTIES

2. Plaintiff Agnes Mercado is a citizen and resident of Far Rockaway, Queens County, New York.

3. Defendant ConAgra is a Delaware corporation, with its headquarters at One ConAgra Drive, Omaha, NE 68102. At all material times hereto, ConAgra was doing business in New York, as well as throughout the United States. At all times material hereto, Defendant ConAgra designed, developed, manufactured, tested, packaged, promoted, marketed, distributed, labeled and sold microwave popcorn, including specifically microwave popcorn containing dangerous butter flavorings with added diacetyl, under the brand name or label “Act II” to consumers in the State of New York, including to Plaintiff Agnes Mercado.

4. Defendant Givaudan is a Delaware corporation, with its headquarters at 1199 Edison Drive, Cincinnati, OH 45216. At all material times hereto Givaudan was doing business in New York as well as throughout the United States. Defendant Givaudan manufactured and designed butter flavorings containing added diacetyl, that were sold to ConAgra for use in ConAgra’s microwave popcorn, Act II Lite.

5. Defendant Berje is a New York corporation with its principal headquarters at 5 Lawrence Street, Bloomfield, NJ 07003. At all material times hereto, Berje was doing business in New York, as well as throughout the United States. At all material times hereto, Defendant Berje manufactured, designed, packaged, marketed, labeled and sold added diacetyl to

Givaudan for use in its butter flavorings that were sold and distributed to ConAgra for use in Act II Lite microwave popcorn.

6. Defendant Chemtura is a Canadian corporation, with its headquarters at 25 Erb Street, Ontario, Canada. At all material times hereto, Chemtura was doing business in the United States, and especially in the State of New York. Defendant Chemtura manufactured, designed, packaged, marketed, labeled and sold added diacetyl to Givaudan for use in its butter flavorings that were sold and distributed to ConAgra for use in ConAgra's Act II Lite microwave popcorn.

7. Defendant Citrus & Allied is a New York corporation with its headquarters at 3000 Marcus Avenue, Lake Success, NY 11042. At all material times hereto, Citrus & Allied was doing business in New York, as well as throughout the United States. At all material times hereto, Defendant Citrus & Allied manufactured, designed, packaged, marketed, labeled and sold added diacetyl to Givaudan for use in its butter flavorings that were sold and distributed to ConAgra for use in ConAgra's Act II Lite microwave popcorn.

8. Defendant DSM is a Delaware corporation with its headquarters at 2675 Eisenhower Avenue, Eagleville, PA 19403. At all material times hereto, DSM was doing business in New York, as well as throughout the United States. At all material times hereto, Defendant DSM manufactured, designed, packaged, marketed, labeled and sold added diacetyl to Givaudan for use in its butter flavorings that were sold and distributed to ConAgra for use in ConAgra's Act II Lite microwave popcorn.

9. Defendant Fleurchem is a New York corporation, with its headquarters at 33 Sprague Avenue, Middletown, NY 10940. At all material times hereto, Fleurchem was doing business in New York. Defendant Fleurchem manufactured, designed, packaged, marketed, labeled and sold added diacetyl to Givaudan for use in its butter flavorings that were sold and distributed to ConAgra for use in ConAgra's Act II Lite microwave popcorn.

10. Defendant O'Laughlin is a Georgia corporation, with headquarters at 150 Morris Avenue, Springfield, NJ 07081 . At all material times hereto O'Laughlin was doing business in New York as well as throughout the United States. Defendant O'Laughlin manufactured, designed, packaged, marketed, labeled and sold added diacetyl to Givaudan for use in its butter flavorings that were sold and distributed to ConAgra for use in ConAgra's Act II Lite microwave popcorn.

11. Defendant Phoenix Aromas is a New York corporation with headquarters at 375 Chestnut Street, Norwood, NJ 08648. At all material times hereto, Defendant Phoenix Aromas was doing business in New York as well as throughout the United States. Defendant Phoenix Aromas manufactured, designed, packaged, marketed, labeled and sold added diacetyl to Givaudan for use in its butter flavorings that were sold and distributed to ConAgra for use in ConAgra's Act II Lite microwave popcorn.

