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**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA**

CALIFORNIA CHAMBER OF  
COMMERCE,

Plaintiff,

v.

XAVIER BECERRA, IN HIS OFFICIAL  
CAPACITY AS ATTORNEY GENERAL  
OF THE STATE OF CALIFORNIA,

Defendant.

Civil Action No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

1 Plaintiff California Chamber of Commerce (“Plaintiff” or “CalChamber”) seeks declaratory  
2 and injunctive relief against Defendant Xavier Becerra, in his official capacity as Attorney General of  
3 the State of California, and alleges as follows:

4 **PRELIMINARY STATEMENT**

5 1. Plaintiff CalChamber brings this suit to enjoin Defendant and those in privity with and  
6 acting in concert with Defendant from enforcing a requirement to provide a false, misleading, and  
7 highly controversial cancer warning for food and beverage (collectively referred to herein as “food”)  
8 products that contain the chemical acrylamide.

9 2. Acrylamide is not intentionally added to food products. Rather, acrylamide is formed  
10 naturally in many types of foods when cooked at high temperatures or otherwise processed with heat.  
11 It is formed in cooking at home, in restaurants, and in food processing and manufacturing facilities,  
12 and it has been present in these foods for as long as they have been cooked. Common sources of  
13 acrylamide in the human diet include, among others, breakfast cereals, crackers, bread crusts, coffee,  
14 grilled or roasted asparagus, French fries, potato chips and other fried and baked snack foods, canned  
15 sweet potatoes, canned black olives, prune juice, roasted nuts, and toast. Acrylamide is also widely  
16 used during the manufacturing of paper, dye, and other industrial products.

17 3. Acrylamide has been identified by certain governmental and scientific entities as a  
18 carcinogen based on studies in laboratory animals. Scientific studies in humans, however, have  
19 found no reliable evidence that exposure to acrylamide in food products is associated with an  
20 increased risk of developing any type of cancer. In fact, the epidemiologic evidence suggests that  
21 dietary acrylamide—i.e., acrylamide that forms naturally in normal cooking of many food products—  
22 does *not* cause cancer in humans or pose an increased risk of cancer in humans. Indeed, some food  
23 products that contain acrylamide (e.g., whole grains and coffee) have been shown to reduce the risk  
24 of certain diseases, including cancer.

25 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986  
26 (“Proposition 65”), businesses are required to warn consumers about an exposure to any chemical  
27 that has been identified by the California Office of Environmental Health Hazard Assessment  
28 (“OEHHA”) as “known to the State to cause cancer,” unless a defense to the warning requirement

1 applies. OEHHA has listed acrylamide as a carcinogen.

2 5. As a result of the acrylamide listing, and despite the scientific studies showing that  
3 exposure to acrylamide in food products does not increase the risk of cancer in humans, businesses  
4 that produce, distribute, or sell food products that contain acrylamide are presumptively required to  
5 provide a Proposition 65 cancer warning for their food products. This is so even though neither  
6 OEHHA nor any other governmental entity has determined that acrylamide is a known human  
7 carcinogen, and in fact OEHHA has acknowledged that the agency does not *know* that acrylamide  
8 increases the risk of cancer in humans.

9 6. A Proposition 65 cancer warning for acrylamide in food products that are intended for  
10 human consumption conveys to consumers the false and misleading message that consuming the  
11 products will increase consumers' risk of cancer, even though there is no reliable evidence that  
12 exposure to dietary acrylamide increases the risk of cancer in humans.

13 7. California's presumptive requirement that businesses provide a Proposition 65 cancer  
14 warning for food products that contain acrylamide therefore violates the First Amendment of the  
15 United States Constitution by compelling Plaintiff's members and other entities that produce,  
16 distribute, or sell acrylamide-containing food products to make false, misleading, and highly  
17 controversial statements about their products.

18 8. In addition to being illegal, California's treatment under Proposition 65 of acrylamide  
19 that forms naturally in normal cooking of many food products harms both businesses and the public.  
20 Businesses, including many of CalChamber's members, must either take action to provide false,  
21 misleading, and highly controversial warnings to California consumers about the safety of their food  
22 products, or face potential costly enforcement actions initiated by Defendant or private enforcers for  
23 failing to do so.

24 9. Members of the public, meanwhile, will be misled about the risks posed by food  
25 products containing acrylamide, potentially frightening them away from a variety of foods—  
26 including whole grains, peanuts, almonds, nut butters, olives, and coffee—that are part of a well-  
27 balanced diet and may actually *reduce* the risk of cancer. Cancer warnings for acrylamide in food  
28 products also can mislead consumers into believing that acrylamide is present only in store-bought

1 foods, when in fact consumer exposure to acrylamide in foods may be greatest through home cooking  
2 (for which no Proposition 65 warnings are required).

3 10. Given the lack of reliable scientific evidence suggesting a causal relationship between  
4 acrylamide in food products and cancer risk, requiring cancer warnings for dietary acrylamide also  
5 will result in over-warning, diluting the effectiveness of Proposition 65 warnings on other products  
6 that actually do pose a risk of harm to consumers and diminishing consumers' confidence in public  
7 health messages and the authorities who promulgate them.

8 11. For these reasons, the Court should declare that mandating Proposition 65 cancer  
9 warnings for acrylamide in food products is unconstitutional under the First Amendment and enjoin  
10 Defendant and those in privity with and/or acting in concert with Defendant (including  
11 Proposition 65 private enforcers) from enforcing the Proposition 65 warning requirement as applied  
12 to acrylamide in food products.

13 **PARTIES**

14 12. Plaintiff CalChamber is a nonprofit business association with over 13,000 members,  
15 both individual and corporate, representing virtually every economic interest in the State of  
16 California, including among others food producers, suppliers, and retailers. CalChamber's members  
17 include several of the largest businesses in California, but seventy-five percent of its members are  
18 small businesses with 100 or fewer employees. CalChamber acts on behalf of the business  
19 community to improve the state's economic and employment climate by representing business on a  
20 broad range of legislative, regulatory, and legal issues. CalChamber's members employ millions of  
21 Californians. Because so many of its members are directly impacted by Proposition 65, CalChamber  
22 has historically been and continues to be deeply involved in a variety of Proposition 65-related  
23 regulatory and litigation matters. Specifically, CalChamber has coordinated and spearheaded policy  
24 discussions on Proposition 65 issues involving business leaders, policy makers, scientists, and  
25 advocacy groups in both the regulatory and legislative forums. CalChamber has also closely  
26 monitored proposed listings of chemicals and other regulatory activities under Proposition 65, has  
27 advised its members on these issues, and has represented its members in policy discussions and  
28 litigation, including litigation challenging Proposition 65 provisions and regulations promulgated

1 under Proposition 65. CalChamber has been intimately involved in Proposition 65 reform initiatives  
2 and related regulatory efforts, coordinating and participating in numerous policy discussions,  
3 providing extensive comments on behalf of its members, presenting detailed proposals, monitoring  
4 developments, advising members on developments, and initiating legislative proposals.

