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13 **UNITED STATES DISTRICT COURT**

14 **EASTERN DISTRICT OF CALIFORNIA**

16 B&G FOODS NORTH AMERICA, INC.,

17 Plaintiff,

18 v.

19 KIM EMBRY and ENVIRONMENTAL
20 HEALTH ADVOCATES, INC., acting as
enforcement representatives under California
21 Proposition 65 on behalf of the State of
California,

22 Defendants.

CASE NO. 2:20-CV-00526-KJM-DB

**DEFENDANTS KIM EMBRY AND
ENVIRONMENTAL HEALTH
ADVOCATES, INC.'S NOTICE OF MOTION
TO DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

Hearing Date: March 10, 2023

Hearing Time: 10:00 a.m.

Courtroom: 3 (15th Floor)

District Judge: Hon. Kimberly J. Mueller

Magistrate Judge: Hon. Deborah Barnes

Complaint Filed: March 6, 2020

FAC Filed: July 7, 2022

SAC Filed: November 23, 2022

Trial Date: None Set

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on March 10, 2023, at 10:00 a.m., or as soon thereafter as this
3 matter may be heard in the courtroom of the Honorable Kimberly J. Mueller, in Courtroom 3 on the
4 15th Floor of the United States District Court for the Eastern District of California, located at 501 I
5 Street, California 95814, Defendants Kim Embry and Environmental Health Advocates, Inc. (“EHA”)
6 (together, “Defendants”) will and hereby do move this Court, pursuant to Federal Rules of Civil
7 Procedure 12(b)(6), for dismissal of Plaintiff B&G Foods North America, Inc.’s (“B&G”) Second
8 Amended Complaint (ECF 57), in its entirety, with prejudice. At least two independent grounds
9 warrant dismissal of the First Amended Complaint: (1) the *Noerr-Pennington* doctrine and (2)
10 Defendants are not “state actors.”

11 This motion is based on the concurrently filed Memorandum of Points and Authorities; the
12 Request for Judicial Notice and the Exhibits attached thereto; and all other pleadings and papers filed
13 in this action, and upon such other matters or arguments as may be presented to the Court at the time
14 of the hearing.

15 Respectfully submitted,

16 Dated: January 19, 2023

NICHOLAS & TOMASEVIC, LLP

17 By: /s/ Jake W. Schulte

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**MEMORANDUM OF POINTS AND
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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION..... 1

II. RELEVANT BACKGROUND 1

A. Proposition 65 Citizen Suits 1

B. The Court Dismissed B&G’s Initial Complaint..... 2

C. The Ninth Circuit Affirmed but Remanded for Limited Amendment 3

D. The Court Dismissed B&G’s First Amended Complaint..... 3

E. B&G Filed a Second Amended Complaint..... 3

III. LEGAL STANDARD 4

IV. THE COURT SHOULD (YET AGAIN) DISMISS UNDER THE *NOERR-PENNINGTON* DOCTRINE..... 4

A. The Sham Exception to the *Noerr-Pennington* Doctrine 4

B. The Sham Exception for Fraud and Intentional Misrepresentations 5

1. “Spoliation” – or Lack Thereof 5

2. Certificates of Merit 6

3. Proposition 65 Lawsuits 7

C. The Sham Exception for Objective Baselessness and Unlawful Motive 10

1. The Standard and General Discussion..... 10

2. Pre-Lawsuit Investigation..... 11

3. Acrylamide and Cancer 12

4. Constitutional Issues..... 12

D. The Sham Exception for a Series of Lawsuits 13

E. Outcome Versus Process Injury 15

V. THE COURT SHOULD ALSO DISMISS DUE TO LACK OF STATE ACTION..... 15

A. Embry and EHA are Presumptively Not State Actors 15

B. Defendants Have Not Acted Under Color of Law..... 16

1. Defendants do Not Perform Traditional and Exclusive Public Functions 16

2. Defendants do Not act Jointly, Have a Symbiotic Relationship, or Have a Close Nexus with the State 17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3. Private Enforcers are Not Compelled to Bring Actions 19

4. Allowing Lawsuits Against Citizens Filing Private Actions Would Chill Citizens
from Acting in the Public Interest..... 20

VI. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Am. Mfrs. Mut. Ins. Co. v. Sullivan,
526 U.S. 40 (2000)-----18, 20

Ashcroft v. Iqbal,
556 U.S. 662 (2009)-----4, 8, 14, 19

B&G Foods N. Am., Inc. v. Embry,
143 S. Ct. 212 (2022)----- 3

B&G Foods v. Embry,
29 F.4th 527 (9th Cir. 2022) ----- 3, 5, 8, 9, 10, 11, 13

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)----- 4, 8, 14

Blum v. Yaretsky,
457 U.S. 991 (1982)-----20

Brunette v. Humane Soc’y of Ventura County,
294 F.3d 1205 (9th Cir. 2002)----- 17, 19

Burton v. Wilmington Parking Auth.,
365 U.S. 715 (1961)-----19

California Chamber of Commerce v. Becerra,
529 F. Supp. 3d (E.D. Cal. 2021)-----13

California Chamber of Commerce v. Council for Educ. & Rsch. on Toxics,
29 F.4th 468 (9th Cir. 2022)-----13

Center for Self-Improvement & Community. Development v. Lennar Corp.
173 Cal.App.4th 1543 (2009)----- 9

Consumer Advocacy Group, Inc. v. ExxonMobil Corp.
168 Cal.App.4th 675 (2008)-----9, 11

Consumer Defense Group v. Rental Housing Industry Members
137 Cal.App.4th 1185 (2006)----- 9

Denis v. Sparks,
449 U.S. 24 (1980)-----19

DiPirro v. Bondo Corp.,
153 Cal.App.4th 150 (2007)----- 9

1	<i>Empress LLC v. City & Cnty. of San Francisco,</i>	
2	419 F.3d 1052 (9th Cir. 2005)-----	10
3	<i>Franchise Realty Interstate Corp. v. San Francisco Loc. Joint Exec. Bd. of Culinary Workers,</i>	
4	542 F.2d 1076 (9th Cir. 1976)-----	10
5	<i>Kearney v. Foley & Lardner, LLP,</i>	
6	590 F.3d 638 (9th Cir. 2009)-----	10
7	<i>Kirtley v. Rainey,</i>	
8	326 F.3d 1088 (9th Cir. 2003)-----	15, 19
9	<i>Kottle v. Nw. Kidney Centers,</i>	
10	146 F.3d 1056 (9th Cir. 1998)-----	10
11	<i>Lee v. City of L.A.,</i>	
12	250 F.3d 668 (9th Cir. 2001)-----	4
13	<i>Lee v. Katz,</i>	
14	276 F.3d 550 (9th Cir. 2002)-----	17
15	<i>Manhattan Cmty. Access Corp. v. Halleck,</i>	
16	139 S. Ct. 1921 (2019)-----	15, 16
17	<i>Naoko Ohno v. Yuko Yasuma,</i>	
18	723 F.3d 984 (9th Cir. 2013)-----	18
19	<i>Navarro v. Block,</i> 250 F.3d	
20	729 (9th Cir. 2001)-----	4
21	<i>Oregon Nat. Res. Council v. Mohla,</i>	
22	944 F.2d 531 (9th Cir. 1991)-----	8, 10, 13
23	<i>Polk Cty. v. Dodson,</i>	
24	454 U.S. 312 (1981)-----	16
25	<i>Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.,</i>	
26	508 U.S. 49 (1993)-----	10
27	<i>Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs,</i>	
28	608 F.3d 110 (1st Cir. 2010)-----	16
	<i>Rendell-Baker v. Kohn,</i>	
	457 U.S. 830 (1982)-----	16
	<i>Roberts v. Corrothers,</i>	
	812 F.2d 1173 (9th Cir. 1987)-----	4

1	<i>Robertson v. Deon Witter Reynolds, Inc.</i> ,	
2	749 F.2d 530 (9th Cir. 1984) -----	4
3	<i>Sprewell v. Golden State Warriors</i> , 266 F.3d	
4	979, 988 (9th Cir.), <i>opinion amended on denial of reh’g</i> , 275 F.3d 1187 (9th Cir. 2001); -----	7
5	<i>Stanislaus Food Prod. Co. v. USS-POSCO Indus.</i> ,	
6	782 F. Supp. 2d 1059 (E.D. Cal. 2011)-----	7, 11
7	<i>Sutton v. Providence St. Joseph Med. Ctr.</i> ,	
8	192 F.3d 826 (9th Cir. 1999) -----	16
9	<i>Thompson v. Illinois Dep’t of Pro. Regul.</i> ,	
10	300 F.3d 750 (7th Cir. 2002) -----	7
11	<i>Wonderful Real Estate Dev. LLC v. Laborers Int’l Union of N. Am. Local 220</i> ,	
12	2020 WL 91998 (E.D. Cal. Jan. 8, 2020) -----	10
13	<i>Yeroushalmi v. Miramar Sheraton</i> ,	
14	88 Cal.App.4th 738 (2001)-----	17
15	<u>STATUTES</u>	
16	16 U.S.C. § 1540 -----	20
17	33 U.S.C. § 1365 -----	20
18	42 U.S.C. § 1983 -----	15
19	42 U.S.C. § 300j-8 -----	20
20	Cal. Health & Safety Code § 25249.10-----	2, 11, 12
21	Cal. Health & Safety Code § 25249.11-----	14
22	Cal. Health & Safety Code § 25249.6-----	1
23	Cal. Health & Safety Code § 25249.7-----	1, 2
24	Cal. Health & Safety Code §25249.8 -----	1
25	Cal. Lab. Code, § 2699-----	20
26	<u>REGULATIONS</u>	
27		
28	Cal. Code Regs, tit. 27 § 27001 -----	1

1 Cal. Code Regs, tit. 27, § 25607.2-----13

2 Cal. Code Regs, tit. 27, § 25703-----6, 12

3 Cal. Code Regs, tit. 27, §§ 25701-21-----2, 12

4

5 **RULES**

6 Fed. R. Civ. P. 11----- 3

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1 **I. INTRODUCTION**

2 This case is now before the Court for a third time on a motion to dismiss. The lawsuit arises
3 from state court lawsuits Defendants Kim Embry and Environmental Health Advocates, Inc. (“EHA”)
4 brought against Plaintiff B&G Foods North America, Inc. (“B&G”) under California’s Proposition
5 65 for failing to warn consumers about exposures to acrylamide, a chemical listed as a carcinogen
6 under the initiative. B&G claims these lawsuits violate its constitutional rights. Rather than simply
7 raise these issues as defenses to the Proposition 65 actions in state court, B&G brought this ill-
8 conceived lawsuit attempting to turn its defenses into federal causes of action.

9 This Court has twice dismissed B&G’s lawsuit under the *Noerr-Pennington* doctrine, which
10 protects petitioning activity – including litigation, and the Ninth Circuit has affirmed the Court’s
11 conclusions. The last time, the Court warned B&G that any further pleading must comply with Rule
12 11 of the Federal Rules of Civil Procedure. ECF 56 at 16:7-10. Because B&G ignored that
13 admonition, Defendants have pre-served and will soon file a motion for sanctions under Rule 11. The
14 Court should grant sanctions and dismiss the case with prejudice because B&G has not and cannot
15 plead around the *Noerr-Pennington* doctrine. The Court need go no further, but Defendants also
16 demonstrate that they are private citizens and not state actors.

17 **II. RELEVANT BACKGROUND**

18 **A. Proposition 65 Citizen Suits**

19 The Safe Drinking Water and Toxic Enforcement Act of 1986, also known as Proposition 65,
20 is a voter-enacted California statute that protects the public’s right to know about the potential threats
21 of cancer, birth defects, or other reproductive harm resulting from exposure to hazardous chemicals.
22 Proposition 65 requires businesses to provide a “clear and reasonable warning” on any product that
23 causes an exposure to “a chemical known to the state to cause cancer or reproductive toxicity.” Cal.
24 Health & Safety Code § 25249.6. The Governor must publish and update a “list of those chemicals
25 known to the state to cause cancer or reproductive toxicity.” Cal. Health & Safety Code § 25249.8(a).
26 Acrylamide, the chemical at issue in this lawsuit, was listed in 1990. 27 C.C.R. § 27001(c).

27 Proposition 65 permits any “person” to bring an action “in the public interest” to enforce the
28 initiative. Cal. Health & Safety Code § 25249.7(d). Before bringing an enforcement action, a private

1 party must give 60 days' notice of the alleged Proposition 65 violation to the alleged violator and to
2 the Attorney General and local prosecutors. *Id.* § 25249.7(d)(1). The notice of violation must include
3 a certificate that “there is a reasonable and meritorious case for the private action” and “[f]actual
4 information sufficient to establish the basis of” that certificate. *Id.* If, after reviewing the notice and
5 certificate of merit, the Attorney General “believes there is no merit to the action, the Attorney General
6 shall serve a letter to the noticing party and alleged violator stating” as much. *Id.* § 25249.7(e)(1)(A).

7 If more than 60 days passes without public enforcers pursuing the matter, the private enforcer
8 may commence an action. *Id.* § 25249.7(c), (d). Private enforcers must notify the Attorney General
9 when the action is filed, *id.* § 25249.7(e)(2), and again when the action “is subject either to settlement
10 or to a judgment,” *id.* § 25249.7(f)(1). The settlement of a private enforcement action requires court
11 approval after a noticed motion. *Id.* § 25249.7(f)(4). The private enforcer must serve the motion for
12 approval of the settlement on the Attorney General, “who may appear and participate in a [settlement]
13 proceeding without intervening in the case.” *Id.* § 25249.7(f)(5).

14 Proposition 65's warning requirement does not apply if a defendant “can show that the
15 exposure poses no significant risk assuming lifetime exposure at the level in question for substances
16 known to the state to cause cancer.” *Id.* § 25249.10(c). This is called the No Significant Risk Level
17 (“NSRL”). Regulations provide detail on the NSRL affirmative defense. 27 C.C.R. §§ 25701-21.

18 **B. The Court Dismissed B&G's Initial Complaint**

19 B&G's original Complaint was brought against Defendants Kim Embry and her attorney Noam
20 Glick with respect to litigation they were pursuing under Proposition 65 as to acrylamide in B&G's
21 Cookie Cakes. ECF 1, ¶¶ 1, 7, 8, 65, 79-80, 87, 94, 97, Prayer. In particular, Ms. Embry had provided
22 a notice to state authorities and B&G with respect to the Cookie Cakes as required by Proposition 65
23 (Cal. Health & Safety Code § 25249.7(d)(1)) and filed a state court lawsuit. Second Amended
24 Complaint (“SAC”), ¶¶ 62, 68 & Ex. E; Defendants' Request for Judicial Notice in Supp. of Mot. to
25 Dismiss and Motion for Sanctions (“RJN”), Ex. A. On October 7, 2020, the Court dismissed B&G's
26 Complaint without leave to amend, ruling that B&G's claims were aimed at petitioning activity
27 protected under the *Noerr-Pennington* doctrine. ECF 33. The Court found that Defendants' past
28 success in acrylamide litigation showed the sham exception to the doctrine did not apply. *Id.* at 4-5.

1 **C. The Ninth Circuit Affirmed but Remanded for Limited Amendment**

2 On March 17, 2022, the Ninth Circuit affirmed the Court’s ruling that the Complaint is barred
3 by the *Noerr-Pennington* doctrine but reversed to permit amendment “[b]ecause it was unclear
4 whether B&G could allege the application of the sham exception to the *Noerr-Pennington* doctrine in
5 an amended complaint.” *B&G Foods v. Embry*, 29 F.4th 527, 542 (9th Cir. 2022).

6 On April 26, 2022, the Ninth Circuit denied B&G’s petition for rehearing en banc. RJN, Ex.
7 I. B&G filed a petition for a writ of certiorari to the Supreme Court of the United States, which was
8 denied on October 3, 2022. *B&G Foods N. Am., Inc. v. Embry*, 143 S. Ct. 212 (2022).

9 **D. The Court Dismissed B&G’s First Amended Complaint**

10 Meanwhile, on July 7, 2022, B&G filed its First Amended Complaint (“FAC”). ECF 45. The
11 amendment removed Mr. Glick and added a new defendant – EHA – with respect to a new product –
12 B&G’s Sandwich Cookies. *Id.*, ¶¶ 21, 26 n.1, 35, 113, 116, 204, 223, 228, Prayer. That product was
13 the subject of a 60-day notice from EHA under Proposition 65 and a state court lawsuit. SAC, ¶¶ 65,
14 69 & Ex. G; RJN, Ex. B.

15 On November 3, 2022, this Court again found that B&G’s claims were barred by the *Noerr-*
16 *Pennington* doctrine and dismissed with leave to amend. ECF 56. The Court permitted leave to amend
17 “only with respect to the sham exception to the *Noerr-Pennington* doctrine and only to advance factual
18 allegations to support its claim that the underlying lawsuits are a sham.” *Id.* at 16:12-14. The Court
19 added: “The court cautions, however, that any amendments must comply with Rule 11, including the
20 requirement that factual allegations ‘have evidentiary support or, if specifically so identified, will
21 likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]’
22 Fed. R. Civ. P. 11(b)(3).” *Id.* at 16:7-10.

23 **E. B&G Filed a Second Amended Complaint**

24 Despite the Court’s admonition, B&G filed a Second Amended Complaint. ECF 57.
25 Defendants sought and the Court granted an extension of time to file a motion to dismiss to allow time
26 for Defendants to serve a motion for sanctions under Rule 11 and for the 21-day safe harbor to pass.
27 ECF 59, 61. Subsequently, the Court reset the motion to dismiss and Rule 11 hearing to March 10,
28 2023. ECF 64. B&G did not alter or withdraw its Second Amended Complaint.

1 **III. LEGAL STANDARD**

2 A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729,
3 732 (9th Cir. 2001). Dismissal is warranted where the complaint lacks a cognizable legal theory, or
4 alternatively, where it fails to plead essential facts under its legal theory. *Robertson v. Deon Witter*
5 *Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). The facts pled must “raise a right to relief above
6 the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

7 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
8 as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
9 (2009). Legal conclusions need not be taken as true merely because they are cast as factual allegations.
10 *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). A court may consider documents on
11 which a complaint relies and may take judicial notice without converting a motion to dismiss into a
12 motion for summary judgment. *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001).

13 **IV. THE COURT SHOULD (YET AGAIN) DISMISS UNDER THE NOERR-**
14 **PENNINGTON DOCTRINE**

15 The Court has already twice dismissed this lawsuit under the *Noerr-Pennington* doctrine.
16 B&G’s Second Amended Complaint largely rehashes the previous complaints but also adds yet more
17 off-point, misleading, and contradictory allegations. Among other missteps, B&G relies on arguments
18 that state courts have rejected in Proposition 65 cases, deletes allegations from the First Amended
19 Complaint that this Court pointed out are at odds with B&G’s other allegations in a futile attempt to
20 avoid the problem, relies on its view of how Proposition 65 cases should be resolved when state courts
21 will have to determine these issues at the appropriate time, makes speculative and conclusory
22 allegations, and ignores that the Attorney General has at least twice brought the same type of
23 Proposition 65 acrylamide cases about which B&G complains. At base, B&G has failed to grapple
24 with the fundamental problems this Court has now twice observed.

25 **A. The Sham Exception to the *Noerr-Pennington* Doctrine**

26 In its ruling in this case, the Ninth Circuit identified a three-step analysis to determine whether
27 the *Noerr-Pennington* doctrine confers immunity from a lawsuit: (1) whether the lawsuit burdens
28 petitioning rights; (2) whether the activities at issue are protected petitioning activity; and (3) whether

1 the statute under which the lawsuit is brought can be construed to avoid burdening petitioning activity.
2 *B&G Foods*, 29 F.4th at 535. As part of the second prong, courts examine whether the petitioning
3 activities are a sham. *Id.* The Ninth Circuit decided most of the *Noerr-Pennington* questions, leaving
4 open only whether B&G could amend its complaint to invoke the sham exception. *See id.* at 537-39,
5 541-42. After the remand, this Court found that B&G’s First Amended Complaint did not support
6 finding that Defendants’ petitioning activities were a sham under any of three sham exceptions or more
7 general principles. ECF 56 at 6:14-15:24. The Second Amended Complaint fares no better.

8 **B. The Sham Exception for Fraud and Intentional Misrepresentations**

9 B&G places new emphasis on the third sham exception, which is where “a party’s knowing
10 fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.”
11 *B&G Foods*, 29 F.4th at 538 (internal quotation marks omitted). The Court has found that a heightened
12 pleading standard applies because this exception involves showing fraud. ECF 56 at 14:4-9. B&G
13 cannot meet this high standard – or even the normal pleading standard.

14 **1. “Spoliation” – or Lack Thereof**

15 B&G first argues that Defendants have committed fraud by spoliating evidence because the
16 samples of B&G’s products that were tested prior to filing the Proposition 65 lawsuits have since been
17 destroyed. SAC, ¶¶ 75-85. But what B&G characterizes as “spoliation” is simply a regular disposal
18 practice of perishable product samples. Further, B&G’s claim that Defendant Embry rather than the
19 lab made the decision to dispose of the samples is unsupported by the exhibit to which B&G points.
20 *Compare* SAC, ¶ 80 with ECF 57-10, Ex. 4. And B&G’s suggestion that Defendants have cherry-
21 picked a particular testing lab is undercut by its admission that Defendants also relied on a “test result
22 from *another lab*.” SAC, ¶ 98 (emphasis added).

23 In any event, the evidence for the Proposition 65 claims is not the particular products that
24 produced the test results but the actual test results. B&G does not claim that there is a lack of additional
25 samples to test. Nor is there anything special about the particular samples that were tested prior to
26 initiating litigation. That is, no greater weight is given to pre-lawsuit testing in determining liability
27 under Proposition 65 than any other testing. The products can be retested using other samples and any
28 dispute over the accuracy of the lab results is a factual issue for trial – not a “spoliation” issue.

1 Indeed, B&G’s counsel have advanced this same “spoliation” argument in at least one
 2 Proposition 65 case, where it was resoundingly rejected. RJN, Exs. K, L. As the Orange County
 3 Superior Court found, “spoliation cases referred to in the briefing all identify a particular item or items
 4 that once lost, could not be replicated in any manner.” RJN, Ex. L at 2. But a Proposition 65 defendant
 5 “could as effectively challenge the initial test results by testing the products initially subjected to
 6 testing as by testing products currently available.” *Id.* B&G’s counsel have recycled the same
 7 spoliation argument they lost to attempt to show fraud. B&G’s logic-defying “spoliation” claim hardly
 8 constitutes fraud to support the sham exception.

9 2. Certificates of Merit

10 B&G next argues that Defendants made false statements in the certificates of merit submitted
 11 with their notices of violation under Proposition 65. SAC, ¶¶ 86-102. This argument is premised on
 12 two baseless claims.

13 First, B&G argues that Defendants conceded there is a *successful* affirmative defense to their
 14 Proposition 65 lawsuits because acrylamide is caused by cooking. SAC, ¶¶ 90-94, 99-100. But the
 15 regulation to which B&G points – 27 C.C.R. § 25703(b)(1) – does not state that a chemical caused by
 16 cooking is *automatically* exempt. Rather, the regulation states:

17 For chemicals assessed in accordance with this section, the risk level which represents
 18 no significant risk shall be one which is calculated to result in one excess case of cancer in an
 19 exposed population of 100,000, assuming lifetime exposure at the level in question, except
 20 where sound considerations of public health support *an alternative level*, as, for example: (1)
 where chemicals in food are produced by cooking necessary to render the food palatable or to
 avoid microbiological contamination.

21 27 C.C.R. § 25703(b) (emphasis added). That is, cooking under certain circumstances could result in
 22 a different level. But that level would be the subject of litigation. There is no blanket exemption for
 23 chemicals caused by cooking, just a question about whether the No Significant Risk Level should be
 24 modified. Indeed, B&G admits that is the proper reading of the regulation by referring to “the
 25 *alternative NSRL* that would be required by Cal. Code Regs. § 25703 (b)(1)” rather than to an
 26 automatic exemption. SAC, ¶ 123 (emphasis added). Additionally, the California Attorney General
 27 has brought at least two acrylamide Proposition 65 cases with respect to snack foods. RJN Exs. G, H.
 28 (Private enforcers have successfully done the same. *See, e.g.*, ECF 18-4, 18-13.) Certainly, B&G is

1 not arguing that the Attorney General has brought baseless, sham lawsuits by ignoring a supposed
2 dispositive affirmative defense.