12. Defendant Polarome is a New York corporation with its headquarters at 200 Theodore Conrad Drive, Jersey City, NJ 07305. At all material times hereto, Defendant Polarome was doing business in New York as well as throughout the United States. Defendant Polarome manufactured, designed, packaged, marketed, labeled and sold added diacetyl to Givaudan for use in its butter flavorings that were sold and distributed to ConAgra for use in ConAgra's Act II Lite microwave popcorn.

13. John Does Defendants 1-100 are as yet unknown individuals and companies, which manufactured, designed, packaged, marketed, labeled and sold added diacetyl to Givaudan for use in its butter flavorings that were sold and distributed to ConAgra for use in ConAgra's Act II Lite microwave popcorn.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this action pursuant to CPLR § 302. Jurisdiction over Defendants is proper in New York because Plaintiff is a citizen and resident of Queens County, New York; her injuries were caused in Queens County, New York; and, Defendants transact business in the State of New York, supply goods in the State of New York and generate significant revenue in New York.

15. Venue is proper in this Court pursuant to CPLR § 503 because Plaintiff Agnes Mercado resides in Queens County, New York.

BACKGROUND

16. Defendant ConAgra manufactured, designed, tested, sold or otherwise placed into the stream of commerce butter-flavored "Act II" brand microwave popcorn containing butter flavoring containing added diacetyl within the ordinary course of business. In order to flavor Act II Lite popcorn, ConAgra uses a butter flavoring containing a chemical by the name of diacetyl.

17. Defendant Givaudan manufactured, sold, designed, and/or distributed or otherwise placed in the stream of commerce butter flavorings containing added diacetyl that were sold and distributed to Defendant ConAgra for use in its Act II Lite microwave popcorn.

18. Defendants Berje, Chemtura, Citrus & Allied, DSM, FleurChem, O'Laughlin, Phoenix Aromas, Polarome and John Doe Defendants 1-100 (hereinafter "Diacetyl Defendants") manufactured, designed, packaged, marketed, labeled, sold and/or distributed or otherwise placed in the stream of commerce added diacetyl, for use in Defendant Givaudan's butter flavorings that were sold and distributed to Defendant ConAgra for use in Act II Lite microwave popcorn.

19. Between approximately 1991 to September, 2007, Plaintiff Agnes Mercado regularly purchased, prepared and consumed Act II Lite microwave popcorn sold by Defendant ConAgra containing Defendant Givaudan's butter flavorings, which contained added diacetyl that was manufactured and/or sold by the Diacetyl Defendants. During that time, Ms. Mercado regularly consumed two to three bags of butter-flavored microwave Act II Lite popcorn daily.

20. The butter flavorings designed, manufactured and sold by Givaudan and the butter flavored microwave popcorn designed, manufactured and sold by ConAgra containing added diacetyl designed, packaged, marketed, labeled and sold by Diacetyl Defendants is defective in its design because exposure to this particular kind of butter flavoring, containing added diacetyl causes serious, debilitating respiratory illnesses. These respiratory illnesses include, without limitation, asthma, bronchiectasis, bronchiolitis obliterans, chronic bronchiolitis, chronic obstructive bronchitis, chronic cough, chronic obstructive pulmonary disease, emphysema, fatigue, obstructive spirometry abnormalities, severe lung impairment, shortness of breath, as well as other respiratory illnesses, disorders and diseases.

21. Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl were negligently and defectively designed, manufactured, and formulated, and sold to Ms. Mercado, causing her to suffer grave injuries and harm.

22. In or about April 2010, Ms. Mercado was diagnosed with a severe lung disease as a result of her exposure to Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl.

23. Because of the severe and grievous damage to her lungs, Ms. Mercado's physicians have ordered her to regularly use an oxygen tank. She is likely to require a lung transplant in the near future.

24. Defendants knew or should have known of the risks associated with exposure to their microwave popcorn and/or butter flavorings and/or added diacetyl.

25. Despite Defendants' superior knowledge of the risks associated with exposure to their products containing, or made with diacetyl, Defendants, who were in a superior position as manufacturers and sellers, failed to warn or alert consumers, including Ms. Mercado, of the risks associated with such exposure.