5 13. Defendant Xavier Becerra is the Attorney General of the State of California and the  
6 highest-ranking officer in the California Department of Justice. Attorney General Becerra is sued in  
7 his official capacity. He performs his official duties in Sacramento and throughout the State of  
8 California. As Attorney General, he is specifically empowered to enforce the provisions of  
9 Proposition 65, and indeed the California Attorney General has done so in the past with respect to  
10 dietary acrylamide in a variety of lawsuits against manufacturers of food products, all of which have  
11 been resolved through settlement as of the date of this Complaint.

#### 12 **JURISDICTION AND VENUE**

13 14. This Court has jurisdiction over this action under 28 U.S.C. § 1331, which confers  
14 original jurisdiction on federal district courts over actions arising under the Constitution or laws of  
15 the United States.

16 15. Venue is proper under 28 U.S.C. § 1391(b)(1) and (b)(2), because the Attorney  
17 General is located within this district and a substantial part of the events giving rise to Plaintiff's  
18 claims occurred in this district.

#### 19 **FACTUAL BACKGROUND**

##### 20 **A. Overview of Acrylamide in Food Products**

21 16. Acrylamide forms naturally from chemical reactions in certain types of starchy foods  
22 when cooked at high temperatures or otherwise processed using heat. Acrylamide is found mainly in  
23 food made from plants, such as potato products (e.g., French fries, potato chips), grain products (e.g.,  
24 breakfast cereals, cookies, and toast), and coffee. Although acrylamide was not detected in foods  
25 until 2002, “[a]crylamide has probably always been present in cooked foods.” *See* Food and Drug  
26 Administration, *Acrylamide Questions and Answers* (Updated Sept. 25, 2019) (“FDA Q&A”),  
27 <https://www.fda.gov/food/chemicals/acrylamide-questions-and-answers>.

28 17. Dietary acrylamide forms as part of a chemical reaction, known as the Maillard

1 reaction, that takes place during high temperature cooking processes, including frying, roasting,  
2 grilling, and baking. During this reaction, sugars such as glucose and fructose react with a naturally-  
3 occurring free amino acid, asparagine, to form acrylamide. The Maillard reaction contributes to the  
4 aroma, taste, and color of certain foods. *See* National Institute of Environmental Health Sciences,  
5 *Acrylamide* (May 14, 2019), <https://www.niehs.nih.gov/health/topics/agents/acrylamide/index.cfm>.

6 18. Common sources of acrylamide in the diet include, among others, breakfast cereals,  
7 crackers, bread crusts, roasted asparagus, French fries, potato chips and other fried and baked snack  
8 foods, canned sweet potatoes, canned black olives, roasted nuts, and toast. *See* OEHHA, *Acrylamide*  
9 *Fact Sheet* (Feb. 2019), [https://www.p65warnings.ca.gov/sites/default/files](https://www.p65warnings.ca.gov/sites/default/files/downloads/factsheets/acrylamide_fact_sheet.pdf)  
10 [/downloads/factsheets/acrylamide\\_fact\\_sheet.pdf](https://www.p65warnings.ca.gov/sites/default/files/downloads/factsheets/acrylamide_fact_sheet.pdf).

11 19. According to the United States Food and Drug Administration (“FDA”), the presence  
12 of acrylamide in foods is so widespread that “it isn’t feasible to completely eliminate acrylamide  
13 exposure.” Statement from FDA Commissioner Scott Gottlieb, M.D., on FDA’s Support for  
14 Exempting Coffee from California’s Cancer Warning Law (Aug. 29, 2018).

15 20. Because acrylamide in food products is formed through cooking, FDA states that  
16 acrylamide levels in cooked organic foods should be similar to levels in cooked non-organic foods.  
17 *See* FDA Q&A, ¶ 16, *supra*. FDA also has explained that consumer exposure to dietary acrylamide  
18 “may be greatest through home cooking,” as acrylamide forms naturally during the cooking process  
19 and is not present only in store-bought foods. *See* Letter from Lester M. Crawford, DVM, Ph.D,  
20 Deputy Commissioner, FDA, to Joan E. Denton, M.S., Ph.D., Director, California Office of  
21 Environmental Health Hazard Assessment (July 13, 2003).

22 21. Although acrylamide can form in many foods that are fried, roasted, or baked, FDA  
23 does not recommend that consumers avoid eating these foods. Instead, FDA recommends that  
24 consumers adopt a healthy eating plan consistent with the Office of Disease Prevention and Health  
25 Promotion’s Dietary Guidelines for Americans (2015-2020) (“Dietary Guidelines”). *See* FDA Q&A,  
26 ¶ 16, *supra*. The Dietary Guidelines, in turn, advise that a healthy diet should consist of a variety of  
27 food products, including vegetables, whole grains, and nuts. *Id.* These food products often contain  
28 acrylamide and have been the subject of Proposition 65 enforcement actions, as described below.

1           **B.       Epidemiologic Studies Demonstrate That Acrylamide From Food Products Does**  
2           **Not Increase the Risk of Cancer in Humans**

3           22.       Current scientific evidence does not support a finding that exposure to acrylamide  
4 from food products increases the risk of cancer in humans.

5           23.       As the National Cancer Institute (“NCI”) explains, “a large number of epidemiologic  
6 studies (both case-control and cohort studies) in humans have found no consistent evidence that  
7 dietary acrylamide exposure is associated with the risk of any type of cancer.” NCI, *Acrylamide and*  
8 *Cancer Risk* (Dec. 5, 2017), [https://www.cancer.gov/about-cancer/causes-](https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-fact-sheet)  
9 [prevention/risk/diet/acrylamide-fact-sheet](https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-fact-sheet). The NCI is the federal government’s principal agency for  
10 cancer research and training and is part of the National Institutes of Health, one of 11 agencies that  
11 make up the U.S. Department of Health and Human Services.