3 Moreover, B&G has previously admitted in the First Amended Complaint: “No one who makes
4 or sells baked goods could ever be sure whether the exemption applies to their products” and “the
5 cooking exemption is also vague on its face and subject to a multitude of differing interpretations.”
6 ECF 45, ¶¶ 73-74. B&G has now deleted these allegations, but “[t]he Court does not ignore the prior
7 allegations in determining the plausibility of the current pleadings.” *Stanislaus Food Prod. Co. v.*
8 *USS-POSCO Indus.*, 782 F. Supp. 2d 1059, 1075 (E.D. Cal. 2011). B&G’s admission that the import
9 of the regulation is subject to interpretation wholly undercuts B&G’s strong claim that attorney Noam
10 Glick made a false statement – a claim that would be subject to a defamation lawsuit if made outside
11 of litigation. Nor can the argument be squared with B&G’s admission that, despite the cooking
12 regulation, “state enforcers have continued to bring acrylamide actions anyway.” ECF 45, ¶ 70. It is
13 the height of irresponsibility to allege an attorney made a false statement given these prior admissions.

14 B&G’s second argument on the certificates of merit is just as bad. The claim is that attorney
15 Noam Glick’s statement that he consulted with an expert to reach the belief there was a meritorious
16 Proposition 65 case was false. SAC, ¶¶ 96-97. B&G’s argument is based on a response to form
17 interrogatories in which EHA supposedly “admitted that it had not obtained a written statement or
18 interviewed any person about its claims, and that no person—including any expert—had prepared a
19 report pertaining to its claims.” SAC, ¶ 97. But the responses *object* to the extent the form
20 interrogatories inquire into *expert* communications and only respond *subject* to that objection. SAC,
21 Ex. F at 8:21-10:3, 10:22-11:12. The very exhibit on which B&G bases its argument shows there was
22 no admission as to experts. Therefore, the allegation should not be accepted as true. *Sprewell v.*
23 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *opinion amended on denial of reh’g*, 275 F.3d
24 1187 (9th Cir. 2001); *Thompson v. Illinois Dep’t of Pro. Regul.*, 300 F.3d 750, 754 (7th Cir. 2002).
25 B&G’s entire theory collapses because the exhibit on which it relies shows there was no falsehood.

26 3. Proposition 65 Lawsuits

27 B&G also argues that Defendants made false statements in their lawsuits. SAC, ¶¶ 124-45. In
28 addressing B&G’s prior similar argument, this Court admonished B&G that it “must allege facts that

1 permit a plausible inference of intentional misrepresentation.” ECF 56 at 13:27-28. That is, the
2 pleading must show that “defendants knew” the statements were false and not simply “disputed facts.”
3 *Id.* at 13:28-14:2; *see also Oregon Nat. Res. Council v. Mohla*, 944 F.2d 531, 536 (9th Cir. 1991) (“the
4 heightened pleading standard . . . would have no force if in order to satisfy it, a party could simply
5 recast disputed issues from the underlying litigation as ‘misrepresentations’”). Similarly, fly-specking
6 a complaint for language that could be cast unfavorably is not the point of the sham exception.

7 B&G first argues that Defendants falsely stated that acrylamide is known to the State of
8 California to cause cancer. SAC, ¶¶ 124-25. But B&G concedes there is acrylamide in the products
9 at issue. SAC, ¶ 9. B&G also agrees that acrylamide is listed under Proposition 65 as a carcinogen.
10 SAC, ¶¶ 221-22. That is: “It is undisputed that B&G’s Cookie Cakes contain some amount of
11 acrylamide, that *acrylamide is on the list of chemicals ‘known to the state to cause cancer,’* and that
12 B&G does not provide a warning.” *B&G Foods*, 29 F.4th at 538 (emphasis added). There was no
13 false statement given B&G’s concessions and the Ninth Circuit ruling.

14 B&G also argues that Defendants falsely stated that they provided valid certificates of merit
15 prior to bringing suit. SAC, ¶¶ 124, 127, 137-39. But B&G concedes that Defendant Embry provided
16 a certificate of merit on April 22, 2019, and did not sue until March 6, 2020. SAC, ¶¶ 68, 89. Likewise,
17 B&G concedes that Defendant EHA provided a certificate of merit on October 8, 2020, and did not
18 sue until January 22, 2021. SAC, ¶¶ 68, 95. B&G does not allege any specific basis on which those
19 certificates of merit were invalid. Speculation and conclusory allegations cannot be presumed true.
20 *Bell Atl. Corp. v. Twombly*, 550 U.S. at 545; *Ashcroft v. Iqbal*, 556 U.S. at 681. B&G appears to rely
21 on later, amended certificates of merit. SAC, ¶¶ 127, 133-34. But the inclusion of additional
22 information does not mean that Defendants failed to provide proper certificates of merit originally.
23 This is particularly true given the following provision of Proposition 65: “If, after reviewing the factual
24 information sufficient to establish the basis for the certificate of merit . . . , the Attorney General
25 believes there is no merit to the action, the Attorney General *shall* serve a letter . . . stating the Attorney
26 General believes there is no merit to the action.” Cal. Health & Safety Code § 25249.7(e)(1)(A)
27 (emphasis added). B&G does not allege that the Attorney General found there was no merit upon
28 review of the initial certificates of merit. Indeed, B&G concedes the Attorney General did not object

1 to the notices of violation (which contain the certificates of merit, Cal. Health & Safety Code §
2 25249.7(d)(1)). SAC, ¶¶ 63, 66.

3 B&G additionally points to Defendants' pleading of irreparable harm and contrasts that to the
4 lack of evidence that any particular person got cancer. SAC, ¶¶ 135-36. But the irreparable harm
5 stems from B&G's failure to provide a warning under Proposition 65's right to know scheme.
6 "Proposition 65 is distinguishable in its fundamentally equitable purpose and remedy: to facilitate the
7 *notification* of the public of potentially harmful substances, so informed decisions may be made by
8 consumers on the basis of disclosure." *DiPirro v. Bondo Corp.*, 153 Cal.App.4th 150, 183 (2007); *see*
9 *also Ctr. for Self-Improvement & Cmty. Dev. v. Lennar Corp.*, 173 Cal.App.4th 1543, 1556 (2009)
10 ("The interest of an individual citizen in assuring that appropriate warnings are given for exposure to
11 toxic chemicals is substantial and appropriate for vindication by a general citizen right to sue.")
12 (internal quotation marks omitted). It is undisputed that B&G has not provided a warning. *B&G*
13 *Foods*, 29 F.4th at 538. Defendants' pleading of irreparable harm in the state court lawsuits is entirely
14 correct based on the deprivation of consumers' right to know so that they can make informed decisions.

15 B&G further points to Defendants' pleading that they are acting in the public interest in
16 contrast to B&G's self-interested view about where the public interest lies. SAC, ¶¶ 140-41, 144-45.
17 Defendants are acting in the public interest in every sense of the phrase. But the phrase is also a term
18 of art for purposes of Proposition 65, which provides: "Actions pursuant to this section may be brought
19 by a person in the public interest." Cal. Health & Safety Code § 25249.7(d). The phrase "in the public
20 interest" is used to distinguish a Proposition 65 case from a case where a plaintiff may sue for personal
21 injury or damages. *See Consumer Advocacy Group, Inc. v. ExxonMobil Corp.*, 168 Cal.App.4th 675,
22 692-93 (2008) (discussing difference between representative action to vindicate public rights under
23 Proposition 65 and individual action). Therefore, it is a "*given* that private-enforcement Proposition
24 65 actions are brought 'in the public interest.'" *Consumer Defense Group v. Rental Housing Industry*
25 *Members*, 137 Cal.App.4th 1185, 1207 (2006) (emphasis added). That is: "Citizens bringing
26 Proposition 65 suits need not plead a private injury and instead are *deemed* to sue in the public
27 interest." *DiPirro*, 153 Cal.App.4th at 183 (emphasis added; internal quotation marks omitted). There
28 is no basis for finding that Defendants made a false statement.

1 Finally, B&G complains about Defendants’ statements that they seek to remedy B&G’s failure
 2 to provide a warning about acrylamide on the ground that Defendants have supposedly not acted in
 3 the public interest in settling prior cases. SAC, ¶¶ 142-45. In addition to the points in the prior
 4 paragraph, differing views about what is in the public interest are not the basis for a claim of fraud and
 5 B&G’s views on *prior* settlements do not make statements about the intent of *later* lawsuits false.

6 C. The Sham Exception for Objective Baselessness and Unlawful Motive

7 1. The Standard and General Discussion

8 The first sham exception applies if “the lawsuit is objectively baseless and the defendant’s
 9 motive in bringing it was unlawful.” *B&G Foods*, 29 F.4th at 537 (internal quotation marks omitted).
 10 Given the Court’s prior ruling, Defendants will analyze this and the remaining sham exceptions under
 11 normal pleading standards. *See* ECF 56 at 3:15-5:28. Defendants note that the weight of the authority
 12 is that a heightened pleading standard applies. *See, e.g., Oregon Nat. Res. Council*, 944 F.2d at 533;
 13 *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1063 (9th Cir. 1998); *Kearney v. Foley & Lardner, LLP*,
 14 590 F.3d 638, 647 (9th Cir. 2009); *Wonderful Real Estate Dev. LLC v. Laborers Int’l Union of N. Am.*
 15 *Local 220*, 2020 WL 91998, at *7, 10 (E.D. Cal. Jan. 8, 2020); *see also* ECF 56 at 3:17-4:12; *but see*
 16 *Empress LLC v. City & Cnty. of San Francisco*, 419 F.3d 1052, 1057 (9th Cir. 2005). Defendants
 17 generally agree with this Court’s analysis of the dispute about whether a heightened pleading standard
 18 applies but further note that a particular reason to apply such a standard is that “where a plaintiff seeks
 19 damages or injunctive relief, or both, for conduct which is prima facie protected by the First
 20 Amendment, the danger that the mere pendency of the action will chill the exercise of First
 21 Amendment rights requires more specific allegations than would otherwise be required.” *Franchise*
 22 *Realty Interstate Corp. v. San Francisco Loc. Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076,
 23 1082-83 (9th Cir. 1976). This concern trumps cases that rely on interpretation of the Federal Rules.
 24 But because B&G cannot meet even the normal pleading standard, there is no need to reach this issue.

25 Defendants’ lawsuits are not objectively baseless – far from it. “A lawsuit is objectively
 26 baseless when ‘no reasonable litigant could realistically expect success on the merits.’” ECF 56 at
 27 8:19-20 (quoting *B&G Foods*, 29 F.4th at 538); *see also Pro. Real Est. Invs., Inc. v. Columbia Pictures*
 28 *Indus., Inc.*, 508 U.S. 49, 65 (1993) (examining objective baselessness with reference to Rule 11

1 standard). B&G concedes the low bar for a Proposition 65 lawsuit: “The State permits Defendants to
 2 file suit against products containing modest, trace amounts of substances, even if they pose no possible
 3 health effect.” SAC, ¶ 28. The California Court of Appeal has stated: “the instigation of Proposition
 4 65 litigation [is] easy—and almost absurdly easy at the pleading stage and pretrial stages.” *Consumer*
 5 *Defense Group v. Rental Housing Industry Members*, 137 Cal.App.4th 1185, 1215 (2006) . As this
 6 Court noted: “B&G’s allegations about low standards and advantageous rules undermine its claim that
 7 the defendants’ lawsuits are objectively meritless.” ECF 56 at 10:22-24 (citing FAC, ¶¶ 85-89). B&G
 8 has deleted these allegations, but they cannot be ignored as discussed above. *Stanislaus Food Prod.*
 9 *Co.*, 782 F. Supp. 2d at 1075. Much of B&G’s remaining allegations are conclusory and speculative.

10 Nor is there a basis to show unlawful motive. Any basis for arguing unlawful motive would
 11 be pure speculation.

12 2. Pre-Lawsuit Investigation

13 B&G primarily relies on two arguments that Defendants did not conduct an adequate pre-
 14 lawsuit investigation. SAC, ¶¶ 103-23. At the outset, the Court has already ruled: “If the defendants
 15 filed a certificate of merit as required by law, then B&G’s allegations about additional steps not taken
 16 do not plausibly convey that no meaningful pre-suit investigation was conducted.” ECF 56 at 10:16-
 17 18. B&G’s two pre-lawsuit investigation arguments are just more of the same.

18 First, B&G argues that Defendants did not investigate an affirmative defense that the products
 19 did not exceed the No Significant Risk Level. SAC, ¶¶ 103-17; *see also B&G Foods*, 29 F.4th at 533;
 20 Cal. Health & Safety Code § 25249.10(c). But an expert has opined that the products contain
 21 acrylamide in amounts that exceed the NSRL. *See* RJN Exs. C, D. (B&G refers to these documents.
 22 *E.g.*, SAC, ¶¶ 89-90, 98, 121.) The expert stated, based on test results showing acrylamide content of
 23 more than 600 parts per billion, “consuming a single serving of the product[s]” results in ingesting
 24 more than 50 times (for the Cookie Cakes) or 145 times (for the Sandwich Cookies) the NSRL. RJN
 25 Exs. C, D. Given this, it is hard to find fault with Defendants’ investigation.

26 But B&G will undoubtedly try. Its attempt, however, will founder. For purposes of the sham
 27 exception, B&G must “demonstrate an enforcement action had no realistic chance of success” based
 28 on an affirmative defense. ECF 56 at 9:6-8. Defendants need not adopt B&G’s litigation position

1 about what an affirmative defense entails. Here, the NSRL affirmative defense is based on a detailed
 2 regulatory scheme. 27 C.C.R. §§ 25701-21. B&G focuses on one aspect of that scheme – consumption
 3 patterns. SAC, ¶ 105. But they are irrelevant given the expert’s finding that consumption of only *one*
 4 *serving* exceeds the NSRL. B&G further argues that Defendant Embry did not personally research
 5 the issue. SAC, ¶ 110. But that is irrelevant as it is the attorney that needs to provide the certificate
 6 of merit (Cal. Health & Safety Code § 25249.10(d)(1)) and Defendants consulted with an expert.

7 At most, there may be a question about whether B&G will ultimately succeed based on the
 8 NSRL. But that is true in the vast majority of Proposition 65 lawsuits. Proposition 65 plaintiffs and
 9 defendants – and their respective experts – will often have different views about how to calculate the
 10 NSRL. That does not make the cases a sham – even if a plaintiff eventually loses on an NSRL defense.

11 B&G’s second argument based on pre-lawsuit investigation is that the Proposition 65 claims
 12 are barred by the cooking regulation – 27 C.C.R. § 25703(b)(1). SAC, ¶¶ 103, 118-23. This argument
 13 is addressed above. *See supra* Part IV.B.2.

14 3. Acrylamide and Cancer

15 In addition, B&G argues that Defendants know that the products do not cause cancer. SAC,
 16 ¶¶ 146-59. The Court has already addressed this argument. “Proposition 65 enforcers do not need to
 17 independently determine whether a listed chemical causes cancer, and they could prevail in a lawsuit
 18 if the chemical is listed.” ECF 56 at 9:11-12. The undisputed facts that the products contain
 19 acrylamide and that acrylamide is listed as a carcinogen under Proposition 65 “could offer an objective
 20 basis for the action.” *Id.* at 9:8-14. Again, the Attorney General has brought at least two acrylamide
 21 Proposition 65 cases with respect to snack foods. RJN Exs. G, H. B&G’s argument would mean that
 22 those lawsuits were shams. Further, to the extent B&G relies on a supposed lack of benefit from
 23 Defendants’ Proposition 65 lawsuits, that is simply a difference of opinion that does not show a sham.

24 4. Constitutional Issues

25 B&G further argues that the mere filing of Proposition 65 lawsuits on acrylamide is a sham
 26 because of a case on the constitutionality of warnings on acrylamide. SAC, ¶¶ 189-200. But
 27 acrylamide is listed as a carcinogen under Proposition 65 and the Proposition 65 lawsuits were filed
 28 *before* the rulings on the preliminary injunction in that case – let alone before a final ruling. SAC,

1 Exs. E (Complaint filed March 6, 2020), G (Complaint filed January 22, 2021); *California Chamber*
 2 *of Commerce v. Becerra*, 529 F. Supp. 3d 1099 (E.D. Cal. 2021) (preliminary injunction ruling of
 3 March 30, 2021), *aff'd sub nom. California Chamber of Commerce v. Council for Educ. & Rsch. on*
 4 *Toxics*, 29 F.4th 468 (9th Cir. 2022). At the time Defendants filed the Proposition 65 lawsuits, there
 5 were no rulings. Moreover, as the Court is aware, the First Amendment issue surrounding acrylamide
 6 Proposition 65 litigation was contested. Defendants were not required to disagree with the Attorney
 7 General. Further, *at Defendants'* request, the Proposition 65 lawsuits have been stayed. SAC, Ex. I.
 8 The timing shows that Defendants have acted responsibly in light of the rulings after they filed suit.

9 Relatedly, B&G argues that the Proposition 65 lawsuits are a sham because they would require
 10 unconstitutional forced speech. SAC, ¶¶ 201-14. But the standard is that no reasonable litigant could
 11 realistically expect success. ECF 56 at 8:19-20. Defendants were entitled to take the same position
 12 as the Attorney General did in defending the acrylamide case before this Court. Moreover, a new
 13 regulation on the content of a Proposition 65 warning particular to acrylamide took effect on January
 14 1, 2023. 27 C.C.R. § 25607.2(b). That regulation was designed in part to avoid First Amendment
 15 concerns with using the general Proposition 65 warning for acrylamide. RJN, Ex. J at 9. Even if the
 16 First Amendment argument prevails in the end, given that Defendants have been aligned throughout
 17 with the State of California, there is no basis to say their lawsuits were shams.

18 **D. The Sham Exception for a Series of Lawsuits**

19 The second sham exception is “where the conduct involves a series of lawsuits brought
 20 pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful
 21 purpose.” *B&G Foods*, 29 F.4th at 537 (internal quotation marks omitted).

22 The Court need not address B&G’s arguments about the earlier litigation activity. As discussed
 23 above, the lawsuits at issue are meritorious. Even had Defendants engaged in earlier meritless
 24 litigation activity – which is not the case – that would not implicate these lawsuits. “The existence of
 25 a series of baseless appeals does not in itself bring *this suit* within the sham exception.” *Oregon Nat.*
 26 *Res. Council*, 944 F.2d at 535. Because the lawsuits at issue in this case are meritorious, B&G has not
 27 shown they “fit[] into that pattern” of purportedly baseless suits. *Id.* This is particularly true given
 28 that B&G is unable to plead any of the prior cases were against B&G. *See* ECF 56 at 11-12 n.2.

1 Even putting that aside, the allegations about prior litigation activity do not support application
2 of the sham exception. This Court has found that “the key question is whether the success rate is so
3 low that it is plausible to infer a sham operation.” ECF 56 at 12:11-12. The Court then stated: “Even
4 with the low-end success rates of 25 out of 260 and 160 out of 800, such an inference is not plausible.”
5 *Id.* at 12:12-14. Yet B&G repeats the same allegations as to success rates. Compare SAC, ¶¶ 168-70,
6 175-77 with FAC, ¶¶ 166-68, 174-76. Because B&G has failed to improve its pleading on the “key
7 question,” there is no reason for the Court to analyze the issue any further.

8 Moreover, as the Court pointed out, these are “low-end success rates.” For instance, B&G
9 conspicuously does not include *ongoing cases* in its allegations. See SAC, ¶¶ 168-71, 175-77.
10 Including those numbers would necessarily change the percentages. Further, there are a host of
11 legitimate reasons that not all Proposition 65 notices of violation are litigated. To start, Proposition
12 65 applies only to companies with at least 10 employees. Cal. Health & Safety Code § 25249.11(b).
13 In addition, a prior court-approved settlement acts as *res judicata* preventing future suits. *Consumer*
14 *Advoc. Grp., Inc. v. ExxonMobil Corp.*, 168 Cal.App.4th 675, 684 (2008) . Further, the volume of
15 products sold in California may not be sufficient to justify litigation. For these and other legitimate
16 reasons that are found after the notice of violation is sent, litigation does not ensue from every such
17 notice. That shows Defendants’ reasonableness, not some ill motive. There is no basis to infer that
18 the failure to litigate over a notice of violation shows bad faith given the myriad other possibilities.

19 B&G adds new allegations solely on information and belief that Defendants have selected a
20 particular lab – IEH – for improper purposes. SAC, ¶¶ 164-67. These are speculative and conclusory
21 allegations that cannot be presumed true. *Bell Atl. Corp. v. Twombly*, 550 U.S. at 545; *Ashcroft v.*
22 *Iqbal*, 556 U.S. at 681. Indeed, were B&G correct, one would expect every other lab’s tests to be in
23 line with B&G’s position. But a second lab, the Medallion Labs facility, produced results that an
24 expert opined showed the NSRL was exceeded. See RJN Ex. D. It is easy – albeit craven – to say on
25 information and belief that a lab conducted improper testing. But to argue that a second lab did so is
26 at best a conspiracy theory. It is certainly possible some tests will show lower amounts of acrylamide.
27 See SAC, ¶ 157 (final bullet point). But those are issues for trial in state court not for baseless charges.
28

1 Further, B&G admits that Defendants have obtained millions of dollars in supposed sham
 2 lawsuits. SAC, ¶ 24. This defeats the sham exception. ECF 33 at 5:9-14; ECF 56 at 12:20-13:17.
 3 In particular, B&G has been unable to plead properly that the millions of dollars stems from
 4 unmeritorious lawsuits. B&G continues to rely on conclusory statements about Defendants hoping
 5 companies will pay Defendants to go away, not being interested in the merits, and being involved in
 6 purported “shake-down” attempts. SAC, ¶¶ 160, 163. B&G also seeks to avoid the import of the
 7 Court’s prior rulings by cursory pleading about whether Defendants’ lawsuits are in the public interest.
 8 *E.g.*, SAC, ¶¶ 172-73. This has largely been addressed above. *See supra* Part IV.B.3. Moreover,
 9 B&G’s purported problems with Defendants’ *settlements* do not show that the *lawsuits* are meritless.

10 The only specific allegation B&G has is that the Attorney General objected to *one* of Defendant
 11 Embry’s proposed settlements. SAC, ¶¶ 182-83. This allegation does not help Defendants. First, just
 12 because the Attorney General objected to a settlement does not make the underlying case meritless.
 13 Second, even if it did, that the Attorney General objected to one settlement does not show a *series* of
 14 meritless cases. Third, B&G has pled that Defendants have entered into 185 settlements. SAC, ¶¶
 15 170, 175, 177. That the Attorney General objected to only one is actually quite a good record.

16 **E. Outcome Versus Process Injury**

17 Beyond the three sham exceptions, this Court has explained that litigation is not a sham when
 18 the injury it supposedly inflicts is a result of the litigation’s outcome as opposed to process. ECF 56
 19 at 14:19-15:14. Here, “B&G does not target the process”; rather, “B&G seeks to avoid harm that
 20 could occur only if the defendants’ Proposition 65 litigation were successful.” *Id.* at 15:17-18. For
 21 this reason as well, *Noerr-Pennington* protects against B&G’s retaliatory lawsuit.

22 **V. THE COURT SHOULD ALSO DISMISS DUE TO LACK OF STATE ACTION**

23 **A. Embry and EHA are Presumptively Not State Actors**

24 B&G sues under the First Amendment as enforced under 42 U.S.C. § 1983. SAC at 38:14-15.
 25 The Constitution prohibits only “*governmental*” and not “*private* abridgement of speech.” *Manhattan*
 26 *Cnty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Section 1983 requires “a deprivation of
 27 a right secured by the Constitution or laws of the United States, *and that the defendant acted under*
 28 *color of state law.*” *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (emphasis added).

1 “When addressing whether a private party acted under color of law,” courts “start with the
 2 presumption that private conduct does not constitute governmental action.” *Sutton v. Providence St.*
 3 *Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). There are only a “few limited circumstances”
 4 when a citizen may “qualify as a state actor:” if: (1) the citizen “performs a traditional, exclusive public
 5 function”; (2) “the government acts jointly with the private” citizen; or (3) “the government compels”
 6 the citizen “to take a particular action.” *Manhattan Cmty.*, 139 S. Ct. at 1928. B&G alleges
 7 Defendants are private parties. SAC, ¶¶ 14, 17. Thus, Defendants are presumed not to be state actors.