26. As a result of Defendants' misconduct in connection with the defective design, development, manufacture and sale of microwave popcorn and/or butter flavorings and/or added diacetyl, and Defendants' failure to warn Plaintiff, as well as other consumers, of the risks associated with exposure to Defendants' products, Ms. Mercado has suffered and will continue to suffer severe, permanent and/or progressive damage to her lungs and respiratory system. Plaintiff has suffered, and continues to suffer, severe physical pain, mental anguish and emotional distress as well as loss of sleep as a result of her condition. Ms. Mercado has lost wages and will continue to suffer from a diminution in her earning capacity. Plaintiff has expended large sums of money for her medical treatment and will continue to incur expenses for medical treatment and care required to care for herself as a result of her injuries.

27. Defendants' misconduct was the result of a conscious and deliberate disregard of the health and safety of consumers, like Ms. Mercado, to the detriment of the consumers, and to enrich the pockets of Defendants. Plaintiff is entitled to punitive damages to the fullest extent necessary and appropriate to punish Defendants and to deter the Defendants and others from engaging in similar conduct, given the conscious or deliberate nature of such conduct; the degree of reprehensibility, duration, and concealment thereof; the degree of its harmful impact on Ms. Mercado as well as other consumers; the profitability of such conduct to Defendants and the desirability of removing that profit; and the financial position or condition of Defendants.

LIMITATION

28. Any applicable statutes of limitation have been tolled by Defendants' knowing and active concealment and denial of the facts as alleged herein. Plaintiff has been kept ignorant of vital information essential to the pursuit of these claims, without any fault or lack of diligence on her part. Plaintiff could not reasonably have discovered the true, latent defective nature of Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl.

29. Defendants are and were under a continuing duty to disclose to Plaintiff the true character, quality and nature of Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl. Because of Defendants' failure to disclose and active concealment of the true character, quality and nature of their products, Defendants are estopped from relying on any statutes of limitation in their defense of this action.

30. Further, because Plaintiff did not discover and could not have reasonably discovered the cause of her illness before April 2010, any statute of limitations is tolled until that time.

31. As a result, Plaintiff seeks recovery of all damages allowable under the law.

FIRST CAUSE OF ACTION

(Negligence)

32. Plaintiff incorporates by reference all preceding allegations as if fully set forth herein.

33. Defendant ConAgra designed, developed, manufactured, tested, packaged, promoted, marketed, distributed, labeled and/or sold microwave popcorn intended to be cooked

in a microwave oven, to be tasted and to have a pleasant aroma or smell. ConAgra had a duty to exercise reasonable care in the design and manufacture of its products.

34. Defendant Givaudan designed, developed, manufactured, tested, packaged, promoted, marketed, distributed, labeled and/or sold butter flavoring using diacetyl as an added ingredient to be used in consumer food products including ConAgra's Act II Lite microwave popcorn, which was intended to be cooked in a microwave oven, to be tasted and to have a pleasant aroma or smell. Givaudan had a duty to exercise reasonable care in the design and manufacture of its products.

35. Diacetyl Defendants designed, developed, manufactured, tested, packaged, promoted marketed, distributed, labeled, and/or sold diacetyl to be used as an added ingredient in Givaudan's butter flavoring, which was intended to be cooked in a microwave oven, to be tasted and to have a pleasant aroma or smell. The Diacetyl Defendants had a duty to exercise reasonable care in the design and manufacture of their products.

36. ConAgra's microwave popcorn contained butter flavoring using diacetyl as an added ingredient, which, when used as intended, was highly likely to be a substantial contributing factor in causing human illnesses, injuries and conditions:

- a. bronchiolitis obliterans,
- b. respiratory disease,
- c. severe impairment of lung function, and
 - a. other types of diseases and injuries associated with butter flavorings and
 - b. their constituents.

37. At all times material, the ordinary consumer, including Plaintiff Agnes Mercado, did not know of the likelihood of, the severity of, or the extent of the risks from Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl.