12           24.       Likewise, the American Cancer Society explains on its website that, “[s]o far, reviews  
13 of studies done in groups of people (epidemiologic studies) suggest that dietary acrylamide isn’t  
14 likely to be related to risk for most common types of cancer.” *See* American Cancer Society,  
15 *Acrylamide and Cancer Risk* (Feb. 11, 2019), [https://www.cancer.org/cancer/cancer-](https://www.cancer.org/cancer/cancer-causes/acrylamide.html)  
16 [causes/acrylamide.html](https://www.cancer.org/cancer/cancer-causes/acrylamide.html). The American Cancer Society further states that “[i]t’s not yet clear if the  
17 levels of acrylamide in foods raise cancer risk. . . .” *Id.*

18           25.       Numerous scientific studies support the conclusion that exposure to acrylamide from  
19 food products does not increase cancer risk in humans. In a 2012 systematic review published in the  
20 *European Journal of Cancer Prevention*, for example, researchers evaluated the association between  
21 dietary acrylamide and cancer. *See* L. Lipworth, et al., *Review of Epidemiologic Studies of Dietary*  
22 *Acrylamide Intake and the Risk of Cancer*, *European Journal of Cancer Prevention*, Vol. 21(4):375-  
23 386 (2012). The researchers explained that “[c]onjectured associations between dietary acrylamide  
24 intake and cancer have been evaluated in more than 15 epidemiologic studies examining almost every  
25 major cancer site.” *Id.* After critically reviewing the available studies, the researchers concluded:

26                   After an extensive examination of the published literature, we found no  
27                   consistent or credible evidence that dietary acrylamide increases the  
28                   risk of any type of cancer in humans, either overall or among  
                    nonsmokers. In particular, the collective evidence suggests that a high

1 level of dietary acrylamide intake is not a risk factor for breast,  
2 endometrial, or ovarian cancers. . . .

3 In conclusion, epidemiologic studies of dietary acrylamide intake have  
4 failed to demonstrate an increased risk of cancer. In fact, the  
5 sporadically and slightly increased and decreased risk ratios reported in  
6 more than two dozen papers examined in this review strongly suggest  
7 the pattern one would expect to find for a true null association over the  
8 course of a series of trials.

7 *Id.*

8 26. Since 2012, there have been several additional studies, across multiple different  
9 populations, evaluating whether there is an association between dietary acrylamide and cancer, and  
10 those studies have consistently found that exposure to acrylamide in food products does not increase  
11 human cancer risk. *See, e.g.,* C. Pelucchi, *et al.*, Dietary Acrylamide and Cancer Risk: An Updated  
12 Meta-Analysis, *Int'l Journal of Cancer*, Vol. 136(12):2912–22 (2015) (“This systematic review and  
13 meta-analysis of epidemiological studies indicates that dietary acrylamide is not related to the risk of  
14 most common cancers.”); A. Kotemori, *et al.*, Dietary Acrylamide Intake and Risk of Breast Cancer:  
15 the Japan Public Health Center-Based Prospective Study, *Cancer Science*, Vol. 109(3):843-53 (2018)  
16 (“In conclusion, dietary acrylamide intake was not associated with the risk of breast cancer in this  
17 population-based prospective cohort study of Japanese women.”); M. McCullough, *et al.*, Dietary  
18 Acrylamide Is Not Associated with Renal Cell Cancer Risk in the CPS-II Nutrition Cohort, *Cancer*  
19 *Epidemiology, Biomarkers & Prevention*, Vol. 28(3):616-619 (2019) (“In conclusion, we found no  
20 evidence that greater dietary acrylamide intake was associated with risk of RCC [renal cell  
21 carcinoma.]”); J. Hogervorst, *et al.*, Interaction Between Dietary Acrylamide Intake and Genetic  
22 Variants for Estrogen Receptor-Positive Breast Cancer Risk, *European Journal of Nutrition*, Vol.  
23 58:1033-1045 (2019) (“This study did not provide evidence for a positive association between  
24 acrylamide intake and ER+ [estrogen receptor-positive] breast cancer risk. If anything, acrylamide  
25 was associated with a decreased ER+ breast cancer risk.”).

26 27. In fact, studies have shown that certain foods that contain acrylamide may actually  
27 *reduce* the risk of cancer in humans. For example, in June 2018, the International Agency for  
28 Research on Cancer (“IARC”) concluded that there is an “inverse association” between drinking



1 coffee (which contains acrylamide) and certain types of cancer. See IARC Monographs on the  
2 Evaluation of Carcinogenic Risks to Humans, *Drinking Coffee, Mate, and Very Hot Beverages*, Vol.  
3 116 at 434 (2018). Likewise, a recent study showed that whole-grain foods may reduce the risk of  
4 liver cancer. See American Cancer Society, *Study Ties Whole Grains to Lower Risk of Liver Cancer*  
5 (Feb. 27, 2019), [https://www.cancer.org/latest-news/study-ties-whole-grains-to-lower-risk-of-liver-](https://www.cancer.org/latest-news/study-ties-whole-grains-to-lower-risk-of-liver-cancer.html)  
6 [cancer.html](https://www.cancer.org/latest-news/study-ties-whole-grains-to-lower-risk-of-liver-cancer.html).

7 28. Some regulatory and scientific entities have identified acrylamide as a possible or  
8 probable carcinogen based on studies in laboratory animals in which virtually pure acrylamide was  
9 administered orally or via injection to rats and mice. As NCI has explained, however, “toxicology  
10 studies have shown that humans and rodents not only absorb acrylamide at different rates, they  
11 metabolize it differently as well.” NCI, *Acrylamide and Cancer Risk* (Updated Dec. 5, 2017),  
12 <https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-fact-sheet>. The  
13 evidence that acrylamide causes cancer in animals is insufficient to conclude that acrylamide that  
14 forms naturally in certain food products increases cancer risk in humans, particularly in light of the  
15 epidemiologic data that strongly suggest that dietary acrylamide does *not* increase human cancer risk.

16 29. There are other examples of chemicals that have been shown to cause cancer in  
17 animals but not in humans. For example, studies in laboratory rats during the early 1970s linked the  
18 artificial sweetener saccharin to development of bladder cancer. Subsequent studies showed,  
19 however, that those results applied only to rats and not to humans, and human epidemiology studies  
20 have found no consistent evidence that saccharin is associated with bladder cancer in humans. See  
21 NCI, *Artificial Sweeteners and Cancer* (Aug. 10, 2016), [https://www.cancer.gov/about-](https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/artificial-sweeteners-fact-sheet)  
22 [cancer/causes-prevention/risk/diet/artificial-sweeteners-fact-sheet](https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/artificial-sweeteners-fact-sheet). As NCI explained: “Because the  
23 bladder tumors seen in rats are due to a mechanism not relevant to humans and because there is no  
24 clear evidence that saccharin causes cancer in humans, saccharin was delisted in 2000 from the U.S.  
25 National Toxicology Program’s *Report on Carcinogens*, where it had been listed since 1981 as a  
26 substance reasonably anticipated to be a human carcinogen (a substance known to cause cancer).” *Id.*

27 **C. Proposition 65 Regulatory Framework**

28 30. In 1986, California voters, by initiative, enacted the Safe Drinking Water and Toxic

1 Enforcement Act of 1986—commonly known as Proposition 65. In relevant part, Proposition 65  
2 prohibits businesses with ten or more employees from knowingly and intentionally exposing  
3 California residents to a chemical known to the State to cause cancer without providing required  
4 warnings, unless an exemption or affirmative defense applies. Cal. Health & Safety Code  
5 §§ 25249.6, 25249.10.