8 **B. Defendants Have Not Acted Under Color of Law**

9 **1. Defendants do Not Perform Traditional and Exclusive Public Functions**

10 The Supreme Court “has stressed that very few functions” are “traditionally” and “exclusively”
 11 reserved to the States. *Manhattan Cmty.*, 139 S. Ct. at 1928. It is “not enough that the function serves
 12 the public good or the public interest.” *Id.* The functions must be traditionally *and* exclusively
 13 performed by government. *Id.* (citing “running elections” and “operating a company town” as
 14 examples). The plaintiff has the burden. *Real Estate Bar Ass’n for Mass., Inc. v. Nat’l Real Estate*
 15 *Info. Servs.*, 608 F.3d 110, 122 (1st Cir. 2010). That “a private entity performs a function which serves
 16 the public does not make its acts state action.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

17 In *Real Estate Bar Ass’n*, a bar association sued an escrow company under a state statute that
 18 permitted the association to enforce the state’s prohibition on unauthorized practice of law. *See* 608
 19 F.3d at 122. The closing service brought a counterclaim under § 1983. *Id.* at 117. The First Circuit
 20 held the bar association was not a “state actor.” *Id.* at 122-23. The court reasoned: “the bringing of a
 21 lawsuit to obtain a declaration as to legality – is far from an exclusive function of government.” *Id.* at
 22 122; *see also Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981) (a public defender is not a state actor).

23 B&G alleges Defendants “are performing a quintessential state function by acting as
 24 California’s enforcement arm relating to the presence of targeted chemicals in the environment.” SAC,
 25 ¶ 234(i). But that the State may enact laws (and even bring public prosecutions) does not make citizens
 26 who enforce those laws state actors as a lawsuit to enforce public policy is “far from” an “exclusive”
 27 function of government. *Real Estate Bar Ass’n*, 608 F.3d at 122. “An action undertaken by a private
 28 party does not become state action merely because the action is authorized by state statute.” *Id.*

1 Proposition 65’s scheme shows its enforcement is not an exclusive government function. The
 2 government may bring an action by “the Attorney General in the name of the People of the State of
 3 California, by a district attorney, by a city attorney . . . [or] by a city prosecutor.” Cal. Health & Safety
 4 Code § 25249.7(c). Alternatively, Proposition 65 permits “private action[s]” brought by a “person”
 5 acting “in the public interest” but only after the person: (1) provides notice of the violation to the
 6 defendant and public prosecutors; and (2) waits 60 days and no public prosecutor has brought suit. *Id.*
 7 § 25249.7(d). The “purpose of the notice provision is to encourage public enforcement, thereby
 8 avoiding the need for a private lawsuit altogether.” *Yeroushalmi v. Miramar Sheraton*, 88 Cal.App.4th
 9 738, 750 (2001). In sum, Proposition 65 differentiates between state actions that are brought by a
 10 public prosecutor and “private actions” that are brought by private citizens after notifying the State
 11 and *the State declines to take its own action*. That is, both public and private actions are permitted.

12 B&G relies on *Lee v. Katz*, 276 F.3d 550, 554-557 (9th Cir. 2002). SAC, ¶ 234(j). In *Lee*, the
 13 defendant leased an outdoor space from a city and was sued by the plaintiffs it excluded for violating
 14 their free speech rights. Because the defendant was regulating free speech in a public forum, which is
 15 a traditional and exclusive public function, the defendant was acting under color of law. *Id.* at 555-
 16 57. Unlike the defendant in *Lee*, which had control over *public* property, Proposition 65 plaintiffs are
 17 merely permitted to seek redress in the courts, which has never been an exclusive function of the State.

18 **2. Defendants do Not act Jointly, Have a Symbiotic Relationship, or Have a**
 19 **Close Nexus with the State**

20 To prove joint action between a private actor and the State, the plaintiff must show the private
 21 actors are “willful participants in joint action with the government or its agents” and their “particular
 22 actions are inextricably intertwined with those of the government.” *Brunette v. Humane Soc’y of*
 23 *Ventura County*, 294 F.3d 1205, 1210, 1211 (9th Cir. 2002) (internal quotation marks omitted).
 24 Further, “derivative of the joint action test” is “the ‘symbiotic relationship’ test.” *Id.* at 1210. That
 25 test “asks whether the government has so far insinuated itself into a position of interdependence with
 26 a private entity that the private entity must be recognized as a joint participant in the challenged
 27 activity.” *Id.* Also related is the “close nexus” test, under which “a private party acts under color of
 28 state law if there is a sufficiently close nexus between the State and the challenged action of the

1 regulated entity so that the action of the latter may be fairly treated as that of the State itself.” *Naoko*
2 *Ohno v. Yuko Yasuma*, 723 F.3d 984, 995 n.13 (9th Cir. 2013) (internal quotation marks omitted).

3 Proposition 65 does not entail joint action, a symbiotic relationship, or a close nexus. Rather,
4 Proposition 65 requires *independent* actions of the government and private citizens. A potential
5 plaintiff must first notify the State and may only bring suit after the State declines to act. Cal. Health
6 & Safety Code § 25249.7(d). Although the Attorney General can inform the potential plaintiff that
7 the Attorney General does not believe the case has merit, that does not stop the action from going
8 forward. *See id.* § 25249.7(e)(1)(A). The plaintiff risks sanctions, but that is true regardless of the
9 views of the Attorney General and is a decision for the state court. *Id.* § 25249.7(h)(2).

10 Indeed, Proposition 65 treats private enforcers differently from government prosecutors:
11 private enforcers are required to provide 60 days’ notice before suing, *id.* § 25249.7(d)(1); they cannot
12 sue if a public enforcer has already sued, *id.* § 25249.7(d)(2); they are subject to sanctions if they bring
13 a frivolous case, *id.* § 25249.7(h)(2); and they must get judicial approval to settle, *id.* § 25249.7(f)(4).

14 That a Proposition 65 plaintiff must first provide notice *to* the State does not constitute joint
15 action, a symbiotic relationship, or a close nexus *with* the State. *See Am. Mfrs. Mut. Ins. Co. v.*
16 *Sullivan*, 526 U.S. 40, 55 (2000) (government agency not responsible for private parties’ actions where
17 its “participation is limited to requiring insurers to file a form prescribed by the Bureau,” processing a
18 request, forwarding the matter to a private entity, and providing information to the parties). A private
19 party is not a state actor where the government’s involvement is limited to providing “mere approval
20 or acquiescence,” “subtle encouragement,” or “permission of a private choice.” *Id.* at 52-54.

21 B&G relies on the Attorney General’s oversight ability and option to review settlements. SAC,
22 ¶ 234(e)-(f). But “[a]ction taken by private entities with the mere approval or acquiescence of the
23 State is not state action.” *Sullivan*, 526 U.S. at 52. Rather, “our cases will not tolerate the imposition
24 of [constitutional] restraints on private action by the simple device of characterizing the State’s
25 inaction as authorization or encouragement.” *Id.* at 54 (internal quotation marks omitted).

26 Nothing in Proposition 65 indicates that inaction during monitoring by the Attorney General
27 constitutes “encouragement” of a private action. As to settlement, a private enforcer must notify the
28 Attorney General and the Attorney General may then “appear and participate in [the settlement]

1 proceeding.” Cal. Health & Safety Code § 25249.7(f)(5). But Proposition 65 leaves it to the state
 2 court to approve or reject a settlement. *See id.*, § 25249.7(f)(4). Even if the Attorney General could
 3 block proposed settlements – which he cannot – that authority would not make him responsible for the
 4 resulting settlement or the private action. Rather, where the Attorney General objects to a settlement,
 5 the State becomes an *adversary* to the plaintiff – the opposite of state action.

6 B&G relies on penalties paid to the State. SAC, ¶¶ 234(e), 237. But financial benefit is state
 7 action only if private action “confers significant financial benefits *indispensable* to the government’s
 8 financial success.” *Brunette*, 294 F.3d at 1213 (emphasis added; internal quotation marks omitted).
 9 B&G does not so allege. B&G relies on *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).
 10 SAC, ¶ 234(h). But there the restaurant that discriminated against black customers operated out of a
 11 building that was owned by the parking authority, whose viability depended on profits of the
 12 restaurant. 365 U.S. at 719-20. Moreover, the state made itself a party to discrimination by “electing
 13 to place its power, property and prestige behind the admitted discrimination.” *Id.* at 725.

14 B&G’s conclusory allegation that Defendants “conspire with state officials” (SAC, ¶ 234(k))
 15 is also lacking. B&G fails to allege any facts for a conspiracy. Further, B&G misplaces reliance on
 16 *Denis v. Sparks*, 449 U.S. 24 (1980). There, a litigant who bribed a judge to influence a decision
 17 participated in an official act. *Id.* at 28. But one does not become a “co-conspirator or joint actor with
 18 the judge” simply by “resorting to the courts and being on the winning side of a lawsuit.” *Id.* If
 19 anything, *Denis* shows Defendants are no more “joint actors” with the State than other private litigants.

20 B&G’s remaining allegations are conclusory and cannot be assumed true. *Ashcroft v. Iqbal*,
 21 556 U.S. at 681. In sum, where “the [private party’s] actions were its own; they were not ‘state actions’
 22 directed by or jointly conceived, facilitated or performed by the [State].” *Brunette*, 294 F.3d at 1213.

23 3. Private Enforcers are Not Compelled to Bring Actions

24 “The compulsion test considers whether the coercive influence or significant encouragement
 25 of the state effectively converts a private action into a government action.” *Kirtley*, 326 F.3d at 1094
 26 (internal quotation marks omitted). Proposition 65 does not require private enforcement. Cal. Health
 27 & Safety Code § 25249.7(d) (“Actions pursuant to this section *may* be brought by a person in the
 28 public interest.”) (emphasis added). The penalties are not such “significant encouragement” that the

1 choice to initiate private enforcement “must in law be deemed to be that of the State.” *Blum v.*
2 *Yaretsky*, 457 U.S. 991, 1004 (1982). Courts “have never held that the mere availability of a remedy
3 for wrongful conduct, even when the private use of that remedy serves important public interests, so
4 significantly encourages the private activity as to make the State responsible.” *Sullivan*, 526 U.S. at
5 53. That the Attorney General may approve or acquiesce “is not state action.” *Id.* at 52.

6 **4. Allowing Lawsuits Against Citizens Filing Private Actions Would Chill**
7 **Citizens from Acting in the Public Interest**

8 Like Proposition 65, numerous statutes permit private actions to enforce public rights without
9 making the private citizen plaintiffs state actors. These include the Clean Water Act, 33 U.S.C. §
10 1365; Endangered Species Act, 16 U.S.C. § 1540(g); and Safe Drinking Water Act, 42 U.S.C. § 300j-
11 8. California permits citizen suits under the Private Attorneys General Act. Cal. Lab. Code § 2699(i).

12 To permit defendants to sue plaintiffs as state actors would chill participation by citizens in
13 vindicating the public policies embodied in Proposition 65 and every other similar state and federal
14 statute permitting private enforcement. Citizens considering a private enforcement action should not
15 have to weigh the risk and burden of defending retaliatory lawsuits. *See Roberts*, 877 F.3d at 845
16 (“[P]rivate parties [do not] face constitutional litigation whenever they seek to rely on some [statute]
17 governing their interactions with the community surrounding them.”) (internal quotation marks
18 omitted). Further, allowing Proposition 65 defendants to bring separate federal actions against private
19 enforcers as if they were the government would create a flood of retaliatory litigation in federal court.
20 The proper way to proceed is in state court, where B&G has asserted the constitutional claims it makes
21 here as affirmative defenses in the Proposition 65 lawsuits. RJN, Exs. E, F (Affirm. Def. No. 17).

22 The absurdly broad definition of a state actor B&G posits is embodied in its claim that
23 Defendants are state actors “because California has interjected itself into this dispute by virtue of the
24 fact that Proposition 65 is a state statute and Defendants have filed suit in state court.” SAC, ¶ 235.
25 In other words, B&G claims that any time a lawsuit is filed under state law the plaintiff is a state actor
26 subject to suit in federal court to defend the constitutionality of the state law. That is not the law.

27 **VI. CONCLUSION**

28 For all of the above reasons, Defendants’ motion to dismiss should be granted.

1 Respectfully submitted,

2 Dated: January 19, 2023

NICHOLAS & TOMASEVIC, LLP

3 By: */s/ Jake W. Schulte*

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11 Attorneys for Defendants

KIM EMBRY and

ENVIRONMENTAL HEALTH ADVOCATES, INC.

13 **UNITED STATES DISTRICT COURT**

14 **EASTERN DISTRICT OF CALIFORNIA**

15 B&G FOODS NORTH AMERICA, INC.,

17 Plaintiff,

18 v.

19 KIM EMBRY and ENVIRONMENTAL
HEALTH ADVOCATES, INC., acting as
20 enforcement representatives under California
Proposition 65 on behalf of the State of
21 California,

22 Defendants.

CASE NO.: 2:20-CV-00526-KJM-DB

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF DEFENDANTS' MOTION
TO DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT AND MOTION
FOR SANCTIONS**

Hearing Date: March 10, 2023

Hearing Time: 10:00 a.m.

Courtroom: 3 (15th Floor)

District Judge: Hon. Kimberly J. Mueller

Magistrate Judge: Hon. Deborah Barnes

Complaint Filed: March 6, 2020

Complaint Dismissed: October 7, 2020

Mandate Issued: May 4, 2022

FAC Filed: July 7, 2022

FAC Dismissed: November 3, 2022

SAC Filed: November 23, 2022

Trial Date: None Set

Under Federal Rule of Evidence 201(b), a district court may take notice of facts not subject to reasonable dispute that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); *see also, Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (noting that the court may take judicial notice of undisputed matters of public record), overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002)).

Defendants respectfully request the Court take judicial notice of the following documents attached as Exhibits A-M to its Request for Judicial Notice in support of their Motion to Dismiss Plaintiff’s Second Amended Complaint and Motion for Sanctions (“RJN”):

<u>Ex.</u>	<u>Document</u>
A	Embry’s Notice of Violation of Proposition 65 regarding B&G’s Cookie Cakes dated April 22, 2019. The notice is publicly available on the Attorney General’s website: https://oag.ca.gov/system/files/prop65/notices/2019-00765.pdf .
B	EHA’s Notice of Violation of Proposition 65 regarding B&G’s Sandwich Cookies dated October 8, 2020. The notice is publicly available on the Attorney General’s website: https://oag.ca.gov/system/files/prop65/notices/2020-02646.pdf .
C	Embry’s Amended Notice of Violation of Proposition 65 regarding B&G Foods’ Cookie Cakes dated August 17, 2022. The amended notice is publicly available on the Attorney General’s website: https://oag.ca.gov/system/files/prop65/notices/2022-01870.PDF .
D	EHA’s Amended Notice of Violation of Proposition 65 regarding B&G Foods’ Sandwich Cookies dated July 27, 2022. The amended notice is publicly available on the Attorney General’s website: https://oag.ca.gov/system/files/prop65/notices/2022-01704.pdf .
E	B&G’s General Denial, Defenses, and Affirmative Defenses to Embry’s Complaint for Civil Penalties and Injunctive Relief, <i>Kim Embry v. B&G Foods North America, Inc., et al.</i> (Superior Court of California for the County of Alameda, Case No. RG20057491) dated June 1, 2020.
F	B&G’s General Denial, Defenses, and Affirmative Defenses to EHA’s Complaint for Civil Penalties and Injunctive Relief, <i>EHA v. B&G Foods North America, Inc., et al.</i> (Superior Court of California for the County of Alameda, Case No. RG21086510) dated March 8, 2021.

<u>Ex.</u>	<u>Document</u>
G	<p>Consent Judgment entered in <i>People of the State of California v. Frito-Lay, Inc., et al.</i> (Superior Court of California for the County of Los Angeles, Case No. BC338956) dated August 1, 2008.</p> <p>The Consent Judgment is publicly available on the Attorney General’s website: https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/peo-v-frito-lay-inc.pdf.</p>
H	<p>Consent Judgment entered in <i>People of the State of California v. Snyder’s of Hanover, Inc., et al.</i> (Superior Court of California for the County of Alameda, Case No. RG09455286) dated August 31, 2011.</p> <p>The Consent Judgment is publicly available on the Attorney General’s website: https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/snyders.pdf.</p>
I	<p>Ninth Circuit’s Order denying B&G’s petition for rehearing en banc dated April 26, 2022.</p>
J	<p>Initial Statement of Reasons for Proposed Amendments to Title 27, California Code of Regulations, Article 6: Safe Harbor Clear and Reasonable Warnings for Acrylamide Exposures from Food dated September 24, 2021.</p> <p>The Initial Statement of Reasons for Proposed Amendments is publicly available on the California Office of Environmental Health Hazard Assessment’s website: https://oehha.ca.gov/media/downloads/crn/isoracrylamide091721.pdf.</p>
K	<p>Notice of Ruling entered in <i>Calsafe Research Center, Inc. v. Earthly Treats, Inc. dba Real Food From the Ground Up</i> (Superior Court of California for the County of Orange – Central Judicial District, Case No. 30-2021-01193600-CU-TT-CC) dated February 4, 2022.</p>
L	<p>Tentative Ruling issued on Earthly Treats, Inc.’s Motion for Terminating Sanctions Due to Spoliation in <i>Calsafe Research Center, Inc. v. Earthly Treats, Inc. dba Real Food From the Ground Up</i> (Superior Court of California for the County of Orange – Central Judicial District, Case No. 30-2021-01193600-CU-TT-CC) dated February 2, 2022.</p>
M	<p>Earthly Treats, Inc.’s Notice of Motion and Motion for Terminating Sanctions Due to Spoliation in <i>Calsafe Research Center, Inc. v. Earthly Treats, Inc. dba Real Food From the Ground Up</i> (Superior Court of California for the County of Orange – Central Judicial District, Case No. 30-2021-01193600-CU-TT-CC) dated December 9, 2021.</p>

A. Defendants’ Notices of Violation of Proposition 65 Against B&G and OEHHA’S Initial Statement of Reasons Regarding New Acrylamide Warning Language

Defendants ask the Court to take judicial notice of Ms. Embry and EHA’s Notices of Violation of Proposition 65 against B&G. (Exs. A-D). The notices are official public records on file with the Office of the California Attorney General (“AG”) and are publicly available on the

1 AG’s website as detailed above. Defendants also ask the Court to take judicial notice of the Initial
2 Statement of Reasons for Proposed Amendments to Title 27, Cal. Code of Regs. Article 6,
3 regarding specific warning language for acrylamide exposure from food, as set forth by the
4 California Office of Environmental Health Hazard Assessment (“OEHHA”). (Ex. J). The
5 document is publicly available on OEHHA’s website as detailed above. Courts may judicially
6 notice information and documents contained on official government websites. *See Daniels-Hall*
7 *v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010); *see also, Consumer Cause Inc. v.*
8 *Johnson & Johnson*, 132 Cal.App.4th 1175, 1180 fn. 5 (2005) (taking judicial notice of
9 Proposition 65 pre-suit 60-day notices of violation).

10 **B. Court Filings**

11 Defendants ask the Court to take judicial notice of several court filings: Ex. E (B&G’s
12 Answer to Embry’s Complaint); Ex. F (B&G’s Answer to EHA’s Complaint); Ex. G (AG Consent
13 Judgment); Ex. H (AG Consent Judgment); Ex. I (Ninth Circuit Order denying rehearing en banc);
14 Ex. K (Notice of Ruling); Ex. L (Tentative Ruling); and Ex. M (Earthly Treats, Inc.’s Notice of
15 Motion and Motion). The Court may take judicial notice of these documents. *See Reyn’s Pasta*
16 *Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 fn. 6 (9th Cir. 2006) (“We may take judicial notice
17 of court filings and other matters of public record.”).

18 Based on the foregoing, Defendants respectfully request that the Court take judicial notice
19 of the aforementioned documents attached to its RJN as Exhibits A-M.

20 [*Signatures on following page.*]
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22
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26
27
28

1 Respectfully submitted,
2 Dated: January 19, 2023

NICHOLAS & TOMASEVIC, LLP

3 By: /s/ Jake W. Schulte

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13 Attorneys for Defendants

14 KIM EMBRY and ENVIRONMENTAL HEALTH
15 ADVOCATES, INC.

EXHIBIT A



225 Broadway, Suite 2100, San Diego, CA 92101

Tel: 619.382.3400 Fax: 619.615.2193

www.glicklawgroup.com

April 22, 2019

Via Certified Mail

B&G Foods North America, Inc.
 c/o Erin Upchurch
 1325 J St STE 1550
 Sacramento, CA 95814

Ralphs Grocery Company
 c/o CSC - Lawyers Incorporating Service
 2710 Gateway Oaks Drive, STE 150 N
 Sacramento, CA 95833

Re: Proposition 65 Notice of Violation

To Whom It May Concern:

We represent Kim Embry, a citizen of the State of California acting in the interest of the general public. This letter serves as notice that the parties listed above are in violation of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, commencing with section 25249.5 of the Health and Safety Code (“Proposition 65”). In particular, the violations alleged by this notice consist of types of harm that may potentially result from exposures to the toxic chemical Acrylamide. This chemical was listed as a carcinogen on January 1, 1990 and listed as a developmental and reproductive toxin on February 25, 2011.

The specific type of product that is causing exposures in violation of Proposition 65 is detailed below:

	<u>Product Name</u>	<u>Manufacturer</u>	<u>Distributor/Retailer</u>	<u>Item Number/SKU</u>
1.	Snack Well's Devil's Food Fat Free Cookie Cakes	B&G Foods North America, Inc.	Ralphs Grocery Company	UPC: 819898019007

The route of exposure for the violations is ingestion by consumers. These exposures occur through the reasonably foreseeable use of the product. The sales of this product have been occurring since at least March 2019, are continuing to this day and will continue to occur as long as the product subject to this notice is sold to and used by consumers.

Proposition 65 requires that a clear and reasonable warning is provided with these products regarding the exposures to Acrylamide caused by ordinary use of the product. The Parties are in violation of Proposition 65 by failing to provide such warning to consumers and as a result of the sales of this product, exposures to Acrylamide have been occurring without proper warnings.

April 19, 2019

Notice of Proposition 65 Violation

Page 2

Pursuant to Proposition 65, notice and intent to sue shall be provided to violators 60-days before filing a complaint. This letter provides notice of the alleged violation to the parties listed above and the appropriate governmental authorities. A summary of Proposition 65 is attached.

If you have any questions or wish to discuss any of the above, please contact me.

Sincerely,

A handwritten signature in blue ink that reads "Noam Glick". The signature is written in a cursive, flowing style.

Noam Glick

Enclosures

Appendix A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA PROTECTION AGENCY THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACTION 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the office of Environmental Health Hazard Assessment, the lead and Toxic Enforcement Act 1986 (commonly known as "Proposition 65") A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide law. The reader is directed to the statute and its implementing regulations (See citations below) for further information.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code Regulations, Sections 250000 through 27000.

WHAT DOES PROPOSITION 65 REQUIRE?

The "Governor's List." Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, or birth defects or other reproductive harm. This list must be updated at least once a year. Over 725 chemicals have been listed as of November 16, 2001. Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release, or otherwise engage in activities involving those chemicals must comply with the

following:

Clear and Reasonable Warnings. A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed. Exposures are exempt from the warning requirement if they occur less than twelve months after the date of the listing of the chemical.

Prohibition from discharges into drinking water. A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Discharges are exempt from this requirement if they occur less than twenty months after the date of the listing of chemical.

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. The law exempts:

Governmental agencies and public water utilities. All agencies of the federal, State or local government, as well as entities operating public water systems, are exempt.

Exposures that pose no significant risk of cancer. For chemicals that are listed as known to the State to cause cancer (“carcinogens”), a warning is not required if the business can demonstrate that the exposure occurs at a level that poses “no significant risk.” This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70- year lifetime. The Proposition 65 regulations identify specific “ no significant risk” levels for more than 250 listed carcinogens.

Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause birth defects or other reproductive harm (“reproductive toxicants”), a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the “no observable effect level (NOEL), “ divided by a 1,000- fold safety or uncertainty factor. The “no observable effect level” is the highest dose level which has not been associated with an observable adverse reproductive or developmental effect.

Discharge that do not result in a “significant amount” of the listed chemical entering into any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a “significant amount” of the list chemical has not, does not, or will not enter any drinking water source, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A “significant amount” means any detectable amount; expect an amount that would meet the “ no significant risk” or “no observable effect” test if an individual were exposed to

such an amount in drinking water.

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys (those in cities with a population exceeding 750,000). Lawsuit may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. A notice must comply with the information and procedural requirements specified in regulations (Title 27. California Code of Regulations, Section 25903). A private party may not pursue an enforcement action directly under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court of law to stop committing the violation.

FOR FURTHER INFORMATION....

Contact the Office of Environmental Health Hazard Assessment’s Proposition 65 Implementation Office at (916)445-6900

CERTIFICATE OF MERIT

I, Noam Glick, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice have violated Health and Safety Code section 25249.6 by failing to provide clear and reasonable warnings.

2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action.