38. Defendants breached their duty to Plaintiff as a result of the following negligent acts and omissions:

a. including, utilizing, and specifying diacetyl, a compound known to cause serious, debilitating respiratory illnesses, in their specifications, design, and formula for their butter flavoring and butter-flavored microwave popcorn;

b. failure to adequately identify, test for, incorporate, and utilize reasonably feasible alternative flavoring additives that would have prevented the reasonably foreseeable injuries suffered by Plaintiff and would have made their products safer overall;

c. the duty to warn all foreseeable users, including consumers, of Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl of the likelihood, probability and/or foreseeability that the harms listed herein would or might occur if the products were used as intended;

d. the duty to acquire, maintain and apply the best scientific knowledge available in the field of microwave popcorn, butter flavor and added diacetyl design, development, manufacture, testing, packaging promotion, marketing, distribution, labeling and/or sale of microwave popcorn and/or their butter flavorings and diacetyl;

e. the duty to test, design, manufacture and sell microwave popcorn, butter flavorings, and added diacetyl, that when used as intended were reasonably safe for all foreseeably exposed persons such as Agnes Mercado;

f. the duty to make feasible improvements in design, composition, or manufacture of microwave popcorn and/or butter flavorings and/or added diacetyl, that would

eliminate or decrease the risk to persons exposed such as Agnes Mercado from an inhalation hazard;

g. the duty to disclose to all foreseeably exposed persons, users and consumers the results of their own scientific research and other scientific research known to them indicating that the use of microwave popcorn and/or butter flavorings and/or added diacetyl, cause serious risks of harm;

h. the duty to warn all foreseeable users and consumers of the known dangers of microwave popcorn and/or butter flavorings and/or added diacetyl;

i. the continuing duty to warn all foreseeable users and consumers of their microwave popcorn and/or butter flavorings and/or added diacetyl, concerning defects of which the Defendants acquired knowledge after the product was manufactured or sold;

j. the duty to provide the post-marketing warning or instruction that a manufacturer and/or seller exercising reasonable care would have provided concerning the risk in light of the likelihood that Defendants' products would cause consumers such as Agnes Mercado's injuries and in light of the likely seriousness of these injuries;

k. the duty to exercise due care and the ordinary, reasonable and technical skill and competence that is required of designers, manufacturers, processors, distributors, marketers, sellers, suppliers, and others in a similar situation, including, without limitation: the duty to test their food products and food flavorings and ingredients; the duty to acquire and maintain the knowledge of an expert to design, manufacture, process, distribute, market, sell, and/or supply their products free from defects and/or latent defects; and the duty to adequately warn of product defects and/or hazards, which duty continued even after the sale of said products.

39. Defendants' products were more dangerous than an ordinary consumer such as Plaintiff would expect when used in an intended or reasonably foreseeable manner.

40. Defendants' inclusion of diacetyl in ConAgra's butter-flavored microwave popcorn products imparted no substantial change to the butter flavoring and butter-flavored microwave popcorn as originally designed and manufactured and as used by Defendants.

41. Any benefit from Defendants' inclusion of diacetyl in ConAgra's butter-flavored microwave popcorn products was outweighed by the unreasonably high risk of suffering serious, debilitating respiratory problems such as those suffered by Plaintiff.

42. Plaintiff was a foreseeable user/consumer of Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl and used/consumed Defendants' products in their intended or reasonably foreseeable manner.

43. Plaintiff's injuries were the direct and proximate result of Defendants' negligence.

44. As a direct and proximate result of Defendants' negligence, Ms. Mercado suffered actual harm and is entitled to compensatory damages based on her physical injuries, emotional distress, loss of sleep, past and future lost wages and earning capacity, and past and future medical expenses, all sustained as a result of Defendants' negligence.

45. As a result of Defendants' malice, fraud, oppression and insult, Ms. Mercado is entitled to punitive/exemplary damages to the fullest extent necessary and appropriate to punish Defendants and to deter them and others from similar conduct, given the conscious or deliberate nature of such conduct, the degree of reprehensibility, and duration thereof; the degree its harmful impact on Ms. Mercado; the profitability of such conduct to Defendants and the desirability of removing that profit; and the financial condition of Defendants.

46. Plaintiff demands judgment against Defendants for compensatory and punitive damages, costs and attorneys' fees, plus interest.