6 31. Proposition 65 requires OEHHA to maintain “a list of those chemicals known to the  
7 state to cause cancer or reproductive toxicity” and provides mechanisms by which OEHHA may (or  
8 must) place a chemical on the list. *Id.* §§ 25249.8(a)-(b).

9 32. As relevant here, the statute provides that a chemical is “known to the state to cause  
10 cancer” if “a body considered to be authoritative by [the state’s qualified] experts has formally  
11 identified it as causing cancer” (the “Authoritative Bodies” listing mechanism). *Id.* § 25249.8(b); *see*  
12 *also* 27 Cal. Code Regs. § 25306(a). IARC and the U.S. Environmental Protection Agency (“EPA”)  
13 have been identified as “authoritative bodies” for the identification of chemicals as causing cancer.  
14 *Id.* § 25306(m).

15 33. After a chemical is added to the Proposition 65 list, and following a 12-month grace  
16 period, Proposition 65 requires that any “person in the course of doing business” provide a “clear and  
17 reasonable warning” before “expos[ing] any individual to” the listed chemical, unless an exemption  
18 or affirmative defense applies. Cal. Health & Safety Code § 25249.6.

19 34. Although Proposition 65 does not define what content suffices to convey a “clear and  
20 reasonable warning,” OEHHA’s regulations had for more than 30 years provided that the warning  
21 “must clearly communicate that the chemical in question is known to the state to cause cancer. . . .”  
22 27 Cal. Code Regs. § 25601 (effective until Aug. 30, 2018). OEHHA also provided a “safe harbor”  
23 for warnings that used the following language: “**WARNING:** This product contains a chemical  
24 known to the State of California to cause cancer.” *Id.* § 25603.2 (effective until Aug. 30, 2018).

25 35. In August 2016, OEHHA adopted new regulations providing that safe harbor  
26 Proposition 65 warnings must provide consumers with additional information.

27 36. Under the new warning regulations, cancer warnings for food products are deemed to  
28 be “clear and reasonable” if they state: “**WARNING:** Consuming this product can expose you to

1 [name of chemical], which is known to the State of California to cause cancer. For more information,  
2 go to [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food).” 27 Cal. Code Regs § 25607.2(a)(2).<sup>1</sup> In addition, where the  
3 warning is provided on the food product label, it “must be set off from other surrounding  
4 information” and “enclosed in a box.” *Id.* § 25607.1(b).

5 37. Proposition 65 provides a statutory exemption to the warning requirement, which can  
6 be asserted as an affirmative defense in a Proposition 65 enforcement action, if “the person  
7 responsible can show that the exposure poses no significant risk assuming lifetime exposure at the  
8 level in question for substances known to the state to cause cancer.” Cal Health & Safety Code  
9 § 25249.10(c). This threshold is commonly referred to as the “No Significant Risk Level” (“NSRL”).  
10 The NSRL is not a concentration limit, but rather an exposure-based limit based on the highest level  
11 of exposure causing no more than a 1 in 100,000 risk of cancer over a lifetime of exposure to that  
12 level. Cal Health & Safety Code § 25249.10(c); 27 Cal. Code Regs. § 25703(b).

13 38. For some listed substances, OEHHA has published a quantitative NSRL, often  
14 referred to as a “safe harbor” NSRL because it is a presumptive NSRL such that a private enforcer  
15 cannot argue for a more stringent NSRL in litigation. 27 Cal. Code Regs. § 25705. A safe harbor  
16 NSRL is also an exposure-based limit. All safe harbor NSRLs for listed chemicals are described in  
17 micrograms of exposure per day. *Id.*

18 39. Under Proposition 65, to determine whether an exposure from a consumer product  
19 exceeds the NSRL, the regulations require that exposures be calculated based on the “average rate of  
20 intake or exposure for average users of the consumer product.” 27 Cal. Code Regs. § 25721(d)(4).  
21 Thus, unlike other laws and regulations affecting businesses that set concentration-based thresholds,  
22 it is not facially apparent from the NSRL described in the statute or from a safe harbor NSRL adopted  
23 by OEHHA and listed in the regulations whether there is a duty to warn under Proposition 65.

24 40. Under the statute, it is the burden of a business to demonstrate that the exposure at  
25 issue does not exceed the NSRL. In addition, the NSRL provides only an “affirmative defense” to  
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27 <sup>1</sup> Where a warning is being provided for an exposure to more than one listed carcinogen, the warning  
28 must state: “**WARNING:** Consuming this product can expose you to chemicals including [name of  
one or more chemicals], which is [are] known to the State of California to cause cancer.” 27 Cal.  
Code Regs §§ 25607.2(a)(2), (6).

1 liability under Proposition 65 and does not immunize industry from enforcement actions in the first  
2 instance. *See DiPirro v. Bondo Corp.*, 153 Cal. App. 4th 150, 185 (2007).

3 41. Courts have found that no warning is required where a business can demonstrate that  
4 exposures to the chemical do not pose a significant risk of cancer at *any* level. In *Baxter Healthcare*  
5 *Corporation v. Denton*, 120 Cal. App. 4th 333 (2004), the California Court of Appeal held that “a  
6 warning is not required if . . . the exposure poses no significant risk of causing cancer in humans.”  
7 *Id.* at 343-44. The court determined that the chemical at issue in that case (DEHP) does not cause  
8 cancer in humans and therefore no warning was required, even though the court found that the  
9 chemical was properly listed and DEHP remains on the list today. Importantly, however, the court  
10 explained that the business (Baxter Healthcare Corporation) bore the burden of proof to establish that  
11 exposure to DEHP presented no significant risk of cancer in humans. *Id.* at 364-369.