4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that “reasonable and meritorious case for the private action” means that the information provides a credible basis that all elements of the plaintiffs' case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code section 25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: April 22, 2019



Noam Glick, Attorney at Law

CERTIFICATE OF SERVICE

I, Charlotte Zell, declare that I am over the age of 18 years, and am not a party to the within action. I am employed in the County of San Diego, California, where the mailing occurs; and my business address is 225 Broadway, 21st Floor, San Diego, California 92101.

On April 22, 2019, I served the following documents: **(1) 60-DAY NOTICE OF VIOLATION SENT IN COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(d); (2) CERTIFICATE OF MERIT; (3) PROPOSITION 65: A SUMMARY; and (4) CERTIFICATE OF MERIT ATTACHMENT (served only on the Attorney General)** on the parties listed below by placing a true and correct copy thereof in a sealed envelope, addressed to each party and depositing it at my business address with the U.S. Postal Service for delivery by Certified Mail with the postage thereon fully prepaid:

Via Certified Mail

B&G Foods North America, Inc.
c/o Erin Upchurch
1325 J St STE 1550
Sacramento, CA 95814

Ralphs Grocery Company
c/o CSC - Lawyers Incorporating Service
2710 Gateway Oaks Drive, STE 150 N
Sacramento, CA 95833

On April 22, 2019, I served the California Attorney General (via website Portal) by uploading a true and correct copy thereof as a PDF file via the California Attorney General's website.

On April 22, 2019, I transmitted via electronic mail the above-listed documents to the electronic mail addresses of the City and/or District Attorneys who have specifically authorized e-mail service and the authorization appears on the Attorney General's web site.

See Attached Service List

On April 22, 2019, I served the following persons and/or entities at the last known address by placing a true and correct copy thereof in a sealed envelope and depositing it at my business address with the U.S. Postal Service for delivery with the postage thereon fully prepaid, and addressed as follows:

See Attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 22, 2019, at San Diego, California.


Charlotte Zell

E-Mail Service List

Stacey Grassini, Deputy District Attorney
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7776 Oakport Street, Suite 650
Oakland, CA 94621
CEPDProp65@acgov.org

EXHIBIT B



225 Broadway, Suite 2100, San Diego, CA 92101

Tel: 619.382.3400 Fax: 619.615.2193

www.glicklawgroup.com

October 8, 2020

Via Certified Mail

B&G Foods North America, Inc.
 C/O Cogency Global Inc.
 1325 J St STE 1550
 Sacramento, CA 95814

Amazon
 CSC – Lawyers Incorporating Service
 2710 Gateway Oaks Drive, STE 150 N
 Sacramento, CA 95833

Amazon
 Attn. Legal Department
 410 Terry Avenue North
 Seattle, WA 98109-5210

Re: Proposition 65 Notice of Violation

To Whom It May Concern:

We represent Environmental Health Advocates, Inc., an organization in the State of California acting in the interest of the general public. This letter serves as notice that the parties listed above are in violation of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, commencing with section 25249.5 of the Health and Safety Code (“Proposition 65”). In particular, the violations alleged by this notice consist of types of harm that may potentially result from exposures to the toxic chemical Acrylamide. This chemical was listed as a carcinogen on January 1, 1990 and listed as a developmental and reproductive toxin on February 25, 2011.

The specific type of product that is causing exposures in violation of Proposition 65 is detailed below:

	<u>Product Name</u>	<u>Manufacturer</u>	<u>Distributor/Retailer</u>	<u>Item Number/SKU</u>
1.	SnackWell's Chocolate Creme Sandwich Cookies	B&G Foods North America, Inc.	Amazon.com, Inc.	UPC 819898019205

The routes of exposure for the violations include dermal absorption, ingestion, and inhalation by consumers. These exposures occur through the reasonably foreseeable use of the product. The sales of this product have been occurring since at least May 2020, are continuing to this day and will continue to occur as long as the product subject to this notice is sold to and used by consumers.

Proposition 65 requires that a clear and reasonable warning is provided with these products regarding the exposures to Acrylamide caused by ordinary use of the product. The Parties are in violation of Proposition 65 by failing to provide such warning to consumers and as

October 8, 2020

Notice of Proposition 65 Violation

Page 2

a result of the sales of this product, exposures to Acrylamide have been occurring without proper warnings.

Pursuant to Proposition 65, notice and intent to sue shall be provided to violators 60-days before filing a complaint. This letter provides notice of the alleged violation to the parties listed above and the appropriate governmental authorities. A summary of Proposition 65 is attached.

If you have any questions or wish to discuss any of the above, please contact me.

Sincerely,

A handwritten signature in blue ink that reads "Noam Glick". The signature is written in a cursive style.

Noam Glick

Enclosures

Appendix A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA PROTECTION AGENCY THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACTION 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the office of Environmental Health Hazard Assessment, the lead and Toxic Enforcement Act 1986 (commonly known as "Proposition 65") A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide law. The reader is directed to the statute and its implementing regulations (See citations below) for further information.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code Regulations, Sections 250000 through 27000.

WHAT DOES PROPOSITION 65 REQUIRE?

The "Governor's List." Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, or birth defects or other reproductive harm. This list must be updated at least once a year. Over 725 chemicals have been listed as of November 16, 2001. Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release, or otherwise engage in activities involving those chemicals must comply with the

following:

Clear and Reasonable Warnings. A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed. Exposures are exempt from the warning requirement if they occur less than twelve months after the date of the listing of the chemical.

Prohibition from discharges into drinking water. A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Discharges are exempt from this requirement if they occur less than twenty months after the date of the listing of chemical.

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. The law exempts:

Governmental agencies and public water utilities. All agencies of the federal, State or local government, as well as entities operating public water systems, are exempt.

Exposures that pose no significant risk of cancer. For chemicals that are listed as known to the State to cause cancer (“carcinogens”), a warning is not required if the business can demonstrate that the exposure occurs at a level that poses “no significant risk.” This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70- year lifetime. The Proposition 65 regulations identify specific “no significant risk” levels for more than 250 listed carcinogens.

Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause birth defects or other reproductive harm (“reproductive toxicants”), a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the “no observable effect level (NOEL), “divided by a 1,000- fold safety or uncertainty factor. The “no observable effect level” is the highest dose level which has not been associated with an observable adverse reproductive or developmental effect.

Discharge that do not result in a “significant amount” of the listed chemical entering into any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a “significant amount” of the list chemical has not, does not, or will not enter any drinking water source, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A “significant amount” means any detectable amount; expect an amount that would meet the “no significant risk” or “no observable effect” test if an individual were exposed to

such an amount in drinking water.

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys (those in cities with a population exceeding 750,000). Lawsuit may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. A notice must comply with the information and procedural requirements specified in regulations (Title 27, California Code of Regulations, Section 25903). A private party may not pursue an enforcement action directly under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court of law to stop committing the violation.

FOR FURTHER INFORMATION....

Contact the Office of Environmental Health Hazard Assessment’s Proposition 65 Implementation Office at (916)445-6900

CERTIFICATE OF MERIT

I, Noam Glick, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice have violated Health and Safety Code section 25249.6 by failing to provide clear and reasonable warnings.


2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action.

4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that “reasonable and meritorious case for the private action” means that the information provides a credible basis that all elements of the plaintiffs' case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code section 25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: October 8, 2020



Noam Glick, Attorney at Law

CERTIFICATE OF SERVICE

I, Leilani Lu, declare that I am over the age of 18 years, and am not a party to the within action. I am employed in the County of San Diego, California, where the mailing occurs; and my business address is 225 Broadway, 21st Floor, San Diego, California 92101.

On October 8, 2020, I served the following documents: **(1) 60-DAY NOTICE OF VIOLATION SENT IN COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(d); (2) CERTIFICATE OF MERIT; (3) PROPOSITION 65: A SUMMARY; and (4) CERTIFICATE OF MERIT ATTACHMENT (served only on the Attorney General)** on the parties listed below by placing a true and correct copy thereof in a sealed envelope, addressed to each party and depositing it at my business address with the U.S. Postal Service for delivery by Certified Mail with the postage thereon fully prepaid:

Via Certified Mail

B&G Foods North America, Inc.
C/O Cogency Global Inc.
1325 J St STE 1550
Sacramento, CA 95814

Amazon
CSC – Lawyers Incorporating Service
2710 Gateway Oaks Drive, STE 150 N
Sacramento, CA 95833

Amazon
Attn. Legal Department
410 Terry Avenue North
Seattle, WA 98109-5210

On October 8, 2020, I served the California Attorney General (via website Portal) by uploading a true and correct copy thereof as a PDF file via the California Attorney General's website.

On October 8, 2020, I transmitted via electronic mail the above-listed documents to the electronic mail addresses of the City and/or District Attorneys who have specifically authorized e-mail service and the authorization appears on the Attorney General's web site.

See Attached Service List

On October 8, 2020, I served the following persons and/or entities at the last known address by placing a true and correct copy thereof in a sealed envelope and depositing it at my business address with the U.S. Postal Service for delivery with the postage thereon fully prepaid, and addressed as follows:

See Attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 8, 2020 in San Diego, California.

Leilani Xinyue Lu
Leilani Lu

E-Mail Service List

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District Attorney AMADOR COUNTY 708 Court Street, #202 Jackson, CA 95642	District Attorney KINGS COUNTY 1400 West Lacey Blvd. Hanford, CA 93230	District Attorney NEVADA COUNTY 201 Commercial Street Nevada City, CA 95959	District Attorney SANTA BARBARA COUNTY 1112 Santa Barbara Street Santa Barbara, CA 93101
District Attorney BUTTE COUNTY 25 County Center Drive Administration Building Oroville, CA 95965	District Attorney LAKE COUNTY 255 N. Forbes Street Lakeport, CA 95453	District Attorney ORANGE COUNTY 401 Civic Center Drive West Santa Ana, CA 92701	District Attorney SANTA CLARA COUNTY 70 West Hedding Street, West Wing San Jose, CA 95110
District Attorney CALAVERAS COUNTY 891 Mountain Ranch Road San Andreas, CA 95249	District Attorney LASSEN COUNTY 220 S. Lassen Street, Suite. 8 Susanville, CA 96130	District Attorney PLACER COUNTY 10810 Justice Center Drive Roseville, CA 95678	District Attorney SANTA CRUZ COUNTY 701 Ocean Street, Room 200 Santa Cruz, CA 95060
District Attorney COLUSA COUNTY 346 5th Street, Suite. 101 Colusa, CA 95932	District Attorney LOS ANGELES COUNTY 210 W. Temple Street Los Angeles, CA 90012	District Attorney PLUMAS COUNTY 520 Main Street, Room 404 Quincy, CA 95971	District Attorney SHASTA COUNTY 1355 West Street Redding, CA 96001
District Attorney CONTRA COSTA COUNTY 900 Ward Street Martinez, CA 94553	District Attorney MADERA COUNTY 209 West Yosemite Avenue Madera, CA 93637	District Attorney RIVERSIDE COUNTY 3960 Orange Street Riverside, CA 92501	District Attorney SIERRA COUNTY 100 Courthouse Square Downieville, CA 95936
District Attorney DEL NORTE COUNTY 450 H Street, Room 171 Crescent City, CA 95531	District Attorney MARIN COUNTY 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney SACRAMENTO COUNTY 901 G Street Sacramento, CA 95812	District Attorney SISKIYOU COUNTY PO BOX 986 Yreka, CA 96097
District Attorney EL DORADO COUNTY 778 Pacific Street Placerville, CA 95667	District Attorney MARIPOSA COUNTY PO BOX 730 Mariposa, CA 95338	District Attorney SAN BENITO COUNTY 419 4th Street Hollister, CA 95023	District Attorney SOLANO COUNTY 675 Texas Street, Suite 4500 Fairfield, CA 94533
District Attorney FRESNO COUNTY 2220 Tulare Street, Suite. 1000 Fresno, CA 93721	District Attorney MENDOCINO COUNTY PO BOX 1000 Ukiah, CA 95482	District Attorney SAN BERNARDINO COUNTY 303 W. Third Street San Bernardino, CA 92415	District Attorney SONOMA COUNTY 600 Administration Drive, Room 212J Santa Rosa, CA 95403
District Attorney GLENN COUNTY PO Box 430 Willows, CA 95988	District Attorney MERCED COUNTY 550 West Main Street Merced, CA 95340	District Attorney SAN DIEGO COUNTY 330 W. Broadway, Suite 1300 San Diego, CA 92101	District Attorney STANISLAUS COUNTY 832 12th Street, Suite 300 Modesto, CA 95353
District Attorney HUMBOLDT COUNTY 825 5th Street Eureka, CA 95501	District Attorney MODOC COUNTY 204 S. Court Street, Room 202 Alturas, CA 96101	District Attorney SAN FRANCISCO COUNTY 880 Bryant Street, Third Floor San Francisco, CA 94103	District Attorney SUTTER COUNTY 446 Second Street, Suite 102 Yuba City, CA 95991
District Attorney IMPERIAL COUNTY 940 West Main Street, Suite. 102 El Centro, CA 92243	District Attorney MONO COUNTY PO BOX 2053 Mammoth Lakes, CA 93546	District Attorney SAN JOAQUIN COUNTY PO BOX 990 Stockton, CA 95202	District Attorney TEHAMA COUNTY PO BOX 519 Red Bluff, CA 96080
District Attorney TULARE COUNTY 221 South Mooney Blvd., Suite 224 Visalia, CA 93291	District Attorney VENTURA COUNTY 800 South Victoria Avenue Ventura, CA 93009	District Attorney YUBA COUNTY 215 Fifth Street, Suite. 152 Marysville, CA 95901	District Attorney TRINITY COUNTY PO BOX 310 Weaverville, CA 96093
District Attorney TUOLUMNE COUNTY 423 No. Washington Street Sonora, CA 95370	District Attorney YOLO COUNTY 301 Second Street Woodland, CA 95695	Mike Feuer City Attorney CITY OF LOS ANGELES 200 N. Main Street Los Angeles, CA 90012	Jan Goldsmith City Attorney CITY OF SAN DIEGO 1200 Third Avenue, 3rd Floor San Diego, CA 92101
Richard Doyle City Attorney CITY OF SAN JOSE 200 East Santa Clara Street San Jose, CA 95113	Dennis J. Herrera, City Attorney CITY OF SAN FRANCISCO City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102		

EXHIBIT C



225 Broadway, Suite 2100, San Diego, CA 92101
 Tel: 619.382.3400 Fax: 619.615.2193
 www.glicklawgroup.com

August 17, 2022

Via Certified Mail

B&G Foods North America, Inc.
 c/o Erin Upchurch
 1325 J St STE 1550
 Sacramento, CA 95814

Ralphs Grocery Company
 c/o CSC - Lawyers Incorporating Service
 2710 Gateway Oaks Drive, STE 150 N
 Sacramento, CA 95833

Re: Amended Proposition 65 Notice of Violation

To Whom It May Concern:

This notice amends the first amended notice AG #2019-00765 dated April 22, 2019. This amendment attaches the relevant laboratory testing results and analysis.

We represent Kim Embry, a citizen of the State of California acting in the interest of the general public. This letter serves as notice that the parties listed above are in violation of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, commencing with section 25249.5 of the Health and Safety Code (“Proposition 65”). In particular, the violations alleged by this notice consist of types of harm that may potentially result from exposures to the toxic chemical Acrylamide. This chemical was listed as a carcinogen on January 1, 1990 and listed as a developmental and reproductive toxin on February 25, 2011.

The specific type of product that is causing exposures in violation of Proposition 65 is detailed below:

	<u>Product Name</u>	<u>Manufacturer</u>	<u>Distributor/Retailer</u>	<u>Item Number/SKU</u>
1.	Snack Well's Devil's Food Fat Free Cookie Cakes	B&G Foods North America, Inc.	Ralphs Grocery Company	UPC: 819898019007

The route of exposure for the violations is ingestion by consumers. These exposures occur through the reasonably foreseeable use of the product. The sales of this product have been occurring since at least March 2019, are continuing to this day and will continue to occur as long as the product subject to this notice is sold to and used by consumers.

Proposition 65 requires that a clear and reasonable warning is provided with these products regarding the exposures to Acrylamide caused by ordinary use of the product. The Parties are in violation of Proposition 65 by failing to provide such warning to consumers and as

August 17, 2022

Notice of Proposition 65 Violation

Page 2

a result of the sales of this product, exposures to Acrylamide have been occurring without proper warnings.

Pursuant to Proposition 65, notice and intent to sue shall be provided to violators 60-days before filing a complaint. This letter provides notice of the alleged violation to the parties listed above and the appropriate governmental authorities. A summary of Proposition 65 is attached.

If you have any questions or wish to discuss any of the above, please contact me.

Sincerely,

A handwritten signature in blue ink that reads "Noam Glick". The signature is written in a cursive style.

Noam Glick

Enclosures

Noam Glick
Glick Law Group
225 Broadway, Suite 2100, San Diego, CA 92101
Tel: [619.382.3400](tel:619.382.3400)
email: noam@glicklawgroup.com

April 12, 2019

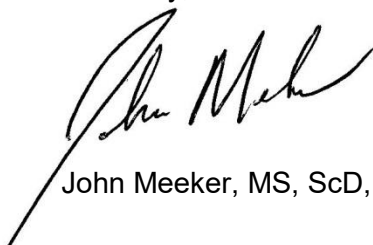
Dear Mr. Glick,

This letter is in response to your request for my opinion on the potential for human overexposure to acrylamide based on the amount measured in a food product purchased in the State of California. The product in question is Snack Well's Devil's Food Fat Free Cookie Cakes. After purchase, the product was sent to IEH Analytical Laboratory in Seattle, WA. IEH is a commercial laboratory that holds accreditation by multiple accrediting bodies; for this analysis they used a modified version of the method developed by scientists at the U.S. Food and Drug Administration, which measures acrylamide in foods via liquid chromatography-tandem mass spectrometry (LC-MS/MS).¹ As part of this method the laboratory analysis included steps to assess and maintain quality control of the method (sample chain of custody, method blanks, spiked standards, recovery tests, etc.). **The analyzing laboratory reported high concentrations of acrylamide which appears on the California Prop 65 list of chemicals known by the State of California to be carcinogenic. The acrylamide content of the product was 643 parts per billion (ppb), equal to 0.643 microgram per gram of food ($\mu\text{g/g}$).**

Acrylamide is a carcinogen that can form as reducing sugars react with free asparagine when carbohydrate-rich foods are processed at high temperatures (such as cooking, frying, roasting, and baking), primarily through what is known as the Maillard reaction.²⁻⁴ Direct ingestion is the primary route of exposure to acrylamide from food products. It is my opinion that consumption of this particular food product could result in exposure well above the No Significant Risk Level (NSRL) for carcinogens set by the state of California, which for acrylamide is set at 0.2 μg per day. *Since this product contains 0.643 $\mu\text{g/g}$ acrylamide, the NSRL would be exceeded when consuming just 0.3 grams (0.01 ounces) of the product. The serving size listed on the package is 16 grams. Thus, one would ingest 10.3 μg of acrylamide when consuming a single serving of the product, which is more than 50 times greater than the NSRL.*

In conclusion, given the amount of acrylamide measured in the product and typical serving sizes, exposures in excess of the NSRL are likely to occur. Please let me know if you have further questions.

Sincerely,



John Meeker, MS, ScD, CIH

References

1. Roach JA, Andrzejewski D, Gay ML, Nortrup D, Musser SM. Rugged LC-MS/MS survey analysis for acrylamide in foods. *J Agric Food Chem*, 2003; 51(26):7547-7554.
2. Arvanitoyannis JS, Dionisopoulou N. Acrylamide: formation, occurrence, in food products, detection methods, and legislation. *Crit Rev Food Sci Nutr*, 2014; 54(6):708-733.
3. Pedreschi F, Mariotti MS, Granby K. Current issues in dietary acrylamide: formation, mitigation and risk assessment. *J Sci Food Agric*, 2014; 94(1):9-20.
4. Xu Y, Cui B, Ran R, Liu Y, Chen H, Kai G, Shi J. Risk assessment, formation, and mitigation of dietary acrylamide: current status and future prospects. *Food Chem Toxicol*, 2014; 69:1-12.



IEH
**Laboratories &
 Consulting Group**

CERTIFICATE OF ANALYSIS

IEH Laboratories & Consulting Group

Nicholas & Tomasevic, LLP

Contact:Lindsay Beatty
 225 Broadway, Suite 1900
 San Diego, CA 92101
 Phone:619-325-0492

IEH Analytical Laboratories
 3927 Aurora Avenue North
 Seattle, WA 98103
 Phone:(206) 632-2715 Fax:(206) 632-2417
 www.iehinc.com

TRADE SECRET / CONFIDENTIAL COMMERCIAL INFORMATION

WO: 1705360				Samples Received: 4/1/2019		Report Date: 4/4/2019		Report No: IAL-5532	
Lab Sample ID		Client Sample ID			Matrix		Acrylamide (ppb)		
1705360-16301		8			SW's FF Cookie Cakes		643		
Test Method: Acrylamide = Acrylamide by LC-MS/MS; Method Reference: J. Agric. Food Chem. 54.19 (2006): 7001-7008; Reporting Limit = 10 ppb									

UNLESS OTHERWISE NOTED, ALL SAMPLES WERE RECEIVED IN ACCEPTABLE CONDITION. THE RESULT(S) IN THIS REPORT RELATE ONLY TO THE PORTION OF THE SAMPLE(S) TESTED. THIS REPORT DOES NOT CONSTITUTE A RELEASE OF PRODUCT FOR CONSUMPTION. THIS REPORT SHALL NOT BE REPRODUCED EXCEPT IN FULL, WITHOUT WRITTEN APPROVAL OF THE LABORATORY. THIS DOCUMENT CONTAINS CONFIDENTIAL COMMERCIAL INFORMATION PURSUANT TO 5 U.S.C. SEC. 552(b)(4).

Authorized Analyst: Zach Gottschalk

CERTIFICATE OF MERIT

I, Noam Glick, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice have violated Health and Safety Code section 25249.6 by failing to provide clear and reasonable warnings.

2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action.

4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that “reasonable and meritorious case for the private action” means that the information provides a credible basis that all elements of the plaintiffs' case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code section 25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: August 17, 2022



Noam Glick, Attorney at Law

CERTIFICATE OF SERVICE

I, Jordyn Naylor, declare that I am over the age of 18 years, and am not a party to the within action. I am employed in the County of San Diego, California, where the mailing occurs; and my business address is 225 Broadway, 19th Floor, San Diego, California 92101.

On August 17, 2022 I served the following documents: **(1) 60-DAY NOTICE OF VIOLATION SENT IN COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(d); (2) CERTIFICATE OF MERIT; (3) PROPOSITION 65: A SUMMARY; and (4) CERTIFICATE OF MERIT ATTACHMENT (served only on the Attorney General)** on the parties listed below by placing a true and correct copy thereof in a sealed envelope, addressed to each party and depositing it at my business address with the U.S. Postal Service for delivery by Certified Mail with the postage thereon fully prepaid:

Via Certified Mail

B&G Foods North America, Inc.
c/o Erin Upchurch
1325 J St STE 1550
Sacramento, CA 95814

Ralphs Grocery Company
c/o CSC - Lawyers Incorporating Service
2710 Gateway Oaks Drive, STE 150 N
Sacramento, CA 95833

On August 17, 2022, I served the California Attorney General (via website Portal) by uploading a true and correct copy thereof as a PDF file via the California Attorney General's website.

On August 17, 2022 I transmitted via electronic mail the above-listed documents to the electronic mail addresses of the City and/or District Attorneys who have specifically authorized e-mail service and the authorization appears on the Attorney General's web site.

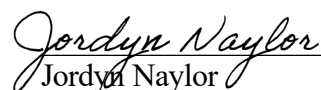
See Attached Service List

On August 17, 2022, I served the following persons and/or entities at the last known address by placing a true and correct copy thereof in a sealed envelope and depositing it at my business address with the U.S. Postal Service for delivery with the postage thereon fully prepaid, and addressed as follows:

See Attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 17, 2022, at San Diego, California.



Jordyn Naylor

Appendix A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA PROTECTION AGENCY THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACTION 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the office of Environmental Health Hazard Assessment, the lead and Toxic Enforcement Act 1986 (commonly known as "Proposition 65") A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide law. The reader is directed to the statute and its implementing regulations (See citations below) for further information.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code Regulations, Sections 250000 through 27000.

WHAT DOES PROPOSITION 65 REQUIRE?

The "Governor's List" Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, or birth defects or other reproductive harm. This list must be updated at least once a year. Over 725 chemicals have been listed as of November 16, 2001. Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release, or otherwise engage in activities involving those chemicals must comply with the

following:

Clear and Reasonable Warnings. A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed. Exposures are exempt from the warning requirement if they occur less than twelve months after the date of the listing of the chemical.