SECOND CAUSE OF ACTION

(Strict Liability)

(Defective Design and/or Formulation)

47. Plaintiff incorporates by reference all preceding allegations as if fully set forth herein.

48. The microwave popcorn and/or butter flavorings and/or added diacetyl manufactured by Defendants is defective in design and/or formulation as the products contained, utilized, and specified diacetyl, a compound known to cause serious, debilitating respiratory illnesses that include asthma, bronchiectasis, bronchiolitis obliterans, chronic bronchiolitis, chronic obstructive bronchitis, chronic cough, chronic obstructive pulmonary disease, emphysema, fatigue, obstructive spirometry abnormalities, severe lung impairment, shortness of breath, and/or other respiratory illnesses and diseases.

49. Defendants' products were not reasonably safe when used in an intended or reasonably foreseeable manner.

50. Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl were defective at the time they left Defendants' control.

51. Defendants' products' utility as a snack food was not and could not have been enhanced by the inclusion of diacetyl, a harmful compound known to cause serious, debilitating respiratory illnesses from exposure.

52. The likelihood that consumers such as Ms. Mercado would suffer harm as a result of exposure to the diacetyl contained in Defendants' products was unreasonably high given the health risks associated with diacetyl known to Defendants at the time the products left their control.

53. Relying on Defendants' marketing of their products as safe for their intended and reasonably foreseeable uses, Ms. Mercado, as a consumer, was in no position to become aware that Defendants' products contained an unreasonably dangerous compound wherein exposure to them would eventually require the replacement of one of her lungs. Nor could Ms. Mercado have used Defendants' products in a manner more careful and safe than she did.

54. There were reasonably available, less harmful substitutes that would impart the same-flavoring to Defendants' products. Defendants could have easily utilized any one of these alternatives as they would have imparted the same butter-flavor to ConAgra's popcorn.

55. The additional cost to Defendants to use any one of these safer, functional alternatives was *de minimis* as Defendants sell a substantial amount of microwave popcorn and/or butter flavorings and/or added diacetyl, and they currently bring in substantial revenues in sales of microwave popcorn and/or butter flavorings and/or added diacetyl. Any costs associated with the inclusion of any one of the reasonably safer alternatives, including, but not limited to, any research and development costs, could easily be spread across the companies.

56. Given the unreasonably high probability of developing serious respiratory illnesses from exposure to diacetyl and the availability of a less harmful substitute, the reasonably foreseeable risks associated with the inclusion and/or specification of diacetyl in Defendants' microwave popcorn and/or butter flavorings exceeded any benefits associated with such a design or formulation.

57. When Plaintiff Agnes Mercado was exposed to Defendants' products:

a. the said food and flavor products were more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, and/or

b. the foreseeable risks associated with the design or formulation of the food and flavor products exceeded and outweighed the benefits associated with their design or formulation, in that:

i. the nature and magnitude of the risks of harm associated with the design or formulation of said products, in light of the intended and reasonably foreseeable uses, modifications and alterations of said products, outweighed the intended or actual utility of said designs and formulations;

ii. consumers, including Agnes Mercado would not likely be aware, whether based on warnings, general knowledge or otherwise of the risks of harm;

iii. it was likely that the design or formulation of the Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl, would cause harm in light of their intended and reasonably foreseeable uses, modifications and alterations;

iv. there was no performance or safety advantages associated with the design or formulation of Defendants' products; and

v. Defendants possessed both the technical and economic feasibility of using an alternative design or formulation when the products left the control of Defendants.

58. Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl, were a substantial factor in causing Ms. Mercado's injuries and harm.

59. Ms. Mercado suffered actual harm and is entitled to compensatory damages based on her physical injuries, loss of consortium, emotional distress, loss of sleep, past and future lost wages and earning capacity, and past and future medical expenses, sustained as a result of Defendants' misconduct

65. Defendants knew or should have known that consumers were at an unreasonably high risk of suffering from such serious, debilitating respiratory illnesses resulting from reasonably foreseeable uses of their products.

66. Yet, despite this knowledge, Defendants failed to provide any warnings or information to consumers, such as Ms. Mercado, regarding the unreasonably dangerous health risks associated with the inhalation of diacetyl.

67. Defendants designed, developed, manufactured, tested, packaged, promoted, marketed, distributed, supplied, and labeled/sold their microwave popcorn and/or butter flavorings and/or added diacetyl, without adequate instructions on their safe use to reduce and/or eliminate exposure thereto, and/or without warnings that the products contained substances that are dangerous to health and life and cause severe respiratory diseases.