12 **D. Enforcement of Proposition 65**

13 42. Proposition 65 employs an unusual enforcement scheme. First, the Attorney General,  
14 a district attorney, or a variety of local government officials may bring an enforcement action under  
15 Cal. Health & Safety Code § 25249.7(c). The statute imposes penalties up to \$2,500 per day for each  
16 violation. *Id.* § 25249.7(b). In addition to these penalties, the statute also provides that any person  
17 who “threatens to violate” the warning requirement may be “enjoined in a court of competent  
18 jurisdiction.” *Id.* § 25249.7(a).

19 43. Second, any *person* (even one who has suffered no injury in fact) may bring a private  
20 enforcement action for an alleged failure to provide an adequate warning and without having to plead  
21 or prove injury or harm. *Id.* § 25249.7(d). These private enforcers are eligible to recover 25 percent  
22 of the penalty, *id.* § 25249.12(d), as well as their reasonable attorneys’ fees and costs, Cal. Code Civ.  
23 Proc. § 1021.5, creating very strong incentives for private enforcement. Defendants usually cannot  
24 remove these enforcement actions to federal court because the plaintiff has no Article III standing.

25 44. The private enforcement mechanism of Proposition 65 is unique and allows any  
26 person or law firm to act as a private enforcer to prosecute alleged violations of the Act. Courts and  
27 commentators have recognized the widescale abuse of Proposition 65 through private enforcement  
28 actions. *See, e.g.*, Anthony T. Caso, *Bounty Hunters and the Public Interest—A Study of California*

1 *Proposition 65*, 13 Engage 30, 31 (Mar. 2012) (describing case in which “law firm created an  
2 ‘astroturf’ environmental group to be a plaintiff in Proposition 65 litigation,” which group “consisted  
3 of partners from the law firm” and which “sent out hundreds of demand letters charging businesses  
4 with failure to provide warnings” and “extort[ing] payments of attorney fees or contributions to the  
5 front group”).

6 45. Significantly, private enforcement actions are pervasive even for chemicals, like  
7 acrylamide, for which OEHHA has adopted a “safe harbor” NSRL. Even where OEHHA has  
8 adopted a safe harbor NSRL, the defendant still bears the burden under the statute of establishing as  
9 an affirmative defense that any exposures fall within the safe harbor. Cal. Health & Safety Code  
10 § 25249.10(c). In alleging an exposure to a listed chemical, a private enforcer is not required to  
11 prove that an exposure exceeds the NSRL. *Consumer Cause, Inc. v. SmileCare*, 91 Cal. App. 4th  
12 454, 474 (2001). Instead, under the statute, the burden to prove that the exposure *does not* exceed the  
13 NSRL rests with the defendant business. And proving this negative in court is a costly and time-  
14 consuming endeavor, typically requiring expert testimony and evidence. *See, e.g., Env'tl. Law Found.*  
15 *v. Beech-Nut Nutrition Corp.*, 235 Cal. App. 4th 307, 314 (2015) (safe harbor defense litigated at  
16 trial); *Council for Educ. & Research on Toxics v. Starbucks Corp.*, No. BC435759 (Cal. Super. Ct.,  
17 June 2, 2017) (rejecting Starbucks’s “no significant risk level” defense at summary judgment). In  
18 other words, a safe harbor NSRL does not effectively deter a private enforcer with significant  
19 financial incentives from initiating suit in the hopes of collecting a settlement.

20 46. California jurists have recognized how onerous private enforcement suits can be for  
21 industry. “[L]awsuits under Proposition 65 can be filed and prosecuted by any person against any  
22 business based on bare *allegations* of a violation unsupported by any evidence of an actual  
23 violation—or even a good faith belief that a defendant is using an unsafe amount of a chemical  
24 known by the state to cause cancer.” *SmileCare*, 91 Cal. App. 4th at 477 (Vogel, J., dissenting)  
25 (emphasis in original). This burden-shifting regime results in “judicial extortion” where many  
26 private parties bring Proposition 65 claims (without an appropriate assessment that an exposure  
27 exceeds the NSRL) and force the defendant to settle to avoid legal fees and the costs of performing  
28 an expensive expert scientific assessment. *Id.* at 477-79.

1           47.     Thus, in practice, businesses faced with the threat of costly litigation to prove a  
2 defense to the warning requirement often are forced to acquiesce and provide a warning, regardless of  
3 whether the businesses know the warning is affirmatively false or misleading. *See* All. for Nat.  
4 Health, *PROPOSITION 65: Evaluating Effectiveness and a Call for Reform*, at 7, [https://www.anh-](https://www.anh-usa.org/wp-content/uploads/2015/09/Prop-65.pdf)  
5 [usa.org/wp-content/uploads/2015/09/Prop-65.pdf](https://www.anh-usa.org/wp-content/uploads/2015/09/Prop-65.pdf) (last accessed October 7, 2019); *see also* LATIMES,  
6 *Warning: Too Many Warnings Signs are Bad for Your Health* (Sept. 30, 2017) (noting “Starbucks,  
7 Whole Foods and about 80 other places in California that sell coffee” are exposed under  
8 Proposition 65 even though “research increasingly” indicates coffee does *not* cause cancer),  
9 <http://beta.latimes.com/opinion/editorials/la-ed-proposition-65-warning-coffee-20170930-story.html>;  
10 Richard Berman, *Thanks to a Poorly-Designed Law, California Classifies Soft Drinks as a Cancer*  
11 *Risk*, *Forbes* (Feb. 20, 2014) (compelling warnings for soda drinks on the basis that if consumers  
12 drink “over 1,000 sodas a day” they would have increased cancer risk); Greg Ryan, *Rice Sellers*  
13 *Threatened with Prop 65 Suits over Lead, Arsenic*, *Law360* (Feb. 20, 2014).

14           **E.     Proposition 65 Listing of Acrylamide and Subsequent Enforcement Actions**

15           48.     OEHHA added acrylamide to the Proposition 65 list of carcinogens in 1990 pursuant  
16 to the Authoritative Bodies listing mechanism, based on EPA’s determination that acrylamide was a  
17 “probable” human carcinogen and IARC’s classification of acrylamide as Group 2B (“possibly  
18 carcinogenic to humans”). IARC has since re-classified acrylamide as Group 2A (“probably  
19 carcinogenic to humans”).

20           49.     The initial Proposition 65 listing of acrylamide was premised on potential exposures to  
21 acrylamide in industrial settings. At that time, it was not known that acrylamide was present in  
22 cooked foods. Acrylamide was not detected in foods until 2002.