Prohibition from discharges into drinking water. A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Discharges are exempt from this requirement if they occur less than twenty months after the date of the listing of chemical.

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. The law exempts:

Governmental agencies and public water utilities. All agencies of the federal, State or local government, as well as entities operating public water systems, are exempt.

Exposures that pose no significant risk of cancer. For chemicals that are listed as known to the State to cause cancer (“carcinogens”), a warning is not required if the business can demonstrate that the exposure occurs at a level that poses “no significant risk.” This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70- year lifetime. The Proposition 65 regulations identify specific “no significant risk” levels for more than 250 listed carcinogens.

Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause birth defects or other reproductive harm (“reproductive toxicants”), a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the “no observable effect level (NOEL),” divided by a 1,000- fold safety or uncertainty factor. The “no observable effect level” is the highest dose level which has not been associated with an observable adverse reproductive or developmental effect.

Discharge that do not result in a “significant amount” of the listed chemical entering into any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a “significant amount” of the list chemical has not, does not, or will not enter any drinking water source, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A “significant amount” means any

detectable amount; expect an amount that would meet the “no significant risk” or “no observable effect” test if an individual were exposed to such an amount in drinking water.

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys (those in cities with a population exceeding 750,000). Lawsuit may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. A notice must comply with the information and procedural requirements specified in regulations (Title 27. California Code of Regulations, Section 25903). A private party may not pursue an enforcement action directly under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court of law to stop committing the violation.

FOR FURTHER INFORMATION...

Contact the Office of Environmental Health Hazard Assessment’s Proposition 65 Implementation Office at (916)445-6900

Stacey Grassini, Deputy District Attorney
CONTRA COSTA COUNTY
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Morgan Briggs Gire, District Attorney
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Roseville, CA 95678
prop65@placer.ca.gov

District Attorney
ORANGE COUNTY
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Santa Ana, CA 92701
Prop65Notice@da.ocgov.com

SERVICE LIST

The Honorable Nancy O'Malley Alameda County District Attorney 1225 Fallon Street, Room 900 Oakland, CA 94612	The Honorable Stacey Montgomery Lassen County District Attorney 220 South Lassen Street, Ste. 8 Susanville, CA 96130	The Honorable Candice Hooper San Benito County District Attorney 419 4th Street, Second Floor Hollister, CA 95203	The Honorable Gregg Cohen Tehama County District Attorney 444 Oak Street, Room L Red Bluff, CA 96080
The Honorable Terese Drabec Alpine County District Attorney 270 Laramie Street, PO BOX 248 Markleeville, CA 96120	The Honorable Jackie Lacey Los Angeles County District Attorney 211 West Temple Street, Suite 1200 Los Angeles, CA 90012	The Honorable Michael Ramos San Bernardino County District Attorney 303 West 3rd Street, 6th Floor San Bernardino, CA 92415-0502	The Honorable Eric Heryford Trinity County District Attorney P.O. Box 310 Weaverville, CA 96093
The Honorable Todd Riebe Amador County District Attorney 708 Court Street Jackson, CA 95842	The Honorable David Linn Madera County District Attorney 209 West Yosemite Avenue Madera, CA 93637	The Honorable Bonnie Dumanis San Diego County District Attorney 330 W. Broadway Street San Diego, CA 92101	The Honorable Tim Ward Tulare County District Attorney 221 South Mooney Boulevard, Rm 224 Visalia, CA 93291-4593
The Honorable Michael Ramsay Butte County District Attorney 25 County Center Drive Oroville, CA 95965	The Honorable Edward Berberian Marin County District Attorney 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	The Honorable George Gascon San Francisco County District Attorney 850 Bryant Street, Room 322 San Francisco, CA 94103	The Honorable Laura Krieg Tuolumne County District Attorney 423 North Washington Street Sonora, CA 95370
The Honorable Barbara Yook Calaveras County District Attorney 991 Mountain Ranch Road San Andreas, CA 95249	The Honorable Thomas Cooke Mariposa County District Attorney 5101 Jones Street, P.O. Box 730 Mariposa, CA 95338	The Honorable Tori Varber Salazar San Joaquin County District Attorney 222 East Weber Avenue, Room 202 Stockton, CA 95201	The Honorable Gregory Totten Ventura County District Attorney 800 South Victoria Avenue Ventura, CA 93009
The Honorable John Poyner Colusa County District Attorney 346 Fifth Street Colusa, CA 95932	The Honorable C. David Eyster Mendocino County District Attorney 100 North State Street, P.O. Box 1000 Ukiah, CA 95482	The Honorable Dan Dow San Luis Obispo County District Atty 1035 Palm Street, 4th Floor San Luis Obispo, CA 93408	The Honorable Jeff Reisig Yolo County District Attorney 301 Second Street Woodland, CA 95695
The Honorable Mark Peterson Contra Costa County District Attorney 900 Ward Street Martinez, CA 94553	The Honorable Larry Morse II Merced County District Attorney 550 W. Main Street Merced, CA 95340	The Honorable Stephen Wagstaffe San Mateo County District Attorney 400 County Center, Third Floor Redwood City, CA 94063	The Honorable Patrick McGrath Yuba County District Attorney 215 Fifth Street Marysville, CA 95901
The Honorable Dale Trigg Del Norte County District Attorney 450 H Street, Room 171 Crescent City, CA 95531	The Honorable Jordan Funk Modoc County District Attorney 204 S. Court Street, Suite 202 Alturas, CA 96101	The Honorable Joyce Dudley Santa Barbara County District Attorney 1112 Santa Barbara Street Santa Barbara, CA 93101	The Honorable Mike Feuer Office of the City Attorney, Los Angeles 800 City Hall East 200 North Main Street Los Angeles, CA 90012
The Honorable Vern Pierson El Dorado County District Attorney 778 Pacific Street Placerville, CA 95867	The Honorable Tim Kendall Mono County District Attorney P.O. Box 617 Bridgeport, CA 93517	The Honorable Jeffrey Rosen Santa Clara County District Attorney 70 West Hedding Street, West Wing San Jose, CA 95110	The Honorable James Sanchez Office of the City Attorney, Sacramento 915 I Street, 4th Floor Sacramento, CA 95814
The Honorable Lisa Smittcamp Fresno County District Attorney 2220 Tulara Street, #1000 Fresno, CA 93721	The Honorable Daan Filipo Monterey County District Attorney P.O. Box 1131 Salinas, CA 93902	The Honorable Jeff Roseff Santa Cruz County District Attorney 701 Ocean Street, Room 200 Santa Cruz, CA 95060	The Honorable Jan Goldsmith Office of the City Attorney, San Diego 1200 Third Avenue, Suite 1820 San Diego, CA 92101
The Honorable Dwayne Stewart Glenn County District Attorney P.O. Box 430 Willows, CA 95988	The Honorable Allison Haley Napa County District Attorney 1127 First Street, Suite C Napa, CA 94559	The Honorable Stephen Carlton Shasta County District Attorney 1355 West Street Redding, CA 96001	The Honorable Dennis Herrera Office of the City Attorney, San Francisco 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102
The Honorable Maggie Fleming Humboldt County District Attorney 825 5th Street, Fourth Floor Eureka, CA 95501	The Honorable Clifford Newell Nevada County District Attorney 201 Commercial Street Nevada City, CA 95959	The Honorable Lawrence Allen Sierra County District Attorney 100 Courthouse Square Downsville, CA 95936	The Honorable Richard Doyle Office of the City Attorney, San Jose 200 East Santa Clara Street, 18th Floor San Jose, CA 95113
The Honorable Gilbert Otero Imperial County District Attorney 940 West Main Street, Suite 102 El Centro, CA 92243	The Honorable Tony Rackauckas Orange County District Attorney 401 Civic Center Drive West Santa Ana, CA 92701	The Honorable James Kirk Andrus Siskiyou County District Attorney P.O. Box 986 Yreka, CA 96097	Office of the California Attorney General Proposition 85 Enforcement Reporting ATTN: Prop 85 Coordinator 1515 Clay Street, Suite 2000 Oakland, CA 94612-0550
The Honorable Thomas Hardy Inyo County District Attorney P.O. Drawer D Independence, CA 93526	The Honorable R. Scott Owens Placer County District Attorney 10810 Justice Center Drive, Suite 240 Roseville, CA 95678	The Honorable Krishna Abrams Solano County District Attorney 675 Texas Street, Suite 4500 Fairfield, CA 94533	
The Honorable Lisa Green Kern County District Attorney 1215 Truxtun Avenue Bakersfield, CA 93301	The Honorable David Hollister Plumas County District Attorney 520 Main Street, Room 404 Quincy, CA 95971	The Honorable Jill Ravitch Sonoma County District Attorney 600 Administration Drive, Room 212J Santa Rosa, CA 95403	
The Honorable Keith Fagundas Kings County District Attorney 1400 West Lacey Boulevard Hanford, CA 93230	The Honorable Michael Hestrin Riverside County District Attorney 3960 Orange Street Riverside, CA 92501	The Honorable Birgit Fladager Stanislaus County District Attorney 832 12th Street, Suite 300 Modesto, CA 95354	
The Honorable Donald Anderson Lake County District Attorney 255 North Forbes Street Lakeport CA 95453	The Honorable Anne Marie Schubert Sacramento County District Attorney 901 G Street Sacramento CA 95814	The Honorable Amanda Hopper Sutter County District Attorney 463 Second Street, Suite 102 Yuba City CA 95991	

EXHIBIT D



225 Broadway, Suite 2100, San Diego, CA 92101

Tel: 619.382.3400 Fax: 619.615.2193

www.glicklawgroup.com

July 27, 2022

Via Certified Mail

B&G Foods North America, Inc.
 C/O Erin Upchurch
 1325 J St. STE 1550
 Sacramento, CA 95814

Amazon
 Attn. Legal Department
 410 Terry Avenue North
 Seattle, WA 98109-5210

Amazon
 CSC – Lawyers Incorporating Service
 2710 Gateway Oaks Drive, STE 150 N
 Sacramento, CA 95833

Re: Amended Proposition 65 Notice of Violation

To Whom It May Concern:

This notice amends the original notice AG #2020-02646 dated October 8, 2020. This amendment attaches relevant laboratory testing results and analysis.

We represent Environmental Health Advocates, Inc., an organization in the State of California acting in the interest of the general public. This letter serves as notice that the parties listed above are in violation of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, commencing with section 25249.5 of the Health and Safety Code (“Proposition 65”). In particular, the violations alleged by this notice consist of types of harm that may potentially result from exposures to the toxic chemical Acrylamide. This chemical was listed as a carcinogen on January 1, 1990 and listed as a developmental and reproductive toxin on February 25, 2011.

The specific type of product that is causing exposures in violation of Proposition 65 is detailed below:

	<u>Product Name</u>	<u>Manufacturer</u>	<u>Distributor/Retailer</u>	<u>Item Number/SKU</u>
1.	SnackWell's Chocolate Creme Sandwich Cookies	B&G Foods, Inc.	Amazon.com, Inc.	UPC 819898019205

The routes of exposure for the violations include ingestion by consumers. These exposures occur through the reasonably foreseeable use of the product. The sales of this product have been occurring since at least May 2020, are continuing to this day and will continue to occur as long as the product subject to this notice is sold to and used by consumers.

July 26, 2022

Notice of Proposition 65 Violation

Page 2

Proposition 65 requires that a clear and reasonable warning is provided with these products regarding the exposures to Acrylamide caused by ordinary use of the product. The Parties are in violation of Proposition 65 by failing to provide such warning to consumers and as a result of the sales of this product, exposures to Acrylamide have been occurring without proper warnings.

Pursuant to Proposition 65, notice and intent to sue shall be provided to violators 60-days before filing a complaint. This letter provides notice of the alleged violation to the parties listed above and the appropriate governmental authorities. A summary of Proposition 65 is attached.

EHA identifies Fred Duran as a responsible individual within the entity.

If you have any questions or wish to discuss any of the above, please contact me.

Sincerely,

A handwritten signature in blue ink that reads "Noam Glick". The signature is written in a cursive style.

Noam Glick

Enclosures

Noam Glick
Glick Law Group
225 Broadway, Suite 2100, San Diego, CA 92101
Tel: [619.382.3400](tel:619.382.3400)
email: noam@glicklawgroup.com

June 24, 2020

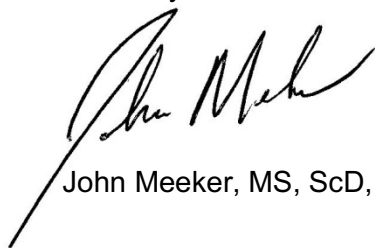
Dear Mr. Glick,

This letter is in response to your request for my opinion on the potential for human overexposure to acrylamide based on the amount measured in a food product purchased in the State of California. The product in question is SnackWell's Chocolate Creme Sandwich Cookies. After purchase, the product was sent to Medallion Labs in Minneapolis, MN. Medallion is a commercial laboratory that holds accreditation by multiple accrediting bodies; for this analysis they measured acrylamide in foods via liquid chromatography-tandem mass spectrometry (LC-MS/MS).¹ As part of this method the laboratory analysis included steps to assess and maintain quality control of the method (sample chain of custody, method blanks, spiked standards, recovery tests, etc.). **The analyzing laboratory reported high concentrations of acrylamide which appears on the California Prop 65 list of chemicals known by the State of California to be carcinogenic. The acrylamide content of the product was 616 parts per billion (ppb), equal to 616 microgram per kilogram of food ($\mu\text{g}/\text{kg}$) or 0.616 microgram per gram of food ($\mu\text{g}/\text{g}$).**

Acrylamide is a carcinogen that can form as reducing sugars react with free asparagine when carbohydrate-rich foods are processed at high temperatures (such as cooking, frying, roasting, and baking), primarily through what is known as the Maillard reaction.²⁻⁴ Direct ingestion is the primary route of exposure to acrylamide from food products. It is my opinion that consumption of this particular food product could result in exposure well above the No Significant Risk Level (NSRL) for carcinogens set by the state of California, which for acrylamide is set at 0.2 μg per day. *Since this product contains 0.616 $\mu\text{g}/\text{g}$ acrylamide, the NSRL would be exceeded when consuming just 0.32 grams (0.01 ounces) of the product. The serving size listed for the product is 48 grams. Thus, one would ingest 29.6 μg of acrylamide when consuming a single serving of the product, which is more than 145 times greater than the NSRL.*

In conclusion, given the amount of acrylamide measured in the product and typical serving sizes, exposures in excess of the NSRL are likely to occur. Please let me know if you have further questions.

Sincerely,



John Meeker, MS, ScD, CIH

References

1. Roach JA, Andrzejewski D, Gay ML, Nortrup D, Musser SM. Rugged LC-MS/MS survey analysis for acrylamide in foods. *J Agric Food Chem*, 2003; 51(26):7547-7554.
2. Arvanitoyannis JS, Dionisopoulou N. Acrylamide: formation, occurrence, in food products, detection methods, and legislation. *Crit Rev Food Sci Nutr*, 2014; 54(6):708-733.
3. Pedreschi F, Mariotti MS, Granby K. Current issues in dietary acrylamide: formation, mitigation and risk assessment. *J Sci Food Agric*, 2014; 94(1):9-20.
4. Xu Y, Cui B, Ran R, Liu Y, Chen H, Kai G, Shi J. Risk assessment, formation, and mitigation of dietary acrylamide: current status and future prospects. *Food Chem Toxicol*, 2014; 69:1-12.



Medallion Labs

www.medallionlabs.com 800-245-5615 info@medlabs.com

Order Number: 2020-004655 **Completed Date:** 23-Jun-2020
Submitted Date: 01-Jun-2020

Submitter: Anissa Elhaiesahar

Company: Environmental Health Advocates
Company Address: 225 Broadway STE 2100
San Diego, CA 92101

Results Email: anissa@glicklawgroup.com
Invoice Email: sara@glicklawgroup.com
Purchase Order: Elhaiesahar01

Medallion Labs maintains A2LA accreditation to ISO/IEC 17025 for the specific tests listed in certificates # 2769.01 and 2769.02. Medallion Labs' services, including this report, are provided subject to all provisions of Medallion's Standard Terms and Conditions, a copy of which appears at www.medallionlabs.com. Unless otherwise noted above, samples were received in acceptable condition and analyzed as received.



Medallion Labs

www.medallionlabs.com 800-245-5615 info@medlabs.com

Order # Sample ID: 2020-004655-01 **Company:** Environmental Health Advocates
Customer Sample ID: 1) SW Chocolate Creme Sandwich Environmental Health Advocates Inc.
Sample Description: 1) SW Chocolate Creme Sandwich Cookies

Analytical Testing

<u>Method:</u>	<u>Component:</u>	<u>Result:</u>	<u>Test Date:</u>
² Acrylamide	Acrylamide	616 ppb	23-Jun-2020

Results Approved By: Alyssa Ofsthun
(Authorized Reviewer)

Medallion Labs maintains A2LA accreditation to ISO/IEC 17025 for the specific tests listed in certificates # 2769.01 and 2769.02. Medallion Labs' services, including this report, are provided subject to all provisions of Medallion's Standard Terms and Conditions, a copy of which appears at www.medallionlabs.com. Unless otherwise noted above, samples were received in acceptable condition and analyzed as received.

² This test is not considered in-scope of our current A2LA accreditation. For a listing of in-scope tests, please visit www.medallionlabs.com.



Medallion Labs

www.medallionlabs.com 800-245-5615 info@medlabs.com

Analytical Method References:

Method Name

Method Reference

Acrylamide

Please contact for Method Details

Medallion Labs maintains A2LA accreditation to ISO/IEC 17025 for the specific tests listed in certificates # 2769.01 and 2769.02.

Medallion Labs' services, including this report, are provided subject to all provisions of Medallion's Standard Terms and Conditions, a copy of which appears at www.medallionlabs.com. Unless otherwise noted above, samples were received in acceptable condition and analyzed as received.

² This test is not considered in-scope of our current A2LA accreditation. For a listing of in-scope tests, please visit www.medallionlabs.com.

CERTIFICATE OF MERIT

I, Jake Schulte, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice have violated Health and Safety Code section 25249.6 by failing to provide clear and reasonable warnings.

2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action.

4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that “reasonable and meritorious case for the private action” means that the information provides a credible basis that all elements of the plaintiffs' case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code section 25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: July 27, 2022



Jake Schulte, Attorney at Law

CERTIFICATE OF SERVICE

I, Jordyn Naylor, declare that I am over the age of 18 years, and am not a party to the within action. I am employed in the County of San Diego, California, where the mailing occurs; and my business address is 225 Broadway, 19th Floor, San Diego, California 92101.

On July 27, 2022, I served the following documents: **(1) 60-DAY NOTICE OF VIOLATION SENT IN COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(d); (2) CERTIFICATE OF MERIT; (3) PROPOSITION 65: A SUMMARY; and (4) CERTIFICATE OF MERIT ATTACHMENT (served only on the Attorney General)** on the parties listed below by placing a true and correct copy thereof in a sealed envelope, addressed to each party and depositing it at my business address with the U.S. Postal Service for delivery by Certified Mail with the postage thereon fully prepaid:

Via Certified Mail

B&G Foods North America, Inc.
C/O Erin Upchurch
1325 J St. STE 1550
Sacramento, CA 95814

Amazon
Attn. Legal Department
410 Terry Avenue North
Seattle, WA 98109-5210

Amazon
CSC – Lawyers Incorporating Service
2710 Gateway Oaks Drive, STE 150 N
Sacramento, CA 95833

On July 27, 2022, I served the California Attorney General (via website Portal) by uploading a true and correct copy thereof as a PDF file via the California Attorney General's website.

On July 27, 2022 I transmitted via electronic mail the above-listed documents to the electronic mail addresses of the City and/or District Attorneys who have specifically authorized e-mail service and the authorization appears on the Attorney General's web site.

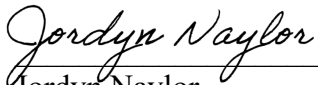
See Attached Service List

On July 27, 2022, I served the following persons and/or entities at the last known address by placing a true and correct copy thereof in a sealed envelope and depositing it at my business address with the U.S. Postal Service for delivery with the postage thereon fully prepaid, and addressed as follows:

See Attached Service List

Executed on July 27, 2022, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Jordyn Naylor

Appendix A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA PROTECTION AGENCY THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACTION 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the office of Environmental Health Hazard Assessment, the lead and Toxic Enforcement Act 1986 (commonly known as "Proposition 65") A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide law. The reader is directed to the statute and its implementing regulations (See citations below) for further information.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code Regulations, Sections 250000 through 27000.

WHAT DOES PROPOSITION 65 REQUIRE?

The "Governor's List" Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, or birth defects or other reproductive harm. This list must be updated at least once a year. Over 725 chemicals have been listed as of November 16, 2001. Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release, or otherwise engage in activities involving those chemicals must comply with the

following:

Clear and Reasonable Warnings. A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed. Exposures are exempt from the warning requirement if they occur less than twelve months after the date of the listing of the chemical.

Prohibition from discharges into drinking water. A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Discharges are exempt from this requirement if they occur less than twenty months after the date of the listing of chemical.

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. The law exempts:

Governmental agencies and public water utilities. All agencies of the federal, State or local government, as well as entities operating public water systems, are exempt.

Exposures that pose no significant risk of cancer. For chemicals that are listed as known to the State to cause cancer (“carcinogens”), a warning is not required if the business can demonstrate that the exposure occurs at a level that poses “no significant risk.” This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70- year lifetime. The Proposition 65 regulations identify specific “no significant risk” levels for more than 250 listed carcinogens.

Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause birth defects or other reproductive harm (“reproductive toxicants”), a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the “no observable effect level (NOEL),” divided by a 1,000- fold safety or uncertainty factor. The “no observable effect level” is the highest dose level which has not been associated with an observable adverse reproductive or developmental effect.

Discharge that do not result in a “significant amount” of the listed chemical entering into any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a “significant amount” of the list chemical has not, does not, or will not enter any drinking water source, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A “significant amount” means any

detectable amount; expect an amount that would meet the “no significant risk” or “no observable effect” test if an individual were exposed to such an amount in drinking water.

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys (those in cities with a population exceeding 750,000). Lawsuit may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. A notice must comply with the information and procedural requirements specified in regulations (Title 27. California Code of Regulations, Section 25903). A private party may not pursue an enforcement action directly under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court of law to stop committing the violation.

FOR FURTHER INFORMATION...