68. Defendants failed to provide the post-marketing warning or instruction that a manufacturer/supplier/distributor/seller exercising reasonable care would have provided concerning the risk, in light of the likelihood that the products would cause consumers, including Agnes Mercado, injuries and in light of the likely seriousness of these injuries.

69. Plaintiff was a foreseeable user/consumer of ConAgra's microwave popcorn and used/consumed the product in its intended or reasonably foreseeable manner. Completely unaware of the latent health risks associated with added diacetyl in Defendants' microwave popcorn and/or butter flavorings, Ms. Mercado consumed Act II Lite microwave popcorn on a regular basis, consistently from approximately 1991 until approximately September 2007. During that time, Ms. Mercado regularly consumed two to three bags of butter-flavored microwave Act II Lite popcorn daily.

70. Had any warning or instruction been given to consumers such as Ms. Mercado regarding the health risks associated with diacetyl, Ms. Mercado would have consumed Defendants' products safely.

71. As a direct and proximate result of Defendants' failure to warn of the risks of exposure to Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl, Ms. Mercado now suffers from lung damage that is so severe that she will likely need a lung transplant in the near future.

72. Ms. Mercado is entitled to compensatory damages based on her physical injuries, loss of consortium, emotional distress, loss of sleep, past and future lost wages and earning capacity, and past and future medical expenses, sustained as a result of Defendants' negligence.

73. As a result of Defendants' malice, fraud, oppression and insult, Ms. Mercado is entitled to punitive/exemplary damages to the fullest extent necessary and appropriate to punish Defendants and to deter them and others from similar conduct, given the conscious or deliberate nature of such conduct, the degree of reprehensibility, and duration thereof; the degree of its harmful impact on Ms. Mercado; the profitability of such conduct to the Defendants and the desirability of removing that profit; and the financial condition of Defendants.

74. Plaintiff demands judgment against Defendants for compensatory and punitive damages, and an award of attorneys' fees, interest and costs

FOURTH CAUSE OF ACTION

(Negligent Failure to Warn)

75. Plaintiff incorporates by reference all preceding allegations as if fully set forth herein.

76. As designers and manufacturers of microwave popcorn and/or butter flavorings and/or added diacetyl, Defendants had a duty to warn consumers, such as Ms. Mercado, of any

unreasonably dangerous health risks resulting from using their products in their intended and reasonably foreseeable manner.

77. Defendants breached their duty to Plaintiff as a result of the following negligent acts and omissions:

a. failure to provide any warnings to consumers such as Ms. Mercado of the unreasonably dangerous health risks associated with added diacetyl;

b. failure to provide consumers such as Ms. Mercado with the information they possessed on the unreasonably dangerous health risks associated with added diacetyl.

c. the duty to warn all foreseeable users, including consumers, of Defendants' microwave popcorn and/or butter flavorings and/or added diacetyl, of the likelihood, probability and/or foreseeability that the harms listed herein would or might occur if the products were used as intended;

d. the duty to acquire, maintain and apply the best scientific knowledge available in the field of microwave popcorn, butter flavor and added diacetyl design, development, manufacture, testing, packaging promotion, marketing, distribution, labeling and/or sale of microwave popcorn and/or their butter flavorings and diacetyl;

e. the duty to test, design, manufacture and sell microwave popcorn and/or butter flavorings and/or added diacetyl, that when used as intended were reasonably safe for all foreseeably exposed persons such as Agnes Mercado;

f. the duty to make feasible improvements in design, composition, or manufacture of microwave popcorn and/or butter flavorings and/or added diacetyl, that would eliminate or decrease the risk to persons exposed such as Agnes Mercado from an inhalation hazard;

g. the duty to disclose to all foreseeably exposed persons, users and consumers the results of their own scientific research and other scientific research known to them indicating that the use of microwave popcorn and/or butter flavorings and/or added diacetyl, cause serious risks of harm;

h. the duty to warn all foreseeable users and consumers of the known dangers of microwave popcorn and/or butter flavorings and/or added diacetyl.