23           50.     Both the EPA and IARC classifications of acrylamide as a “probable” human  
24 carcinogen are based on studies in laboratory animals in which virtually pure acrylamide was  
25 administered orally or via injection to rats and mice. EPA and IARC *did not* classify acrylamide as a  
26 probable carcinogen based on studies in *humans*. In its most recent assessment of acrylamide, for  
27 example, IARC concluded in 1994 that there was “*inadequate evidence* in humans for the  
28 carcinogenicity of acrylamide.” *See* IARC Monographs on the Identification of Carcinogenic Risks

1 to Humans, *Some Industrial Chemicals*, Vol. 60 at 425 (Feb. 1994), [https://monographs.iarc.fr/wp-](https://monographs.iarc.fr/wp-content/uploads/2018/06/mono60.pdf)  
2 [content/uploads/2018/06/mono60.pdf](https://monographs.iarc.fr/wp-content/uploads/2018/06/mono60.pdf). Similarly, in its most recent toxicological review of  
3 acrylamide in 2010, EPA explained that human studies assessing the carcinogenicity of acrylamide  
4 (including studies of both dietary and industrial exposures) “are judged as providing limited or no  
5 evidence of carcinogenicity in humans.” U.S. EPA, *Toxicological Review of Acrylamide* at 167  
6 (March 2010), [https://cfpub.epa.gov/ncea/iris/iris\\_documents/documents/toxreviews/0286tr.pdf](https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/0286tr.pdf).

7 51. OEHHA itself conceded in 2007 that acrylamide is not actually known to cause cancer  
8 in humans. Specifically, Martha Sandy—now the Branch Chief of OEHHA’s Reproductive and  
9 Cancer Hazard Assessment Branch—was designated as OEHHA’s “Person Most Knowledgeable” in  
10 an action involving acrylamide. *See* Cal. Code Civ. P. § 2025.230. Ms. Sandy testified that (a) she  
11 was not aware of any governmental health organization listing acrylamide as a known human  
12 carcinogen, (b) she was not aware of any pharmacodynamic data regarding rats and humans and  
13 acrylamide, and (c) OEHHA did not actually “know” that acrylamide was a human carcinogen.

14 52. OEHHA also has recognized that acrylamide in certain food products—namely,  
15 coffee—does not increase human cancer risk. In particular, in June 2019, OEHHA adopted a new  
16 regulation that states: “Exposures to chemicals in coffee, listed on or before March 15, 2019 as  
17 known to the state to cause cancer, that are created by and inherent in the processes of roasting coffee  
18 beans or brewing coffee do not pose a significant risk of cancer.” 27 Cal. Code Regs. § 25704  
19 (effective Oct. 1, 2019). In adopting this regulation, OEHHA explained that “[t]he weight of the  
20 evidence from the very large number of studies in the scientific literature does not support an  
21 association between the complex mixture of chemicals that is coffee [including acrylamide] and a  
22 significant risk of cancer.” OEHHA, Final Statement of Reasons, Adoption of New Section 25704  
23 Exposures to Listed Chemicals in Coffee Posing No Significant Risk (June 7, 2019),  
24 <https://oehha.ca.gov/media/downloads/crn/fsorcoffee060719.pdf>.

25 53. Since its listing in 1990, acrylamide has been the target of significant Proposition 65  
26 enforcement activity, particularly with respect to food products. In the first such litigation, several  
27 private enforcers were joined by the California Attorney General in pursuing claims that several  
28 major restaurants and food manufacturers failed to provide Proposition 65 warnings for acrylamide in

1 French fries, potato chips, and other potato products. The California Attorney General eventually  
2 settled these claims with each of the defendants. Under the terms of the settlements, the restaurant  
3 defendants, which include McDonald's, Wendy's, Burger King, and KFC, must provide warnings for  
4 acrylamide in French fries and similar products. The manufacturer defendants, which include the  
5 makers of Pringles, Lay's, Baked Lay's, Kettle, and other potato chip products, must either reduce  
6 the levels of acrylamide in their products or provide warnings to consumers. Likewise, the makers of  
7 Ore-Ida frozen potato products must change their cooking instructions in order to encourage  
8 consumers to reduce the levels of acrylamide in the finished products they cook at home. The  
9 Attorney General has also entered into settlements with makers of other snack food products on  
10 similar terms that require warnings if acrylamide concentrations exceed specified levels.

11 54. Under Proposition 65, private parties are required to provide 60-days' notice—to the  
12 California Attorney General, the district attorney, city attorney, or prosecutor in whose jurisdiction  
13 the violation is alleged to have occurred, and to the alleged violator—before initiating an enforcement  
14 action. *See* Cal. Health & Safety Code § 25249.7(d)(1). The California Attorney General maintains  
15 a database of these 60-day notices (the "AG Database"), available at [https://oag.ca.gov/prop65/60-](https://oag.ca.gov/prop65/60-day-notice-search)  
16 [day-notice-search](https://oag.ca.gov/prop65/60-day-notice-search).

17 55. To date, there have been more than *five hundred sixty* 60-day notices for alleged  
18 violations of the Proposition 65 warning requirement with respect to alleged exposures to acrylamide.  
19 More than *five hundred* of these 60-day notices relate to acrylamide in food products.

20 56. These 60-day notices include alleged violations related to, among others: potato and  
21 potato-based products (more than 90 notices); nut butters, including peanut and almond butter (more  
22 than 40 notices); almonds (more than 30 notices); cereals (more than 20 notices); and olives (more  
23 than 10 notices).

24 57. Notably, although acrylamide has been on the Proposition 65 list for many years, the  
25 number of 60-day notices has increased exponentially in recent years, going from only three notices  
26 in 2015 to 32 notices in 2016 to 144 and 147 notices in 2017 and 2018, respectively. The number of  
27 notices filed for 2019, moreover, has already exceeded 2018's amount, as 170 notices were filed by  
28 October 4, 2019.



1           58. Many of these 60-day notices have resulted in litigation or settlements, and there is a  
2 real and credible threat that other companies are likely to be future targets of Proposition 65 litigation  
3 related to alleged exposures to acrylamide in food products. Indeed, in July 2019 alone, just three  
4 private enforcers filed *forty-four* 60-day notices for the alleged presence of acrylamide in food  
5 products.

6                   **ADVERSE IMPACTS TO PLAINTIFF, ITS MEMBERS, AND THE PUBLIC**

7           59. If not enjoined, the Proposition 65 warning requirement for chemicals listed as  
8 “known to the State of California to cause cancer,” as applied to acrylamide in food products, will  
9 have an immediate and irreversible impact on Plaintiff, its members, and the public.

10           60. More than 250 companies, including many of Plaintiff’s members that sell food  
11 products containing acrylamide, have been targeted with 60-day pre-litigation notices in connection  
12 with alleged exposures to acrylamide in their food products. Several of Plaintiff’s members also have  
13 been sued in connection with these 60-day notices. Indeed, several of the companies represented on  
14 Plaintiff’s Board of Directors have received 60-day notices on acrylamide in food products and been  
15 sued in connection with such notices.