Contact the Office of Environmental Health Hazard Assessment’s Proposition 65 Implementation Office at (916)445-6900

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District Attorney
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Santa Ana, CA 92701
Prop65Notice@da.ocgov.com

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The Honorable Terese Drabec Alpine County District Attorney 270 Laramie Street, PO BOX 248 Markleeville, CA 96120	The Honorable Jackie Lacey Los Angeles County District Attorney 211 West Temple Street, Suite 1200 Los Angeles, CA 90012	The Honorable Michael Ramos San Bernardino County District Attorney 303 West 3rd Street, 6th Floor San Bernardino, CA 92415-0502	The Honorable Eric Henryford Trinity County District Attorney P.O. Box 310 Weaverville, CA 96093
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The Honorable Barbara Yook Calaveras County District Attorney 991 Mountain Ranch Road San Andreas, CA 95249	The Honorable Thomas Cooke Mariposa County District Attorney 5101 Jones Street, P.O. Box 730 Mariposa, CA 95338	The Honorable Tori Varber Salazar San Joaquin County District Attorney 222 East Weber Avenue, Room 202 Stockton, CA 95201	The Honorable Gregory Totten Ventura County District Attorney 800 South Victoria Avenue Ventura, CA 93009
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The Honorable Vern Person El Dorado County District Attorney 778 Pacific Street Placerville, CA 95667	The Honorable Tim Kendall Mono County District Attorney P.O. Box 617 Bridgeport, CA 93517	The Honorable Jeffrey Rosen Santa Clara County District Attorney 70 West Hedding Street West Wing San Jose, CA 95110	The Honorable James Sanchez Office of the City Attorney, Sacramento 915 I Street, 4th Floor Sacramento, CA 95814
The Honorable Lisa Smittcamp Fresno County District Attorney 2220 Tulare Street, #1000 Fresno, CA 93721	The Honorable Dean Fippo Monterey County District Attorney P.O. Box 1131 Salinas, CA 93902	The Honorable Jeff Rose# Santa Cruz County District Attorney 701 Ocean Street, Room 200 Santa Cruz, CA 95060	The Honorable Jan Goldsmith Office of the City Attorney, San Diego 1200 Third Avenue, Suite 1620 San Diego, CA 92101
The Honorable Dwayne Stewart Glenn County District Attorney P.O. Box 430 Willows, CA 95988	The Honorable Allison Haley Napa County District Attorney 1127 First Street, Suite C Napa, CA 94559	The Honorable Stephen Carlton Shasta County District Attorney 1355 West Street Redding, CA 96001	The Honorable Dennis Herrera Office of the City Attorney, San Francisco 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102
The Honorable Maggie Fleming Humboldt County District Attorney 825 5th Street, Fourth Floor Eureka, CA 95501	The Honorable Clifford Newell Nevada County District Attorney 201 Commercial Street Nevada City, CA 95959	The Honorable Lawrence Allen Sierra County District Attorney 100 Courthouse Square Downsville, CA 95936	The Honorable Richard Doyle Office of the City Attorney, San Jose 200 East Santa Clara Street, 18th Floor San Jose, CA 95113
The Honorable Gilbert Otero Imperial County District Attorney 940 West Main Street, Suite 102 El Centro, CA 92243	The Honorable Tony Rackauckas Orange County District Attorney 401 Civic Center Drive West Santa Ana, CA 92701	The Honorable James Kirk Andrus Siskiyou County District Attorney P.O. Box 986 Yreka, CA 96097	Office of the California Attorney General Proposition 65 Enforcement Reporting ATTN: Prop 65 Coordinator 1515 Clay Street, Suite 2000 Oakland, CA 94612-0550
The Honorable Thomas Hardy Inyo County District Attorney P.O. Drawer D Independence, CA 93526	The Honorable R. Scott Owens Placer County District Attorney 10810 Justice Center Drive, Suite 240 Roseville, CA 95678	The Honorable Krishna Abrams Solano County District Attorney 675 Texas Street, Suite 4500 Fairfield, CA 94533	
The Honorable Lisa Green Kern County District Attorney 1215 Truxtun Avenue Bakersfield, CA 93301	The Honorable David Hollister Plumas County District Attorney 520 Main Street, Room 404 Quincy, CA 95971	The Honorable Jill Ravitch Sonoma County District Attorney 600 Administration Drive, Room 212J Santa Rosa, CA 95403	
The Honorable Keilh Fagundas Kings County District Attorney 1400 West Lacey Boulevard Hanford, CA 93230	The Honorable Michael Hestrin Riverside County District Attorney 3960 Orange Street Riverside, CA 92501	The Honorable Birgit Fladager Stanislaus County District Attorney 832 12th Street, Suite 300 Modesto, CA 95354	
The Honorable Donald Anderson Lake County District Attorney 255 North Forbes Street Lakeport, CA 95453	The Honorable Anne Marie Schubert Sacramento County District Attorney 901 G Street Sacramento CA 95814	The Honorable Amanda Hopper Sutter County District Attorney 463 Second Street, Suite 102 Yuba City CA 95991	

EXHIBIT E

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5 BRAUNHAGEY & BORDEN LLP
351 California Street, 10th Floor
6 San Francisco, CA 94104
Telephone: (415) 599-0210
7 Facsimile: (415) 599-0210

8 ATTORNEYS FOR DEFENDANT
B&G FOODS NORTH AMERICA, INC.
9

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF ALAMEDA**
13

14 KIM EMBRY, an individual,
15 **Plaintiff,**
16 **v.**
17 B&G FOODS NORTH AMERICA, INC., a
18 Delaware corporation, RALPHS GROCERY
COMPANY, an Ohio corporation, and DOES 1
19 through 100, inclusive,
20 **Defendants.**

FILED BY FAX
ALAMEDA COUNTY
June 01, 2020
CLERK OF
THE SUPERIOR COURT
By Cheryl Clark, Deputy
CASE NUMBER:
RG20057491

Case No. RG20057491

**GENERAL DENIAL, DEFENSES, AND
AFFIRMATIVE DEFENSES TO
COMPLAINT**

Assigned For All Purposes To:

Judge: Julia Spain
Dept: 520

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1 Defendant B&G Foods North America, Inc. (“B&G Foods”) respectfully submits the
2 following general denial and defenses:

3 **GENERAL DENIAL**

4 B&G Foods denies each and every allegation in the Complaint filed by Plaintiff.

5 **AFFIRMATIVE DEFENSES**

6 B&G Foods sets forth below its defenses and affirmative defenses. Each defense and
7 affirmative defense is asserted as to all claims against it. By setting forth these defenses and
8 affirmative defenses, B&G Foods does not assume the burden of proving any fact, issue or element
9 of a claim where such burden properly belongs to Plaintiff. B&G Foods reserves the right to allege
10 additional defenses and affirmative defenses as they become known or as they evolve during
11 litigation.

12 **FIRST AFFIRMATIVE DEFENSE**

13 Defendant alleges that neither Plaintiff’s Complaint nor any purported cause of action
14 therein state facts sufficient to constitute a claim for relief against Defendant.

15 **SECOND AFFIRMATIVE DEFENSE**

16 Defendant alleges that the Complaint and each claim therein are vague, ambiguous,
17 uncertain, and fail to adequately notify which products are alleged to violate Health and Safety
18 Code section 25249.5, *et seq.* and which are not alleged to violate Proposition 65.

19 **THIRD AFFIRMATIVE DEFENSE**

20 Defendant alleges that it lacked knowledge of the allegations set forth in the Complaint.

21 **FOURTH AFFIRMATIVE DEFENSE**

22 Defendant alleges that Plaintiff has failed to satisfy all conditions precedent to pursue a
23 claim under Proposition 65.

24 **FIFTH AFFIRMATIVE DEFENSE**

25 Defendant alleges that some or all of Plaintiff’s claims are barred in that Defendant is or
26 was not a “person within the course of doing business” within the meaning of Health and Safety
27 Code Section § 25249.6 at times relevant to the Complaint.
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SIXTH AFFIRMATIVE DEFENSE

Defendant alleges, on information and belief, that Plaintiff is barred and estopped by the equitable doctrine of unclean hands from seeking or obtaining any recovery against Defendant by reason of its Complaint.

SEVENTH AFFIRMATIVE DEFENSE

Defendant denies that Plaintiff has sustained any injury or damage by any act or omission by Defendant. However, if it is established that Plaintiff suffered any injury or damage for which Defendant is held liable, Defendant alleges that such injury or damage was proximately caused or contributed to by the intervening negligence or wrongful acts of Plaintiff, or others acting for or on its behalf and that those negligent and/or wrongful acts by Plaintiff or others, eliminate and/or reduce any damages Plaintiff can recover from Defendant in this action.

EIGHTH AFFIRMATIVE DEFENSE

Defendant alleges that any and all losses or damages sustained by Plaintiff, as a result of the occurrences alleged in the Complaint, if any, were proximately caused in whole or in part by the negligence or fault of persons or entities other than Defendant, and for whom Defendant is not responsible. The negligence and fault of other persons or entities eliminates or reduces any damages Plaintiff may recover from Defendant in this action.

NINTH AFFIRMATIVE DEFENSE

Defendant alleges that there is a lack of personal jurisdiction over Defendant and that this is the improper venue for this action.

TENTH AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff's claims for relief are barred by the principle of unjust enrichment.

ELEVENTH AFFIRMATIVE DEFENSE

Defendant alleges that the damages sought by the Complaint have already been paid to the Plaintiff for the alleged acts and Plaintiff is thereby barred from further recovery.

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TWELFTH AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff's Complaint is barred by the applicable statutes of limitations, including, but not limited to, Code of Civil Procedure sections 338, 340, and 343.

THIRTEENTH AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff, by virtue of the legal doctrines of waiver and laches is estopped from pursuing some or all of the claims alleged against Defendant.

FOURTEENTH AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff is not entitled to the damages sought or attorney's fees pursuant to any of the claims for relief alleged in its Complaint.

FIFTEENTH AFFIRMATIVE DEFENSE

Defendant asserts that it did not violate Health and Safety Code section 25249.6 because the product "poses no significant risk assuming lifetime exposure at the level in question" and "will have no observable effect" as set forth in Health and Safety Code section 25249.10.

SIXTEENTH AFFIRMATIVE DEFENSE

Defendant asserts that federal law preempts all causes of action alleged.

SEVENTEENTH AFFIRMATIVE DEFENSE

Defendant alleges that the claims asserted and remedies sought by Plaintiff violate Defendant's rights to due process and free speech under the California and United States Constitutions.

EIGHTEENTH AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff's claims for relief should be denied under the equitable doctrine of abstention.

NINETEENTH AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff's claims are barred in whole or in part to the extent they are based on alleged acts, conduct or statements that were undertaken, made or received outside of California.

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TWENTIETH AFFIRMATIVE DEFENSE

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Defendant alleges that its actions are protected by the safe harbor provisions controlling Proposition 65.

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TWENTY-FIRST AFFIRMATIVE DEFENSE

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Defendant alleges that Plaintiff's claims violate Defendant's rights under the California and United States Constitutions in that, among other things: (1) Plaintiff is attempting to enforce Proposition 65 in a manner which renders the requirements of that statute and regulation unconstitutionally vague; and (2) given the vague, overbroad and uncertain nature of Plaintiff's allegations, requiring proof that the alleged exposures cause no significant risk and/or have no observable effect violates Defendant's due process and other constitutional rights.

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TWENTY-SECOND AFFIRMATIVE DEFENSE

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Defendant alleges that it is protected and exempt from Plaintiff's claims pursuant to Cal. Code Regs. tit. 27, § 25501(a) because a party cannot be held liable for any "exposure" for purposes of Section 25249.6 of the Act to a listed chemical to the extent that the person allegedly responsible for the exposure can show that the chemical is naturally occurring in the food.

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TWENTY-THIRD AFFIRMATIVE DEFENSE

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Defendant alleges that it is protected and exempt from Plaintiff's claims pursuant to Cal. Code Regs. tit. 27, § 25703 to the extent that the exposures alleged by Plaintiff, if any there were, resulted from cooking necessary to render food palatable or to avoid microbiological contamination.

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TWENTY-FOURTH AFFIRMATIVE DEFENSE

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Defendant reserves its right to assert additional defenses based on information gathered in the course of additional investigation and discovery.

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PRAYER FOR RELIEF

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Wherefore, B&G Foods respectfully request that the Court:

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1. Enter judgment in favor of B&G Foods and against Plaintiff on all alleged claims for relief;
2. Dismiss Plaintiff's claims against B&G Foods with prejudice;

1 3. Require Plaintiff and/or its lawyers to pay all of B&G Foods' attorney's fees and
2 costs in defending this action; and

3 4. Grant such other and further relief as the Court deems just and proper.
4

5 Dated: June 1, 2020

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

7
8 By: 
 David H. Kwasniewski

9 Attorneys for Defendant
10 B&G FOODS NORTH AMERICA,
11 INC.
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EXHIBIT F

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8 ATTORNEYS FOR DEFENDANT
 B&G FOODS NORTH AMERICA, INC.
 9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 11 **COUNTY OF ALAMEDA**
 12

13 ENVIRONMENTAL HEALTH ADVOCATES,
 14 INC.,

15 Plaintiff,

16 v.

17 B&G FOODS NORTH AMERICA, INC., a
 Delaware corporation, AMAZON.COM, INC. a
 18 Delaware corporation, BERKELEY BOWL
 PRODUCE, INC., a California Corporation, and
 19 DOES 1-100, inclusive,

20 Defendants.
 21

Case No. RG21086510

**DEFENDANT B&G FOODS NORTH
 AMERICA, INC.'S GENERAL DENIAL,
 DEFENSES, AND AFFIRMATIVE
 DEFENSES TO FIRST AMENDED
 COMPLAINT**

Dept: 17
Before: Hon. Frank Roesch

Complaint Filed: January 22, 2021
FAC Filed: January 29, 2021
Trial Date: None

1 Defendant B&G Foods North America, Inc. (“B&G Foods”) hereby answers Plaintiff
2 Environmental Health Advocates, Inc.’s First Amended Complaint as follows:

3 **GENERAL DENIAL**

4 B&G Foods denies each and every allegation in the Complaint filed by Plaintiff.

5 **AFFIRMATIVE DEFENSES**

6 B&G Foods sets forth below its defenses and affirmative defenses. Each defense and
7 affirmative defense is asserted as to all claims against it. By setting forth these defenses and
8 affirmative defenses, B&G Foods does not assume the burden of proving any fact, issue or element
9 of a claim where such burden properly belongs to Plaintiff. B&G Foods reserves the right to allege
10 additional defenses and affirmative defenses as they become known or as they evolve during
11 litigation.

12 **FIRST DEFENSE AND AFFIRMATIVE DEFENSE**

13 B&G Foods alleges that neither Plaintiff’s Complaint nor any purported cause of action
14 therein state facts sufficient to constitute a claim for relief against Defendant.

15 **SECOND DEFENSE AND AFFIRMATIVE DEFENSE**

16 Defendant alleges that the Complaint and each claim therein are vague, ambiguous,
17 uncertain, and fail to adequately notify which products are alleged to violate Health and Safety
18 Code section 25249.5, *et seq.* and which are not alleged to violate Proposition 65.

19 **THIRD DEFENSE AND AFFIRMATIVE DEFENSE**

20 Defendant alleges that it lacked knowledge of the allegations set forth in the Complaint.

21 **FOURTH DEFENSE AND AFFIRMATIVE DEFENSE**

22 Defendant alleges that Plaintiff has failed to satisfy all conditions precedent to pursue a
23 claim under Proposition 65.

24 **FIFTH DEFENSE AND AFFIRMATIVE DEFENSE**

25 Defendant alleges that some or all of Plaintiff’s claims are barred in that Defendant is or was
26 not a "person within the course of doing business" within the meaning of Health and Safety Code
27 Section § 25249.6 at times relevant to the Complaint.

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SIXTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges, on information and belief, that Plaintiff is barred and estopped by the equitable doctrine of unclean hands from seeking or obtaining any recovery against Defendant by reason of its Complaint.

SEVENTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant denies that Plaintiff has sustained any injury or damage by any act or omission by Defendant. However, if it is established that Plaintiff suffered any injury or damage for which Defendant is held liable, Defendant alleges that such injury or damage was proximately caused or contributed to by the intervening negligence or wrongful acts of Plaintiff, or others acting for or on its behalf and that those negligent and/or wrongful acts by Plaintiff or others, eliminate and/or reduce any damages Plaintiff can recover from Defendant in this action.

EIGHTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that any and all losses or damages sustained by Plaintiff, as a result of the occurrences alleged in the Complaint, if any, were proximately caused in whole or in part by the negligence or fault of persons or entities other than Defendant, and for whom Defendant is not responsible. The negligence and fault of other persons or entities eliminates or reduces any damages Plaintiff may recover from Defendant in this action.

NINTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that there is a lack of personal jurisdiction over Defendant and that this is the improper venue for this action.

TENTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff's claims for relief are barred by the principle of unjust enrichment.

ELEVENTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that the damages sought by the Complaint have already been paid to the Plaintiff for the alleged acts and Plaintiff is thereby barred from further recovery.

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TWELFTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff's Complaint is barred by the applicable statutes of limitations, including, but not limited to, Code of Civil Procedure sections 338, 340, and 343.

THIRTEENTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff, by virtue of the legal doctrines of waiver and laches is estopped from pursuing some or all of the claims alleged against Defendant.

FOURTEENTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff is not entitled to the damages sought or attorney's fees pursuant to any of the claims for relief alleged in its Complaint.

FIFTEENTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant asserts that it did not violate Health and Safety Code section 25249.6 because the product "poses no significant risk assuming lifetime exposure at the level in question" and "will have no observable effect" as set forth in Health and Safety Code section 25249.10.

SIXTEENTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant asserts that federal law preempts all causes of action alleged.

SEVENTEENTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that the claims asserted and remedies sought by Plaintiff violate Defendant's rights to due process and free speech under the California and United States Constitutions.

EIGHTEENTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff's claims for relief should be denied under the equitable doctrine of abstention.

NINETEENTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff's claims are barred in whole or in part to the extent they are based on alleged acts, conduct or statements that were undertaken, made or received outside of California.

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TWENTIETH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that its actions are protected by the safe harbor provisions controlling Proposition 65.

TWENTY-FIRST DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that Plaintiff's claims violate Defendant's rights under the California and United States Constitutions in that, among other things: (1) Plaintiff is attempting to enforce Proposition 65 in a manner which renders the requirements of that statute and regulation unconstitutionally vague; and (2) given the vague, overbroad and uncertain nature of Plaintiff's allegations, requiring proof that the alleged exposures cause no significant risk and/or have no observable effect violates Defendant's due process and other constitutional rights.

TWENTY-SECOND DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that it is protected and exempt from Plaintiff's claims pursuant to Cal. Code Regs. tit. 27, § 25501(a) because a party cannot be held liable for any "exposure" for purposes of Section 25249.6 of the Act to a listed chemical to the extent that the person allegedly responsible for the exposure can show that the chemical is naturally occurring in the food.

TWENTY-THIRD DEFENSE AND AFFIRMATIVE DEFENSE

Defendant alleges that it is protected and exempt from Plaintiff's claims pursuant to Cal. Code Regs. tit. 27, § 25703 to the extent that the exposures alleged by Plaintiff, if any there were, resulted from cooking necessary to render food palatable or to avoid microbiological contamination.

TWENTY-FOURTH DEFENSE AND AFFIRMATIVE DEFENSE

Defendant reserves its right to assert additional defenses based on information gathered in the course of additional investigation and discovery.

PRAYER FOR RELIEF

Wherefore, B&G Foods respectfully requests that the Court:

1. Enter judgment in favor of B&G Foods and against Plaintiff on all alleged claims for relief;
2. Dismiss Plaintiff's claims against B&G Foods with prejudice;

1 3. Require Plaintiff and/or its lawyers to pay all of B&G Foods’s attorney’s fees and
2 costs in defending this action; and

3 4. Grant such other and further relief as the Court deems just and proper.
4

5 Dated: March 8, 2021

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

7
8 By: 

David H. Kwasniewski

9 Attorney for Defendant
10 B&G FOODS NORTH AMERICA, INC.
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EXHIBIT G

1 EDMUND G. BROWN, JR.
 Attorney General
 2 J. MATTHEW RODRIQUEZ
 Chief Assistant Attorney General
 3 KEN ALEX
 Senior Assistant Attorney General
 4 EDWARD G. WEIL
 Supervising Deputy Attorney General
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 9 Telephone: (510) 622-2149
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 10

11 Attorneys for Plaintiffs
 People of the State of California
 12 (Additional Counsel On Signature Page)
 13

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 15 FOR THE COUNTY OF LOS ANGELES

16 PEOPLE OF THE STATE OF CALIFORNIA,
 17 ex rel. EDMUND G. BROWN JR., Attorney
 General of the State of California,
 18
 19 Plaintiff,

20 v.

21
 22 FRITO-LAY, INC., H.J. HEINZ COMPANY,
 KETTLE FOODS, INC., KFC
 23 CORPORATION, LANCE, INC., THE
 24 PROCTER & GAMBLE DISTRIBUTING
 COMPANY, THE PROCTER & GAMBLE
 25 MANUFACTURING COMPANY, WENDY'S
 INTERNATIONAL, INC., McDONALD'S
 26 CORPORATION, BURGER KING
 27 CORPORATION, *et al.*,
 28 Defendants.

Original Conformed Copy
 Of Original Filed
 Los Angeles Superior Court

AUG - 1 2008

John A. Clarke, Executive Officer/Clerk
 By: I. Flores, Deputy

Case No.: BC 338956

~~PROPOSED~~ 
 CONSENT JUDGMENT AS TO
 DEFENDANT FRITO-LAY, INC.

Dept: 307
 Judge: Hon. William F. Highberger
 Trial Date: August 5, 2008
 Action Filed: August 26, 2005

1 **1. INTRODUCTION**

2 1.1. On August 26, 2005, the People of the State of California, *ex rel.* the Attorney
3 General of the State of California (the “People” or the “Attorney General”), filed a
4 complaint for civil penalties and injunctive relief for violations of Proposition 65 and
5 unlawful business practices in the Superior Court for the County of Los Angeles. The
6 People’s Complaint alleges that the Defendants failed to provide clear and reasonable
7 warnings that ingestion of the products identified in the Complaint would result in exposure
8 to acrylamide, a chemical known to the State of California to cause cancer. The Complaint
9 further alleges that under the Safe Drinking Water and Toxic Enforcement Act of 1986,
10 Health and Safety Code section 25249.5 *et seq.*, also known as “Proposition 65,” businesses
11 must provide persons with a “clear and reasonable warning” before exposing individuals to
12 these chemicals, and that the Defendants failed to do so. The Complaint also alleges that
13 these acts constitute unlawful acts in violation of the Unfair Competition Law, pursuant to
14 Business and Professions Code sections 17200 *et seq.*

15 1.2. Frito-Lay, Inc. (“Settling Defendant”) is among the defendants named in the
16 complaint. Both the People and Settling Defendant shall be referred to as a “Party” to this
17 Consent Judgment, and collectively they shall be referred to herein as the “Parties” to this
18 Consent Judgment.

19 1.3. Settling Defendant is a Delaware corporation that employs more than ten
20 employees, and has employed more than ten employees at some time relevant to the
21 allegations of the complaint, and that manufactures, distributes and/or sells products in the
22 State of California and has done so in the past.

23 1.4. The products covered by this Consent Judgment are those products
24 manufactured and sold by Settling Defendant that are described in Exhibit A as either
25 (i) Potato Crisp Products (also known as restructured potato chips); or (ii) Potato Chip
26 Products (also known as sliced potato chips). The Potato Crisp Products and Potato Chip
27 Products are collectively referred to herein as Covered Products. After the Effective Date,
28 should Settling Defendant introduce for sale to consumers in California a restructured

1 potato chip product or a sliced potato chip product that is not described in Exhibit A, then
2 Settling Defendant shall give notice of such to the Attorney General in the form of a revised
3 version of Exhibit A. Should the Attorney General object to such notice within 30 days
4 following receipt of such notice, then the Parties shall proceed in accordance with
5 Paragraph 5.1; otherwise, this Consent Judgment shall be deemed to be modified to include
6 such product as a Potato Crisp Product or Potato Chip Product, as appropriate.

7 1.5. For purposes of this Consent Judgment only, the People and the Settling
8 Defendant stipulate that this Court has jurisdiction over the allegations of violations
9 contained in the People's Complaint and personal jurisdiction over Settling Defendant as to
10 the acts alleged in the People's Complaint, that venue is proper in the County of Los
11 Angeles, and that this Court has jurisdiction to enter this Consent Judgment as a full and
12 final resolution of all claims which were or could have been raised in the Complaint based
13 on the facts alleged therein.

14 1.6. The People and Settling Defendant enter into this Consent Judgment as a full
15 and final settlement of all claims that were raised in the Complaint (except as specified in
16 Paragraph 8.1 herein), arising out of the facts or conduct alleged therein. Except as
17 expressly set forth herein, nothing in this Consent Judgment shall prejudice, waive or impair
18 any right, remedy, or defense the Attorney General and Settling Defendant may have in any
19 other or in future legal proceedings unrelated to these proceedings. However, this
20 paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties
21 of the Parties under this Consent Judgment.

22 1.7. By executing this Consent Judgment and agreeing to provide the relief and
23 remedies specified herein, Settling Defendant does not admit (a) that it has violated or
24 threatened to violate Proposition 65 or Business and Professions Code sections 17200 *et*
25 *seq.*, or any other law or legal duty; or (b) that the chemical acrylamide in food poses any
26 risk to human health. The Parties recognize that acrylamide is naturally formed when
27 certain foods such as potato products are heated and that levels of acrylamide formation are
28 due to a wide variety of factors in the raw material and that may vary from location to

1 location. Settling Defendant contends that the Potato Chip Target Level set in this Consent
2 Judgment is based on specific factors that affect acrylamide levels in Potato Chip Products
3 manufactured in or near California from potatoes grown in or near California, and that the
4 Potato Chip Target Level is not relevant in areas outside of California where these same
5 factors vary.

6 1.8. The Effective Date of this Consent Judgment shall be the date on which the
7 Consent Judgment is entered as a judgment by the Superior Court.

8 **2. INJUNCTIVE RELIEF: ACRYLAMIDE REDUCTION**

9 2.1. *Potato Crisp Products: Target Level and Target Date.* Settling Defendant
10 shall reduce the level of acrylamide in its Potato Crisp Products shipped after April 30, 2011
11 (the “Potato Crisp Target Date”) for sale in California to a level of 490 parts per billion,
12 measured by the weighted arithmetic mean pursuant to the protocol described in Paragraph
13 2.5 (the “Potato Crisp Target Level”) or be subject to the provisions of Paragraph 3.
14 Settling Defendant shall endeavor, in good faith using commercially and technologically
15 reasonable efforts, to achieve the Potato Crisp Target Level in Potato Crisp Products
16 shipped for sale in California by the Potato Crisp Target Date.