i. the continuing duty to warn all foreseeable users and consumers of their products concerning defects of which the Defendants acquired knowledge after the product was manufactured or sold;

j. the duty to provide the post-marketing warning or instruction that a manufacturer and/or seller exercising reasonable care would have provided concerning the risk in light of the likelihood that Defendants' products would cause consumers such as Agnes Mercado's injuries and in light of the likely seriousness of these injuries;

k. the duty to exercise due care and the ordinary, reasonable and technical skill and competence that is required of designers, manufacturers, processors, distributors, marketers, sellers, suppliers, and others in a similar situation, including, without limitation: the duty to test their food products and food flavorings and ingredients; the duty to acquire and maintain the knowledge of an expert to design, manufacture, process, distribute, market, sell, and/or supply their products free from defects and/or latent defects; and the duty to adequately warn of product defects and/or hazards, which duty continued even after the sale of said products.

78. Defendants knew or should have known that exposure to diacetyl is known to cause serious, debilitating respiratory illnesses from exposure, including asthma, bronchiectasis, bronchiolitis obliterans, chronic bronchiolitis, chronic obstructive bronchitis, chronic cough,

chronic obstructive pulmonary disease, emphysema, fatigue, obstructive spirometry abnormalities, severe lung impairment, shortness of breath, and/or other respiratory illnesses and diseases.

79. Defendants failed to provide any information to consumers such as Ms. Mercado regarding the dangers of exposure to diacetyl.

80. Had Defendants provided information which they possessed, and which Defendants should have known was necessary to make use of the butter-flavored microwave popcorn safe to consumers, such a warning by Defendants would have allowed Ms. Mercado to consume ConAgra's Act II Lite butter-flavored microwave popcorn safely.

81. As a direct and proximate result of Defendants' failure to warn Ms. Mercado and other consumers of the risks associated with exposure to their microwave popcorn and/or butter flavorings and/or added diacetyl, Ms. Mercado suffered actual harm and is entitled to compensatory damages based on her physical injuries, emotional distress, loss of sleep, past and future lost wages and earning capacity, and past and future medical expenses, sustained as a result of Defendants' negligence.

82. As a result of Defendants' malice, fraud, oppression and insult, Ms. Mercado is entitled to punitive/exemplary damages to the fullest extent necessary and appropriate to punish Defendants and to deter them and others from similar conduct, given the conscious or deliberate nature of such conduct, the degree of reprehensibility, and duration thereof; the degree of its harmful impact on Ms. Mercado; the profitability of such conduct to the Defendants and the desirability of removing that profit; and the financial condition of Defendants.

83. Plaintiff demands judgment against the Defendants for compensatory and punitive damages, plus and award of attorneys' fees, interest and costs.

FIFTH CAUSE OF ACTION

(Breach of Warranties)

(Express and Implied)

84. Plaintiff incorporates by reference all preceding allegations as if fully set forth herein.

85. In their marketing of microwave popcorn and/or butter flavorings and/or added diacetyl, Defendants expressly and impliedly warranted to Plaintiff that their products were safe for the ordinary purposes or which their products were used.

86. Defendants breached any and all implied and express warranties because Defendants' products contained added diacetyl, a harmful compound known to cause severe, debilitating respiratory illnesses, which include asthma, bronchiectasis, bronchiolitis obliterans, chronic bronchiolitis, chronic obstructive bronchitis, chronic cough, chronic obstructive pulmonary disease, emphysema, fatigue, obstructive spirometry abnormalities, severe lung impairment, shortness of breath, and/or other respiratory illnesses and diseases. Defendants' products were defective and unfit for their intended purpose at the time they left Defendants' control.

87. Ms. Mercado was exposed to diacetyl when she consumed ConAgra's Act II Lite microwave popcorn. Ms. Mercado consumed Act II Lite microwave popcorn on a regular basis, consistently from approximately 1991 until approximately September 2007. During that time, Ms. Mercado regularly consumed two to three bags of butter-flavored microwave Act II Lite popcorn daily.

88. No warnings were placed on the packaging or given to consumers such as Ms. Mercado that Defendants' product contained a compound that was known to cause serious, debilitating respiratory illnesses from exposure to it.

JURY TRIAL DEMAND

Plaintiff hereby demands a jury trial for all claims so triable.

Dated: May 3, 2010
New York, New York

By: _____



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