16           61. Because of California’s listing of acrylamide and the attendant Proposition 65 warning  
17 requirement, Plaintiff’s members must either take action, in conjunction with their distributors and  
18 customers, to provide false, misleading, and factually controversial warnings to California consumers  
19 about acrylamide in their food products—conveying the unsubstantiated message that acrylamide in  
20 food products increases cancer risk in humans—or face enforcement actions seeking substantial civil  
21 penalties and attorneys’ fees for failing to do so.

22           62. Alternatively, Plaintiff’s members may be forced to undertake costly exposure  
23 assessments for their acrylamide-containing products to demonstrate that any exposures to  
24 acrylamide from their products do not exceed the NSRL and do not require warnings. And even if  
25 Plaintiff’s members’ assessments indicate that exposures to acrylamide from their products do not  
26 exceed the NSRL, they still would need to prepare to defend against likely enforcement actions by  
27 private enforcers. Private enforcers are not required to defer to a company’s exposure assessment  
28 and may dispute the exposure assessment. Thus, a company that wishes to defend its exposure

1 assessment and to prove that an exposure does not exceed the NSRL faces the prospect of costly and  
2 risky litigation on a technical and expert-heavy defense.

3 63. The requirement to place a false, misleading, and highly controversial Proposition 65  
4 cancer warning for acrylamide on food products has had, and will continue to have, a substantial  
5 adverse impact on Plaintiff's members. Such a warning disparages Plaintiff's members and their  
6 food products by creating the false impression among consumers that those products are unsafe and  
7 increase human cancer risk, despite scientific evidence suggesting that acrylamide that forms  
8 naturally in food does not increase (and may even *reduce*) the risk of cancer in humans.

9 64. Applying a false, misleading, and highly controversial Proposition 65 cancer warning  
10 on food products also would have a substantial adverse impact on the public.

11 65. First, a Proposition 65 cancer warning for acrylamide in food products would mislead  
12 consumers about the human health risks posed by foods containing acrylamide and frighten  
13 consumers away from those foods that are part of a well-balanced diet.

14 66. FDA has explained, for example, that "requiring a cancer warning on coffee, based on  
15 the presence of acrylamide, would be more likely to mislead consumers than to inform them." FDA,  
16 *Statement from FDA Commissioner Scott Gottlieb, M.D., on FDA's Support for Exempting Coffee*  
17 *from California's Cancer Warning Law* (August 29, 2018) ("*FDA Statement on Coffee*"); *see also*  
18 *Letter from Lester M. Crawford, DVM, Ph.D, Deputy Commissioner, FDA, to Joan E. Denton, M.S.,*  
19 *Ph.D., Director, California Office of Environmental Health Hazard Assessment* (July 13, 2003)  
20 ("*2003 FDA Letter*") ("[W]arning labels based on the presence of acrylamide in food might be  
21 misleading.").

22 67. Foods that contain acrylamide are part of a well-balanced diet. These include whole  
23 grains, almonds, and nut butters as examples. With respect to whole grains, for example, FDA  
24 Commissioner Dr. Scott Gottlieb explained in August 2018: "We recognize that some [whole grain  
25 food] products may contain acrylamide. But we also know that consumption of whole grains is  
26 beneficial for health and nutrition. Labeling whole grain foods with a cancer warning may cause  
27 American consumers to avoid foods that would have a benefit to their health, including avoiding  
28 foods that may reduce cancer risks." *See* FDA Statement on Coffee; *see also* 2003 FDA Letter ("[A]

1 requirement for warning labels on food might deter consumers from eating foods with such labels.  
2 Consumers who avoid eating some of these foods, such as breads and cereals, may encounter greater  
3 risks because they would have less fiber and other beneficial nutrients in their diets.”).

4 68. Similarly, the Dietary Guidelines (*see* ¶ 21, *supra*) emphasize that vegetables and nuts  
5 are part of a healthy diet. Because of California’s listing of acrylamide and the attendant warning  
6 requirement, numerous food products that the Dietary Guidelines recommend as part of a healthy  
7 diet—including olives, peanuts, almonds, and nut butters—have been the target of 60-day notice  
8 letters and enforcement litigation under Proposition 65. If Plaintiff’s members are forced to provide  
9 warnings for these products, consumers will be misled to avoid them.

10 69. In addition, requiring businesses to apply a Proposition 65 cancer warning for  
11 acrylamide in food products will mislead consumers into thinking that acrylamide is only present in  
12 store-bought food. Raw foods ordinarily do not contain acrylamide. Because acrylamide forms  
13 naturally during the cooking process, however, acrylamide can form in those foods when cooked at  
14 consumers’ homes. Indeed, FDA has observed that consumer exposure to acrylamide “may be  
15 greatest through home cooking.” *See* Letter from Lester M. Crawford, DVM, Ph.D, Deputy  
16 Commissioner, FDA, to Joan E. Denton, M.S., Ph.D., Director, California Office of Environmental  
17 Health Hazard Assessment (July 13, 2003).

18 70. Finally, requiring businesses to apply a Proposition 65 cancer warning for acrylamide  
19 in food products, despite the lack of reliable scientific evidence supporting a finding that acrylamide  
20 from food products increases human cancer risk, dilutes the effectiveness of legitimate Proposition 65  
21 warnings. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §2 cmt. j (1998) (noting  
22 that excessive, multitudinous warnings “may be ignored by users and consumers and may diminish  
23 the significance of warnings about [other] risks” and “could reduce the efficacy of warnings  
24 generally.”); *Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652, 661 (1991) (“[U]nnecessary  
25 warnings . . . could distract the public from other important warnings on consumer products.’ Since  
26 one of the principal purposes of [Proposition 65] is to provide ‘clear and reasonable warning’ of  
27 exposure to carcinogens and reproductive toxins, such warnings would be diluted to the point of  
28 meaninglessness if they were to be found on most or all food products.”) (quoting the Final Statement

1 of Reasons for the “naturally occurring” regulation now found at CAL. CODE REGS. tit. 27, §25501));  
2 accord *Johnson v. Am. Standard, Inc.*, 43 Cal. 4th 56, 70 (2008) (quoting *Finn v. G.D. Searle & Co.*,  
3 35 Cal. 3d 691, 701 (1984)).