17 2.2. *Potato Chip Products: Target Level and Target Date.* Settling Defendant
18 shall reduce the level of acrylamide in its Potato Chip Products shipped after December 31,
19 2011 (the “Potato Chip Target Date”) for sale in California to a level that is twenty percent
20 (20%) below the Baseline Level, as defined below, measured by the weighted arithmetic
21 mean pursuant to the protocol described in Paragraph 2.5 (the “Potato Chip Target Level”) or
22 be subject to the provisions of Paragraph 3. Settling Defendant shall endeavor, in good
23 faith using commercially and technologically reasonable efforts, to achieve the Potato Chip
24 Target Level in Potato Chip Products shipped for sale in California by the Potato Chip
25 Target Date.

26 2.3. *Baseline Level.* The “Baseline Level” is the arithmetic mean of the
27 acrylamide levels present in the test data for Potato Chip Products submitted in this matter
28 through Covance Laboratories and as reflected in pages 2-6 of Exhibit 63 to the Deposition

1 of Dr. Barbara Petersen, attached hereto as Exhibit B (the “Covance Data”), corrected to
2 weight the samples proportionately to the 2007 sales in California (net of returns, and based
3 on available Frito-Lay internal sales data) of each of the Groups (as set forth in Exhibit A)
4 of the Potato Chip Products. The People and Settling Defendant, by and through their
5 counsel, shall meet and confer to determine the Baseline Level no later than December 1,
6 2008. If the People and Settling Defendant do not agree on the Baseline Level, the issue
7 shall be submitted to the Court by motion, with Settling Defendant permitted to seek
8 permission to file any sales data under seal pursuant to applicable law. If the sales data
9 presented by Settling Defendant are materially different from the People’s previous
10 estimates, then as part of the motion process, the Court may adjust the Baseline Level to
11 correspond to such estimates.

12 2.4. “Shipped for sale in California” means Covered Products that Settling
13 Defendant either directly ships into California for sale in California or that it sells to a
14 distributor who Settling Defendant knows will sell the Covered Products to consumers in
15 California. Where a retailer or distributor sells Covered Products both in California and
16 other states, Settling Defendant shall take commercially reasonable steps to ensure that,
17 after the respective Target Levels have been reached, the only Covered Products that are
18 sold in California are either (i) Covered Products included in the weighted arithmetic mean
19 for which the Target Level has been achieved; or (ii) Covered Products for which Settling
20 Defendant has complied with Paragraph 3.

21 2.5. *Testing.*

22 (a) Testing for acrylamide shall be performed using either GC/MS (Gas
23 Chromatrography/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass
24 Spectrometry/Mass Spectrometry), or any other testing method agreed upon by the Parties
25 to this Consent Judgment.

26 (b) Representative samples of Potato Crisp Products to be tested for purposes of
27 demonstrating compliance with the Potato Crisp Target Level must be taken over no less
28 than a ten-day period from at least ten batches of Potato Crisp Products produced at

1 locations that supply Potato Crisp Products to California. Likewise, representative samples
2 of Potato Chip Products to be tested for purposes of demonstrating compliance with the
3 Potato Chip Target Level must be taken over no less than a ten-day period from at least ten
4 batches of Potato Chip Products produced at locations that supply Potato Chip Products to
5 California.

6 (c) To comply with the Target Level, testing must establish that the weighted
7 arithmetic mean of the samples is at or below the Target Level with a 95% confidence level,
8 i.e., $p < 0.05$, using stratified random sampling.

9 (d) The weighted arithmetic mean is to be calculated by the following formula:
10 Multiply the arithmetic mean of the acrylamide concentration (established by the sampling
11 methodology) of all products within a Group (as set forth in Exhibit A) by that Group's
12 fraction of total sales volume (net of returns) for all Groups to be included in the weighted
13 arithmetic mean of the Potato Crisp Products or Potato Chip Products, as appropriate, and
14 thereafter sum all such adjusted concentrations for all Groups that are required to be
15 included in the weighted arithmetic mean. Sales volume for each Group and for total sales
16 volume for Potato Crisp Products or Potato Chip Products shall be based upon the most
17 current 52 week IRI InfoScan data (in dollars, net of returns) for the Los Angeles, San
18 Francisco/Oakland, San Diego and Sacramento metropolitan areas available to Settling
19 Defendant as of the date of sampling.

20 (e) All test results of acrylamide concentrations, once provided to the Attorney
21 General, shall be public documents, but nothing in this Consent Judgment shall preclude
22 Settling Defendant from claiming business confidentiality as to sales volumes of any or all
23 of the Covered Products.

24 (f) Testing of Covered Products to demonstrate compliance with this Paragraph 2
25 shall be conducted and/or supervised by a third party under contract to and paid by Settling
26 Defendant.

27 2.6. *Verification and Warnings: Potato Crisp Products.*

28 (a) If Settling Defendant's test results demonstrate that the Potato Crisp Target

1 Level has been achieved for the Potato Crisp Products, Settling Defendant shall be required
2 to test the Potato Crisp Products on two additional occasions only: once during the first
3 year and once during the second year after the Potato Crisp Target Level has been achieved,
4 provided that there is at least a six-month interval between these two testing occasions. If
5 those tests confirm that the Potato Crisp Target Level has been achieved for the Potato
6 Crisp Products, Settling Defendant shall have no further duty to test the Potato Crisp
7 Products.

8 (b) If Settling Defendant has not achieved the Potato Crisp Target Level for the
9 Potato Crisp Products by the Potato Crisp Target Date (including any extensions provided
10 under Paragraph 2.8), it shall provide warnings for the Potato Crisp Products as provided
11 herein in Paragraph 3. Settling Defendant may also continue testing of the Potato Crisp
12 Products until tests demonstrate that the Potato Crisp Target Level has been achieved for the
13 Potato Crisp Products, at which time Settling Defendant shall have no further duty to warn.

14 (c) After Settling Defendant has demonstrated that the Potato Crisp Target Level
15 has been achieved and has fulfilled its duty to test the Potato Crisp Products, if the Attorney
16 General believes that the Potato Crisp Target Level has not been achieved, he may apply to
17 the Court for enforcement of this Consent Judgment. Any test data used by the Attorney
18 General for this purpose must be performed and analyzed by methods consistent with
19 Paragraph 2.5(a) and include at least ten samples of Potato Crisp Products. A prima facie
20 showing of violation based on such test results may be rebutted by a showing made in
21 compliance with all aspects of the testing and sampling protocol of Paragraph 2.5.

22 2.7. *Verification and Warnings: Potato Chip Products.*

23 (a) If Settling Defendant's test results demonstrate that the Potato Chip Target
24 Level has been achieved for the Potato Chip Products, Settling Defendant shall be required
25 to test the Potato Chip Products on two additional occasions only: once during the first year
26 and once during the second year after the Potato Chip Target Level has been achieved,
27 provided that there is at least a six-month interval between these two testing occasions. If
28 those tests confirm that the Potato Chip Target Level has been achieved for the Potato Chip

1 Products, Settling Defendant shall have no further duty to test the Potato Chip Products.

2 (b) If Settling Defendant has not achieved the Potato Chip Target Level for the
3 Potato Chip Products by the Potato Chip Target Date (including any extensions provided
4 under Paragraph 2.8), it shall provide warnings for the Potato Chip Products as provided
5 herein in Paragraph 3. Settling Defendant may also continue testing of the Potato Chip
6 Products until tests demonstrate that the Potato Chip Target Level has been achieved for the
7 Potato Chip Products, at which time Settling Defendant shall have no further duty to warn.

8 (c) After Settling Defendant has demonstrated that the Potato Chip Target Level
9 has been achieved and has fulfilled its duty to test the Potato Chip Products, if the Attorney
10 General believes that the Potato Chip Target Level has not been achieved, he may apply to
11 the Court for enforcement of this Consent Judgment. Any test data used by the Attorney
12 General for this purpose must be performed and analyzed by methods consistent with
13 Paragraph 2.5(a) and include at least ten samples of Potato Chip Products. A prima facie
14 showing of violation based on such test results may be rebutted by a showing made in
15 compliance with all aspects of the testing and sampling protocol of Paragraph 2.5.

16 2.8. *Extension of Target Dates.* At least 90 days prior to the Potato Crisp Target
17 Date, the Potato Chip Target Date, or both, as applicable, Settling Defendant may initiate a
18 meet and confer session with the Attorney General regarding a possible extension of either
19 or both Target Date(s). Upon timely application to the Court prior to the passing of either
20 or both Target Date(s), and for good cause shown based on Settling Defendant's diligence
21 and good faith efforts as well as reported progress to date, this Consent Judgment shall be
22 modified to extend either or both Target Date(s) by no more than six (6) months.

23 **3. INJUNCTIVE RELIEF: CLEAR AND REASONABLE WARNINGS**

24 3.1. *Warnings in General.* If Settling Defendant does not achieve one or both of
25 the Target Level(s) by the applicable Target Date(s), Settling Defendant shall within 30
26 days and until such time as it achieves the applicable Target Level(s) provide warnings
27 either:

28 (a) by placing a warning label as described in Paragraph 3.2 on the package of all

1 Potato Crisp Products and/or Potato Chip Products, as applicable, that Settling Defendant
2 would be required to exclude from the calculation of the weighted arithmetic mean to
3 achieve the Target Level for Potato Crisp Products and/or Potato Chip Products, as
4 applicable;

5 or, at Settling Defendant's option,

6 (b) by providing signs as described in Paragraph 3.3 for all Potato Crisp Products
7 and/or Potato Chip Products, as applicable, that Settling Defendant would be required to
8 exclude from the calculation of the weighted arithmetic mean to achieve the Target Level
9 for Potato Crisp Products and/or Potato Chip Products, as applicable.

10 3.2. *Label Warnings.* A label warning placed on the package of a Covered
11 Product pursuant to Paragraph 3.1(a) shall either (a) conform to the requirements for the
12 "safe harbor" warning methods set out in 27 Cal. Code Regs. section 25601(b), and, at the
13 Settling Defendant's option, may also state that acrylamide is the chemical in question
14 and/or the approximate level of acrylamide in the product; or (b) provide substantially the
15 same information as set forth for sign warnings in Paragraph 3.3(b).

16 3.3. *Sign Warnings.*

17 (a) *Form of Sign.* A warning sign shall be rectangular and at least 36 square
18 inches in size, with the word "WARNING" centered one-half of an inch from the top of the
19 sign in ITC Garamond bold condensed type face all in one-half inch capital letters. The
20 body of the warning message shall be in ITC Garamond bold condensed type face. For the
21 body of the warning message, left and right margins of at least one-half of an inch, and a
22 bottom margin of at least one-half inch shall be observed. Larger signs shall bear
23 substantially the same proportions of type size and spacing to sign dimension as a sign that
24 is 36 square inches in size.

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1 (b) *Text of Sign.* Unless modified by agreement of the Parties to this Consent
2 Judgment, the sign shall contain the following text:

3 WARNING

4
5 Cooked potatoes that have been browned, such as potato crisps
6 and/or potato chips [*whichever one or both is applicable, or*
7 *just specific products if applicable*] contain acrylamide, a
8 substance identified as causing cancer under California's
9 Proposition 65. [*At Settling Defendant's option, the following*
10 *sentence may also be added:* Other cooked foods that have
11 been roasted or browned, such as coffee, cereals, french fries,
12 potato chips and crisps, breads, crackers, cookies, and nuts,
13 also contain acrylamide, but usually at lower levels than in
14 certain cooked potatoes that have been browned.]

15 Acrylamide is not added to these foods but is created when
16 these and certain other foods are browned.

17 The FDA has not advised people to stop eating potato crisps
18 and/or potato chips [*whichever one or both is applicable, or*
19 *just specific products if applicable*] or any foods containing
20 acrylamide as a result of cooking. For more information, see
21 www.fda.gov.

22 (c) *Placement of Sign.* The sign shall be posted on the shelf(ves) or in the aisle(s)
23 where the Covered Products for which the warning is being provided are sold; unless the
24 store has less than 7,500 square feet of retail space and no more than two cash registers, in
25 which case it may be placed at each cash register. Should Settling Defendant, in
26 conjunction with one or more retailers, desire to provide the warning via sales receipts or
27 other information provided to each customer at checkout, or should Proposition 65 or its
28 implementing regulations be changed from their terms as they exist on the date of entry of
this Consent Judgment to provide a new manner or language for an optional safe-harbor
warning, then Settling Defendant shall meet and confer with the Attorney General and,
following agreement, jointly apply to the Court for approval of a plan for implementing
warnings in such manner. Such plan shall be approved only upon a showing that the
warning provided in such manner will comply with the law and be at least as effective as

1 the forms of warnings otherwise required by this Consent Judgment.

2 (d) *Distribution.* Settling Defendant (or its agent) shall provide signs to retailers
3 who operate retail locations in California that are collectively responsible for at least 70
4 percent of Settling Defendant's sales in the State of California of Covered Products for
5 which the warning is being provided. Signs shall be provided with a letter substantially as
6 provided in Exhibit C, in which posting instructions are provided. The letter shall request
7 that the receiving retailer provide Settling Defendant a written acknowledgement that the
8 sign will be posted. Settling Defendant shall send a follow up letter substantially as
9 provided in Exhibit D to the same retailers who were sent the original letter and who did not
10 send any acknowledgment. Settling Defendant (or its agent) shall maintain files
11 demonstrating compliance with this provision, including the letters sent and receipts of any
12 acknowledgements from retailers, which shall be provided to the Attorney General on
13 written request.

14 3.4. *Option to Provide Warnings.*

15 (a) With respect to Potato Crisp Products and/or Potato Chip Products, Settling
16 Defendant may opt to provide warnings under Paragraph 3.1 and cease its acrylamide
17 reduction efforts under Paragraph 2 if either or both of the following conditions have been
18 satisfied with respect to Potato Crisp Products and/or Potato Chip Products: (i) acrylamide
19 warnings covering potato crisps and/or chips appear on packages of such products
20 accounting for 20% of sales of all such products in California that are not produced by
21 Settling Defendant, based on IRI sales data; and/or (ii) non-package acrylamide warnings
22 specifically mentioning potato crisps and/or chips appear at 500 or more store locations in
23 California.

24 (b) If Settling Defendant believes either or both conditions has/have occurred
25 with respect to Potato Crisp Products and/or Potato Chip Products, it shall give notice of
26 such to the Attorney General, together with documentation evidencing such occurrence.
27 Following such notice, Settling Defendant and the Attorney General will promptly meet and
28 confer regarding the situation, and following that meet and confer period of no longer than

1 30 days, Settling Defendant, by giving further notice of at least 30 days to the Attorney
2 General, which the Attorney General may extend, at his option, by up to 60 days, may elect
3 to (i) cease reduction efforts with respect to Potato Crisp Products and/or Potato Chip
4 Products, as applicable; (ii) provide the warnings required by Paragraph 3.1 for Potato Crisp
5 Products and/or Potato Chip Products, as applicable; and (iii) within 30 days make all
6 remaining payments required by Paragraph 4 with respect to Potato Crisp Products and/or
7 Potato Chip Products, as applicable.

8 3.5. *Extra-Territorial Effect.* Nothing in this Consent Judgment requires that
9 warnings be given for any Covered Products sold outside the State of California.

10 3.6. *Cessation of Warnings.* If Settling Defendant has demonstrated by testing that
11 it has achieved the Target Levels for any or all Covered Products after providing warnings
12 for such Covered Products under Paragraph 3, then Settling Defendant may cease providing
13 warnings for such Covered Products.

14 **4. PAYMENTS**

15 4.1. *Initial Civil Penalty.* Settling Defendant shall pay a civil penalty to the
16 Attorney General pursuant to Health & Safety Code section 25249.12 of \$600,000 no later
17 than 30 days after the Effective Date.

18 4.2. *Interim Civil Penalty.* As an incentive for early achievement in acrylamide
19 reduction, Settling Defendant shall pay an additional civil penalty to the Attorney General
20 pursuant to Health & Safety Code section 25249.12 of \$550,000 (“Interim Civil Penalty”)
21 no later than 18 months after the Effective Date, but if Settling Defendant has achieved the
22 Potato Crisp Target Level before such Interim Civil Penalty is due, then fifty percent (50%)
23 of such Interim Civil Penalty will be waived, and if Settling Defendant has achieved the
24 Potato Chip Target Level before such Interim Civil Penalty is due, then fifty percent (50%)
25 of such Interim Civil Penalty will be waived, so that if Settling Defendant has achieved both
26 Potato Crisp Target Level and the Potato Chip Target Level before such payment is due, the
27 entire Interim Civil Penalty shall be waived.

28 ///

1 4.3. *Final Civil Penalties.* As a further incentive for early achievement in
2 acrylamide reduction, Settling Defendant shall pay an additional civil penalty (“Final Crisp
3 Civil Penalty”) to the Attorney General pursuant to Health & Safety Code section 25249.12
4 of \$1,000,000 no later than the Potato Crisp Target Date (without considering any
5 extensions provided under Paragraph 2.8), but if Settling Defendant has achieved the Potato
6 Crisp Target Level before the Potato Crisp Target Date (without considering any extensions
7 provided under Paragraph 2.8), such Final Crisp Civil Penalty shall be waived. Likewise,
8 Settling Defendant shall pay an additional civil penalty (“Final Chip Civil Penalty”) to the
9 Attorney General pursuant to Health & Safety Code section 25249.12 of \$1,000,000 no later
10 than the Potato Chip Target Date (without considering any extensions provided under
11 Paragraph 2.8), but if Settling Defendant has achieved the Potato Chip Target Level before
12 the Potato Chip Target Date (without considering any extensions provided under Paragraph
13 2.8), such Final Chip Civil Penalty shall be waived.

14 4.4. *Enforcement Fund Payment.* Within 30 days of the Effective Date, Settling
15 Defendant shall pay \$350,000 to be used by the Attorney General for the enforcement of
16 Proposition 65. Funds paid pursuant to this paragraph shall be placed in an interest-bearing
17 Special Deposit Fund established by the Attorney General. These funds, including any
18 interest, shall be used by the Attorney General, until all funds are exhausted, for the costs
19 and expenses associated with the enforcement and implementation of Proposition 65,
20 including investigations, enforcement actions, other litigation or activities as determined by
21 the Attorney General to be reasonably necessary to carry out his duties and authority under
22 Proposition 65. Such funding may be used for the costs of the Attorney General’s
23 investigation, filing fees and other court costs, payment to expert witnesses and technical
24 consultants, purchase of equipment, travel, purchase of written materials, laboratory testing,
25 sample collection, or any other cost associated with the Attorney General’s duties or
26 authority under Proposition 65. Funding placed in the Special Deposit Fund pursuant to this
27 paragraph, and any interest derived therefrom, shall solely and exclusively augment the
28 budget of the Attorney General’s Office and in no manner shall supplant or cause any

1 reduction of any portion of the Attorney General's budget.

2 4.5. *Delivery.* Each payment required by this Consent Judgment shall be made
3 through the delivery of separate checks payable to "California Department of Justice," to
4 the attention of Edward G. Weil, Supervising Deputy Attorney General, Department of
5 Justice, 1515 Clay Street, 20th Floor, Oakland, CA 94612.

6 **5. MODIFICATION OF CONSENT JUDGMENT**

7 5.1. *Procedure for Modification.* Except as provided in Paragraph 1.4, this
8 Consent Judgment may be modified by written agreement of the Attorney General and
9 Settling Defendant, after noticed motion, and upon entry of a modified consent judgment by
10 the Court thereon, or upon motion of the Attorney General or Settling Defendant as
11 provided herein or as otherwise provided by law, and upon entry of a modified consent
12 judgment by the Court. Before filing an application with the Court for a modification to
13 this Consent Judgment, Settling Defendant shall meet and confer with the Attorney General
14 to determine whether the Attorney General will consent to the proposed modification. If a
15 proposed modification is agreed upon, then Settling Defendant and the Attorney General
16 will present the modification to the Court by means of a stipulated modification to the
17 Consent Judgment. Otherwise, Settling Defendant shall bear the burden of establishing that
18 the modification is appropriate based on the occurrence of a condition set forth in this
19 Consent Judgment or as otherwise provided by law.

20 5.2. *Duty to Warn.* If the Attorney General agrees in a settlement or judicially
21 entered consent judgment that some or all potato crisp products and/or potato chip products
22 sold by companies other than Settling Defendant do not require a warning for acrylamide
23 under Proposition 65, or if a court of competent jurisdiction renders a final judgment, and
24 the judgment becomes final, that some or all potato crisp products and/or potato chip
25 products sold by companies other than Settling Defendant do not require a warning for
26 acrylamide under Proposition 65, then the duty to warn under Paragraph 3 of this Consent
27 Judgment and the duty to reduce acrylamide levels under Paragraph 2 of this Consent
28 Judgment shall be eliminated with respect to such portion (or all) of the Potato Crisp

1 Products and/or Potato Chip Products as is appropriate, except that, in the event that such
2 final judgment is not binding on the Attorney General, the Court may determine whether (or
3 the extent to which) Settling Defendant's duties should be eliminated or modified
4 considering other equitable and legal factors.

5 5.3. *Manner or Form of Warning.* If the Attorney General subsequently agrees in
6 a settlement or judicially entered consent judgment, or if a court of competent jurisdiction
7 renders a final judgment, and the judgment becomes final, that warnings under Proposition
8 65 (based on the presence of acrylamide) for some or all of the Covered Products (as sold
9 by other companies) may be provided in a manner or form different from that set forth in
10 this Consent Judgment, then the manner and form of warning set forth in this Consent
11 Judgment shall be modified to entitle Settling Defendant to provide warnings in such other
12 manner or form, except that, in the event that such final judgment is not binding on the
13 Attorney General, the Court may determine whether (or the extent to which) Settling
14 Defendant's duties should be eliminated or modified considering other equitable and legal
15 factors.

16 5.4. *Change in Proposition 65.* If Proposition 65 or its implementing regulations
17 (including the "safe harbor no significant risk level" for acrylamide set forth at 27 Cal. Code
18 Regs. section 25705(c)(2)) are changed from their terms as they exist on the date of entry of
19 this Consent Judgment to establish that warnings for acrylamide in some or all of the
20 Covered Products are not required, then this Consent Judgment will be modified to relieve
21 Settling Defendant of its obligations with respect to such portion of the Covered Products as
22 is appropriate. The Parties recognize that the Target Levels are based on a compromise of a
23 number of issues, and that an increase in the "safe harbor no significant risk level" above
24 the current 0.2 micrograms per day would not necessarily entitle Settling Defendant to a
25 modification of the terms of this Consent Judgment.

26 5.5. *Federal Preemption.* If a court of competent jurisdiction or an agency of the
27 federal government, including, but not limited to the U.S. Food and Drug Administration,
28 states through any communication, regulation, or legally binding act, that federal law has

1 preemptive effect on any of the requirements of this Consent Judgment, including, but not
2 limited to precluding Settling Defendant from providing any of the warnings set forth in this
3 Consent Judgment or the manner in which such warnings are given, then this Consent
4 Judgment will be modified to bring it into compliance with or avoid conflict with federal
5 law, but the modification shall not be granted unless this Court concludes, in a final
6 judgment or order, that such modification is necessary to bring this Consent Judgment into
7 compliance with or avoid conflict with federal law. Specifically, a determination that the
8 provision of some, but not all, forms of warning described in Paragraph 3 above is not
9 permitted shall not relieve Settling Defendant of the duty to provide one of the other
10 warnings described under this judgment for which such determination has not been made.

11 5.6. *Scientific Review.* If an agency of the federal government, including but not
12 limited to the U.S. Food and Drug Administration, determines in an official communication,
13 regulation, or legally binding act, following a thorough review of the available scientific
14 studies and opportunity for public comment, a cancer potency estimate (Q*) for acrylamide
15 that equates to a no significant risk level of 1.0 mcg/day or higher, Settling Defendant or its
16 representative (including a coalition or trade association) may petition the California Office
17 of Environmental Health Hazard Assessment (“OEHHA”) to revise the no significant risk
18 level for acrylamide set forth at 27 Cal. Code Regs. section 25705(c)(2)) in light of such
19 federal action. If the Potato Crisp Target Date and/or the Potato Chip Target Date
20 (including any extensions under Paragraph 2.8) falls after the date of the federal agency
21 determination noted above, but before OEHHA has issued a final decision on the petition,
22 then the Potato Crisp Target Date and/or the Potato Chip Target Date will be extended to
23 such date as is 90 days after the date on which OEHHA issues a final decision on such
24 petition.