4 71. Indeed, the California Supreme Court in another context has recognized that excessive  
5 warnings “produce a cacophony . . . that by reason of their sheer volume would add little to the  
6 effective protection of the public.” *Thompson v. Cty. of Alameda*, 27 Cal. 3d 741, 754–55 (1980); see  
7 also *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 932 (2004) (“The  
8 problems of overwarning are exacerbated if warnings must be given even as to very remote risks . . . .  
9 Against the benefits that may be gained by a warning must be balanced the dangers of overwarning  
10 and of less meaningful warnings crowding out necessary warnings, the problem of remote risks, and  
11 the seriousness of the possible harm to the consumer.”) (internal citation omitted).

12 72. An order enjoining the Proposition 65 warning requirement for cancer as applied to  
13 acrylamide in food products would redress the harms described above.

14 **CLAIM FOR RELIEF**

15 **(Violation of the First Amendment to the U.S. Constitution)**

16 73. The foregoing Paragraphs are incorporated by reference as if set forth in full herein.

17 74. The Free Speech Clause of the First Amendment of the United States Constitution  
18 provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend.  
19 I. The Fourteenth Amendment of the United States Constitution made this proscription applicable to  
20 the States and their political subdivisions. *See id.* amend. XIV § 1.

21 75. In addition to providing protections against restrictions on speech, the First  
22 Amendment provides protection against the government *compelling* individuals or entities to engage  
23 in speech.

24 76. Under the First Amendment, laws compelling speech ordinarily receive strict scrutiny.  
25 *See Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977). Laws regulating commercial speech generally  
26 receive at least intermediate scrutiny, *i.e.*, they are prohibited if they do not directly and materially  
27 advance the government’s interest, or are more extensive than necessary. *Cent. Hudson Gas & Elec.*  
28 *Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980). And even laws that require businesses to

1 provide information in connection with commercial transactions are permissible only if the  
2 compelled disclosure is of information that is purely factual and uncontroversial, reasonably related  
3 to a substantial government purpose, and not unjustified or unduly burdensome. *See Nat'l Inst. of*  
4 *Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372, 2377 (2018) (“NIFLA”); *Zauderer v.*  
5 *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). The Government bears the burden to show  
6 that a compelled disclosure is permissible under the First Amendment.

7 77. A Proposition 65-compliant cancer warning—irrespective of the specific language  
8 used—conveys to the average consumer of products intended for human consumption that the  
9 chemical at issue (here, acrylamide) causes cancer in humans.

10 78. Contrary to the warning mandated by Proposition 65, there is no reliable scientific  
11 evidence that dietary acrylamide increases the risk of cancer in humans. To the contrary, a large  
12 number of epidemiological studies suggest that there is no association between exposure to  
13 acrylamide from food products and cancer in humans.

14 79. Nor does California “know” that dietary acrylamide causes cancer. In fact, the  
15 California agency responsible for implementing Proposition 65—OEHHA—has admitted that  
16 OEHHA does *not* know that acrylamide is a *human* carcinogen. *See* ¶ 51, *supra*.

17 80. Moreover, even the agencies on which OEHHA relied to add acrylamide to the  
18 Proposition 65 list—EPA and IARC—have not said that they “know” that exposure to acrylamide  
19 causes cancer in humans. Rather, they have only identified acrylamide as a “probable” human  
20 carcinogen based on studies in laboratory animals in which virtually pure acrylamide was  
21 administered orally or via injection to rats and mice. EPA and IARC have concluded, respectively,  
22 that studies of acrylamide in humans (of which there are many) provide “inadequate” and “limited or  
23 no” evidence of carcinogenicity in humans. *See* ¶ 50, *supra*.

24 81. The Proposition 65 cancer warning requirement as applied to acrylamide in food  
25 products thus compels speech that is false, misleading, and factually controversial.

26 82. Because Proposition 65’s cancer warning requirement as applied to acrylamide in food  
27 products is false, misleading, and factually controversial, it cannot survive any level of constitutional  
28 scrutiny. *See Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 967 (9th Cir. 2009)

1 (“[T]he State has no legitimate reason to force retailers to affix false information on their products.”).  
2 Proposition 65’s cancer warning requirement as applied to acrylamide in food products therefore  
3 constitutes impermissible compelled speech under the First Amendment.

4 83. In the alternative, the Proposition 65 warning requirement also is unconstitutional on  
5 its face. In *NIFLA*, the U.S. Supreme Court made clear that the State has the burden to show that a  
6 warning is “justified” before it may compel a business to provide one consistent with the First  
7 Amendment. *See* 138 S. Ct. at 2377. A Proposition 65 warning requirement is “justified” only for an  
8 exposure to a listed chemical at a level that exceeds the NSRL. Proposition 65, however, reverses  
9 this burden, stating that “the burden of showing that an exposure [poses no significant risk] shall be  
10 on the defendant.” Cal. Health & Saf. Code § 25249.10(c). The Proposition 65 warning requirement  
11 is thus unconstitutional on its face because it places the burden on the *business* to disprove that a  
12 warning is justified, when *NIFLA* and other U.S. Supreme Court precedent hold that it is the  
13 *government’s* burden to prove that a warning is justified.

14 84. Plaintiff’s members include entities that have already been harmed by California’s  
15 requirement to provide a false, misleading, and/or highly controversial cancer warning for acrylamide  
16 in food products, and will be injured further if forced to either comply with Proposition 65’s  
17 compelled false warning requirement, or incur costly other burdens and face the threat of private  
18 enforcement suits or other enforcement actions.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff demands judgment against Defendant as follows:

21 1. A declaration, pursuant to 28 U.S.C. § 2201, that the Proposition 65 warning  
22 requirement for cancer, Cal. Health & Safety Code § 25249.6, as applied to any exposures to  
23 acrylamide in food products, violates the First Amendment of the United States Constitution.

24 2. In the alternative, a declaration, pursuant to 28 U.S.C. § 2201, that the Proposition 65  
25 warning requirement, Cal. Health & Safety Code § 25249.6, on its face violates the First Amendment  
26 of the United States Constitution.

27 3. Preliminary and permanent injunctions prohibiting Defendant or any of its officers,  
28 employees, or agents, and all those in privity with and/or acting in concert with those entities or

1 individuals (including private enforcers of Proposition 65 under Cal. Health & Safety Code  
2 § 25249.7(d)), from enforcing or threatening to enforce the Proposition 65 warning requirement for  
3 cancer with respect to acrylamide in food products intended for human consumption.

4 4. All costs, attorneys' fees, and expenses that Plaintiff reasonably incurs, *see* 42 U.S.C.  
5 § 1988; and

6 5. Such other and further relief as this Court deems just and proper.  
7

8 Dated: October 7, 2019

Respectfully submitted,

9  
10 By: /s/ Trenton H. Norris

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