25 6. ENFORCEMENT

26 6.1. The People may, by motion or application for an order to show cause before
27 this Court, enforce the terms and conditions contained in this Consent Judgment. In any
28 such proceeding, the People may seek whatever fines, costs, penalties, or remedies are

1 provided by law for failure to comply with the Consent Judgment and where said violations
2 of this Consent Judgment constitute subsequent violations of Proposition 65 or other laws
3 independent of the Consent Judgment and/or those alleged in the Complaint, the People are
4 not limited to enforcement of the Consent Judgment, but may seek in another action
5 whatever fines, costs, penalties, or remedies are provided for by law for failure to comply
6 with Proposition 65 or other laws. In any action brought by the People alleging subsequent
7 violations of Proposition 65 or other laws, Settling Defendant may assert any and all
8 defenses that are available.

9 **7. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

10 7.1. Each signatory to this Consent Judgment certifies that he or she is fully
11 authorized by the Party he or she represents to stipulate to this Consent Judgment and to
12 enter into and execute the Consent Judgment on behalf of the Party represented and legally
13 to bind that Party.

14 **8. CLAIMS COVERED**

15 8.1. This Consent Judgment is a full, final, and binding resolution between the
16 People and Settling Defendant, of any violation of Proposition 65, Business & Professions
17 Code sections 17200 *et seq.*, or any other statutory or common law claims that have been or
18 could have been asserted in the Complaint against Settling Defendant for failure to provide
19 clear and reasonable warnings of exposure to acrylamide from the consumption of the
20 Covered Products, or any other claim based on the facts or conduct alleged in the Complaint
21 as to the Covered Products, whether based on actions committed by Settling Defendant or
22 by any entity to whom it distributes or sells Covered Products, or any entity that sells the
23 Covered Products to consumers in the state of California except for sales of Covered
24 Products by retailers during any period in which such retailers have not posted signs sent to
25 them pursuant to Paragraph 3.3(d). With this one exception, as to Covered Products,
26 compliance with the terms of this Consent Judgment resolves any issue now, in the past,
27 and in the future concerning compliance by Settling Defendant, its parents, shareholders,
28 divisions, subdivisions, subsidiaries, sister companies, affiliates, franchisees, cooperative

1 members, and licensees; their distributors, wholesalers, and retailers who sell Covered
2 Products; and the predecessors, successors, and assigns of any of them, with the
3 requirements of Proposition 65.

4 **9. RETENTION OF JURISDICTION**

5 9.1. This Court shall retain jurisdiction of this matter to implement the Consent
6 Judgment.

7 **10. PROVISION OF NOTICE**

8 10.1. When any Party is entitled to receive any notice under this Consent Judgment,
9 the notice shall be sent by overnight courier service to the person and address set forth in
10 this Paragraph. Any Party may modify the person and address to whom the notice is to be
11 sent by sending the other Party notice by certified mail, return receipt requested. Said
12 change shall take effect for any notice mailed at least five days after the date the return
13 receipt is signed by the Party receiving the change.

14 10.2. Notices shall be sent to:

15 For the People/ the Attorney General:

16 Edward G. Weil
17 Supervising Deputy Attorney General
18 1515 Clay Street, 20th Floor
Oakland, CA 94612

19 For Frito-Lay, Inc.:

20 Attn: General Counsel	<i>with a copy to:</i>	Trenton H. Norris
21 Frito-Lay, Inc.		Arnold & Porter LLP
22 7701 Legacy Drive		777 S. Figueroa Street, 44 th Floor
23 Plano, TX 75024-4099		Los Angeles, CA 90017-5844

24 **11. COURT APPROVAL**

25 11.1. This Consent Judgment shall be submitted to the Court for entry by noticed
26 motion. If this Consent Judgment is not approved by the Court, it shall be of no force or
27 effect and may not be used by the Attorney General or Settling Defendant for any purpose.

28 **12. ENTIRE AGREEMENT**

12.1. This Consent Judgment contains the sole and entire agreement and
understanding of the Parties with respect to the entire subject matter hereof, and any and all

1 prior discussions, negotiations, commitments and understandings related hereto. No
2 representations, oral or otherwise, express or implied, other than those contained herein
3 have been made by any Party hereto. No other agreements not specifically referred to
4 herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

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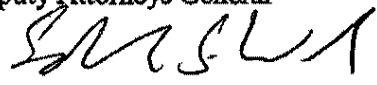
1 13. EXECUTION IN COUNTERPARTS

2 13.1. The stipulations to this Consent Judgment maybe executed in counterparts and
3 by means of facsimile or digital transmission, which taken together shall be deemed to
4 constitute one document.

5 IT IS SO STIPULATED:

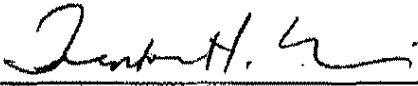
6 Dated: 7/30/08

EDMUND G. BROWN, JR.
Attorney General
EDWARD G. WEIL
Supervising Deputy Attorney General
LAURA ZUCKERMAN
DEBORAH SLON
Deputy Attorneys General

7
8
9
10
11 By: 
12 Edward G. Weil
13 Supervising Deputy Attorney General
14 For Plaintiff People of the State of California

14 Dated: 7/30/08

TRENTON H. NORRIS
ARNOLD & PORTER LLP

15
16
17 By: 
18 Trenton H. Norris
19 For Defendant Frito-Lay, Inc.

20 Dated: 7/30/08

21
22 By: 
23 For Defendant Frito-Lay, Inc.

24 IT IS SO ORDERED, ADJUDGED, AND DECREED:

25 Dated:
26 8/1/08


27 
28 Hon. William F. Highberger
Judge of the Superior Court

Exhibit A

POTATO CRISP PRODUCTS

GROUP A. Baked! Lay's (all flavors, including but not limited to BBQ, Cheddar & Sour Cream, Original, and Sour Cream & Onion); and **Baked! Ruffles** (all flavors, including but not limited to Cheddar & Sour Cream and Original)

GROUP B. Lay's Stax (all flavors, including but not limited to Cheddar, Hot 'n Spicy Barbecue, Mesquite Barbecue, Original, Ranch, Salt & Vinegar, and Sour Cream & Onion)

GROUP C. Munchos

POTATO CHIP PRODUCTS

GROUP A. Lay's (all flavors, including but not limited to Classic, BBQ, California Cool Dill, Cheddar & Sour Cream, Chile Piquin, Chili Limon, Crab Spice, Deli Style, Dill Pickle, Flamin' Hot, Florida Lime & Sea Salt, Habanero Limon, Hot N' Spicy BBQ, Lightly Salted, Limon, Loaded Potato Skins, Pinch of Salt, Salt & Vinegar, Santa Fe Ranch, Sour Cream & Onion, and Southwestern Jalapeno & Cheddar); **Lay's Light** (all flavors, including but not limited to Original and BBQ); **Lay's Natural** (all flavors, including but not limited to BBQ and Sea Salt); and **Lay's Wavy** (all flavors, including but not limited to Au Gratin, Hickory Barbecue, Original, and Ranch)

GROUP B. Ruffles (all flavors, including but not limited to Authentic BBQ, Cheddar & Sour Cream, Original, Pinch of Salt, and Sour Cream & Onion); **Ruffles Light** (all flavors, including but not limited to Cheddar & Sour Cream and Original); **Ruffles Reduced Fat** (all flavors); **Ruffles Natural** (all flavors, including but not limited to Original and Natural with Sea Salt); and **Ruffles Thick Cut** (all flavors, including but not limited to Cheddar Baked Potato and Original)

GROUP C. Lay's Kettle Cooked (all flavors, including by not limited to BBQ, Jalapeno, Original, Reduced Fat, Salt & Malt Vinegar, and Sweet Maui Onion); and **Miss Vickie's** (all flavors, including but not limited to Country Onion with Three Cheese, Creamy Buttermilk Ranch, Jalapeno, Sea Salt & Malt Vinegar, Simply Sea Salt, and Smokehouse BBQ)

Exhibit B

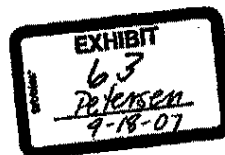
From: Carolyn Scrafford <cscrafford@exponent.com>
Sent: Monday, September 10, 2007 7:02 AM
To: Barbara Petersen <bpetersen@exponent.com>
Cc: Edmister, Todd O. <todd.edmister@bingham.com>; Chanin, Rachel L. <rachel.chanin@bingham.com>
Subject: Potato Chip acrylamide data
Attach: potato chip acrylamide data 9-10-07.xls

Barbara,

Attached are the final acrylamide results for potato chips from Covance.

Thanks,
Carolyn

Carolyn G. Scrafford, MPH
Managing Scientist
Center for Chemical Regulation and Food Safety
Exponent, Inc.
Washington, DC
t: 202-772-4928
f: 202-772-4979



BP014594

PRODNAME	CODE	CHRTYPE	COMPANY	ANALYSIS	PRODCODE
BAKEDI LAY'S Original Potato Crisps	01-LA-LAYS BK-A	2	1	1720	1
BAKEDI LAY'S Original Potato Crisps	01-SD-LAYS BK-A	2	1	1590	1
BAKEDI LAY'S Original Potato Crisps	02-LA-LAYS BK-A	2	1	1300	1
BAKEDI LAY'S Original Potato Crisps	02-SA-LAYS BK-A	2	1	1330	1
BAKEDI LAY'S Original Potato Crisps	02-SD-LAYS BK-A	2	1	1020	1
BAKEDI LAY'S Original Potato Crisps	03-LA-LAYS BK-A	2	1	994	1
BAKEDI LAY'S Original Potato Crisps	03-SA-LAYS BK-A	2	1	1360	1
BAKEDI LAY'S Original Potato Crisps	03-SD-LAYS BK-A	2	1	749	1
BAKEDI LAY'S Original Potato Crisps	04-LA-LAYS BK-A	2	1	916	1
BAKEDI LAY'S Original Potato Crisps	04-SA-LAYS BK-A	2	1	1110	1
BAKEDI LAY'S Original Potato Crisps	05-LA-LAYS BK-A	2	1	1020	1
BAKEDI LAY'S Original Potato Crisps	05-SA-LAYS BK-A	2	1	980	1
BAKEDI LAY'S Original Potato Crisps	06-LA-LAYS BK-A	2	1	831	1
BAKEDI LAY'S Original Potato Crisps	06-SA-LAYS BK-A	2	1	1240	1
BAKEDI LAY'S Original Potato Crisps	07-LA-LAYS BK-A	2	1	832	1
BAKEDI LAY'S Original Potato Crisps	07-SA-LAYS BK-A	2	1	789	1
BAKEDI LAY'S Original Potato Crisps	08-LA-LAYS BK-A	2	1	976	1
BAKEDI LAY'S Original Potato Crisps	08-SA-LAYS BK-A	2	1	1020	1
BAKEDI LAY'S Original Potato Crisps	08-SD-LAYS BK-A	2	1	935	1
BAKEDI LAY'S Original Potato Crisps	09-LA-LAYS BK-A	2	1	811	1
BAKEDI LAY'S Original Potato Crisps	09-SA-LAYS BK-A	2	1	1630	1
BAKEDI LAY'S Original Potato Crisps	09-SD-LAYS BK-A	2	1	798	1
BAKEDI LAY'S Original Potato Crisps	10-LA-LAYS BK-A	2	1	948	1
BAKEDI LAY'S Original Potato Crisps	10-SA-LAYS BK-A	2	1	983	1
BAKEDI LAY'S Original Potato Crisps	10-SD-LAYS BK-A	2	1	1070	1
BAKEDI LAY'S Original Potato Crisps	11-LA-LAYS BK-A	2	1	713	1
BAKEDI LAY'S Original Potato Crisps	11-SA-LAYS BK-A	2	1	895	1
BAKEDI LAY'S Original Potato Crisps	11-SD-LAYS BK-A	2	1	864	1
BAKEDI LAY'S Original Potato Crisps	12-LA-LAYS BK-A	2	1	930	1
BAKEDI LAY'S Original Potato Crisps	12-SA-LAYS BK-A	2	1	730	1
BAKEDI LAY'S Original Potato Crisps	12-SD-LAYS BK-A	2	1	876	1
BAKEDI LAY'S Original Potato Crisps	13-LA-LAYS BK-A	2	1	1190	1
BAKEDI LAY'S Original Potato Crisps	13-SA-LAYS BK-A	2	1	706	1
BAKEDI LAY'S Original Potato Crisps	13-SD-LAYS BK-A	2	1	1070	1
BAKEDI LAY'S Original Potato Crisps	14-LA-LAYS BK-A	2	1	1280	1
BAKEDI LAY'S Original Potato Crisps	14-SA-LAYS BK-A	2	1	846	1
BAKEDI LAY'S Original Potato Crisps	14-SD-LAYS BK-A	2	1	1820	1
BAKEDI LAY'S Original Potato Crisps	15-SA-LAYS BK-A	2	1	952	1
BAKEDI LAY'S Original Potato Crisps	15-SD-LAYS BK-A	2	1	741	1
LAY'S Classic Potato Chips	01-LA-LAYS CL-A	1	1	360	9
LAY'S Classic Potato Chips	01-SA-LAYS CL-A	1	1	284	9
LAY'S Classic Potato Chips	01-SD-LAYS CL-A	1	1	342	9
LAY'S Classic Potato Chips	02-LA-LAYS CL-A	1	1	382	9
LAY'S Classic Potato Chips	02-SA-LAYS CL-A	1	1	388	9
LAY'S Classic Potato Chips	02-SD-LAYS CL-A	1	1	808	9
LAY'S Classic Potato Chips	03-LA-LAYS CL-A	1	1	261	9
LAY'S Classic Potato Chips	03-SA-LAYS CL-A	1	1	313	9
LAY'S Classic Potato Chips	03-SD-LAYS CL-A	1	1	418	9
LAY'S Classic Potato Chips	04-LA-LAYS CL-A	1	1	266	9
LAY'S Classic Potato Chips	04-SA-LAYS CL-A	1	1	334	9
LAY'S Classic Potato Chips	04-SD-LAYS CL-A	1	1	557	9
LAY'S Classic Potato Chips	05-LA-LAYS CL-A	1	1	279	9
LAY'S Classic Potato Chips	05-SA-LAYS CL-A	1	1	307	9
LAY'S Classic Potato Chips	05-SD-LAYS CL-A	1	1	430	9
LAY'S Classic Potato Chips	06-LA-LAYS CL-A	1	1	326	9
LAY'S Classic Potato Chips	06-SA-LAYS CL-A	1	1	349	9
LAY'S Classic Potato Chips	06-SD-LAYS CL-A	1	1	329	9
LAY'S Classic Potato Chips	07-LA-LAYS CL-A	1	1	286	9
LAY'S Classic Potato Chips	07-SA-LAYS CL-A	1	1	241	9
LAY'S Classic Potato Chips	07-SD-LAYS CL-A	1	1	408	9
LAY'S Classic Potato Chips	08-LA-LAYS CL-A	1	1	429	9
LAY'S Classic Potato Chips	08-SA-LAYS CL-A	1	1	291	9
LAY'S Classic Potato Chips	08-SD-LAYS CL-A	1	1	386	9
LAY'S Classic Potato Chips	09-LA-LAYS CL-A	1	1	263	9
LAY'S Classic Potato Chips	09-SA-LAYS CL-A	1	1	274	9
LAY'S Classic Potato Chips	09-SD-LAYS CL-A	1	1	618	9

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LAY'S Classic Potato Chips	10-LA-LAYS CL-A	1	1	361	9
LAY'S Classic Potato Chips	10-SA-LAYS CL-A	1	1	317	9
LAY'S Classic Potato Chips	10-SD-LAYS CL-A	1	1	757	9
LAY'S Classic Potato Chips	11-LA-LAYS CL-A	1	1	482	9
LAY'S Classic Potato Chips	11-SA-LAYS CL-A	1	1	289	9
LAY'S Classic Potato Chips	11-SD-LAYS CL-A	1	1	464	9
LAY'S Classic Potato Chips	12-LA-LAYS CL-A	1	1	492	9
LAY'S Classic Potato Chips	12-SA-LAYS CL-A	1	1	282	9
LAY'S Classic Potato Chips	12-SD-LAYS CL-A	1	1	334	9
LAY'S Classic Potato Chips	13-LA-LAYS CL-A	1	1	389	9
LAY'S Classic Potato Chips	13-SA-LAYS CL-A	1	1	297	9
LAY'S Classic Potato Chips	13-SD-LAYS CL-A	1	1	383	9
LAY'S Classic Potato Chips	14-LA-LAYS CL-A	1	1	313	9
LAY'S Classic Potato Chips	14-SA-LAYS CL-A	1	1	327	9
LAY'S Classic Potato Chips	14-SD-LAYS CL-A	1	1	484	9
LAY'S Classic Potato Chips	15-SA-LAYS CL-A	1	1	333	9
LAY'S Classic Potato Chips	15-SD-LAYS CL-A	1	1	443	9
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	01-LA-LAYS KC-A	1	1	413	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	01-SA-LAYS KC-A	1	1	363	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	01-SD-LAYS KC-A	1	1	445	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	02-LA-LAYS KC-A	1	1	324	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	02-SA-LAYS KC-A	1	1	273	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	02-SD-LAYS KC-A	1	1	541	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	03-LA-LAYS KC-A	1	1	433	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	03-SA-LAYS KC-A	1	1	303	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	03-SD-LAYS KC-A	1	1	394	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	04-LA-LAYS KC-A	1	1	319	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	04-SA-LAYS KC-A	1	1	258	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	04-SD-LAYS KC-A	1	1	472	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	05-LA-LAYS KC-A	1	1	345	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	05-SA-LAYS KC-A	1	1	271	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	05-SD-LAYS KC-A	1	1	602	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	06-LA-LAYS KC-A	1	1	371	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	06-SA-LAYS KC-A	1	1	295	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	06-SD-LAYS KC-A	1	1	408	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	07-LA-LAYS KC-A	1	1	432	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	07-SA-LAYS KC-A	1	1	307	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	07-SD-LAYS KC-A	1	1	419	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	08-LA-LAYS KC-A	1	1	333	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	08-SA-LAYS KC-A	1	1	289	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	08-SD-LAYS KC-A	1	1	457	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	09-LA-LAYS KC-A	1	1	399	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	09-SA-LAYS KC-A	1	1	270	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	09-SD-LAYS KC-A	1	1	382	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	10-LA-LAYS KC-A	1	1	371	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	10-SA-LAYS KC-A	1	1	253	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	10-SD-LAYS KC-A	1	1	429	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	11-LA-LAYS KC-A	1	1	362	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	11-SA-LAYS KC-A	1	1	284	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	11-SD-LAYS KC-A	1	1	340	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	12-LA-LAYS KC-A	1	1	352	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	12-SA-LAYS KC-A	1	1	315	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	12-SD-LAYS KC-A	1	1	385	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	13-LA-LAYS KC-A	1	1	321	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	13-SA-LAYS KC-A	1	1	327	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	13-SD-LAYS KC-A	1	1	421	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	14-LA-LAYS KC-A	1	1	378	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	14-SA-LAYS KC-A	1	1	334	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	14-SD-LAYS KC-A	1	1	398	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	15-SA-LAYS KC-A	1	1	322	10
LAY'S KC MASTERPIECE® BBQ Flavored Potato Chips	15-SD-LAYS KC-A	1	1	512	10
LAY'S Kettle Cooked Original Potato Chips	01-LA-LAYS KT-A	1	1	130	11
LAY'S Kettle Cooked Original Potato Chips	01-SA-LAYS KT-A	1	1	220	11
LAY'S Kettle Cooked Original Potato Chips	01-SD-LAYS KT-A	1	1	317	11
LAY'S Kettle Cooked Original Potato Chips	02-LA-LAYS KT-A	1	1	282	11
LAY'S Kettle Cooked Original Potato Chips	02-SD-LAYS KT-A	1	1	194	11
LAY'S Kettle Cooked Original Potato Chips	03-SA-LAYS KT-A	1	1	248	11

BP014596

LAYS Kettle Cooked Original Potato Chips	03-SD-LAYS KT-A	1	1	281	11
LAYS Kettle Cooked Original Potato Chips	04-SA-LAYS KT-A	1	1	235	11
LAYS Kettle Cooked Original Potato Chips	04-SD-LAYS SV-A	1	1	297	11
LAYS Kettle Cooked Original Potato Chips	05-LA-LAYS KT-A	1	1	247	11
LAYS Kettle Cooked Original Potato Chips	05-SA-LAYS KT-A	1	1	259	11
LAYS Kettle Cooked Original Potato Chips	05-SD-LAYS KT-A	1	1	223	11
LAYS Kettle Cooked Original Potato Chips	06-LA-LAYS KT-A	1	1	324	11
LAYS Kettle Cooked Original Potato Chips	06-SA-LAYS KT-A	1	1	357	11
LAYS Kettle Cooked Original Potato Chips	07-LA-LAYS KT-A	1	1	175	11
LAYS Kettle Cooked Original Potato Chips	07-SA-LAYS KT-A	1	1	284	11
LAYS Kettle Cooked Original Potato Chips	07-SD-LAYS KT-A	1	1	247	11
LAYS Kettle Cooked Original Potato Chips	08-SA-LAYS KT-A	1	1	314	11
LAYS Kettle Cooked Original Potato Chips	08-SD-LAYS KT-A	1	1	185	11
LAYS Kettle Cooked Original Potato Chips	09-LA-LAYS KT-A	1	1	181	11
LAYS Kettle Cooked Original Potato Chips	09-SA-LAYS KT-A	1	1	358	11
LAYS Kettle Cooked Original Potato Chips	09-SD-LAYS KT-A	1	1	349	11
LAYS Kettle Cooked Original Potato Chips	10-LA-LAYS KT-A	1	1	180	11
LAYS Kettle Cooked Original Potato Chips	10-SA-LAYS KT-A	1	1	405	11
LAYS Kettle Cooked Original Potato Chips	10-SD-LAYS KT-A	1	1	210	11
LAYS Kettle Cooked Original Potato Chips	11-LA-LAYS KT-A	1	1	308	11
LAYS Kettle Cooked Original Potato Chips	11-SA-LAYS KT-A	1	1	387	11
LAYS Kettle Cooked Original Potato Chips	11-SD-LAYS KT-A	1	1	232	11
LAYS Kettle Cooked Original Potato Chips	12-LA-LAYS KT-A	1	1	315	11
LAYS Kettle Cooked Original Potato Chips	12-SA-LAYS KT-A	1	1	205	11
LAYS Kettle Cooked Original Potato Chips	12-SD-LAYS KT-A	1	1	262	11
LAYS Kettle Cooked Original Potato Chips	13-LA-LAYS KT-A	1	1	203	11
LAYS Kettle Cooked Original Potato Chips	13-SA-LAYS KT-A	1	1	285	11
LAYS Kettle Cooked Original Potato Chips	13-SD-LAYS KT-A	1	1	158	11
LAYS Kettle Cooked Original Potato Chips	14-SA-LAYS KT-A	1	1	158	11
LAYS Kettle Cooked Original Potato Chips	14-SD-LAYS KT-A	1	1	243	11
LAYS Kettle Cooked Original Potato Chips	15-SA-LAYS KT-A	1	1	236	11
LAYS Kettle Cooked Original Potato Chips	15-SD-LAYS KT-A	1	1	226	11
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	01-LA-LAYS SC-A	1	1	320	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	01-SA-LAYS SC-A	1	1	275	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	01-SD-LAYS SC-A	1	1	494	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	02-LA-LAYS SC-A	1	1	278	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	02-SA-LAYS SC-A	1	1	313	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	02-SD-LAYS SC-A	1	1	312	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	03-LA-LAYS SC-A	1	1	228	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	03-SA-LAYS SC-A	1	1	356	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	03-SD-LAYS SC-A	1	1	455	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	04-LA-LAYS SC-A	1	1	303	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	04-SA-LAYS SC-A	1	1	243	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	04-SD-LAYS SC-A	1	1	375	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	05-LA-LAYS SC-A	1	1	313	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	05-SA-LAYS SC-A	1	1	284	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	05-SD-LAYS SC-A	1	1	481	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	06-LA-LAYS SC-A	1	1	257	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	06-SA-LAYS SC-A	1	1	304	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	06-SD-LAYS SC-A	1	1	290	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	07-LA-LAYS SC-A	1	1	470	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	07-SA-LAYS SC-A	1	1	315	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	07-SD-LAYS SC-A	1	1	429	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	08-LA-LAYS SC-A	1	1	275	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	08-SA-LAYS SC-A	1	1	324	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	08-SD-LAYS SC-A	1	1	379	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	09-LA-LAYS SC-A	1	1	384	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	09-SA-LAYS SC-A	1	1	442	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	09-SD-LAYS SC-A	1	1	501	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	10-LA-LAYS SC-A	1	1	373	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	10-SA-LAYS SC-A	1	1	383	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	10-SD-LAYS SC-A	1	1	611	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	11-LA-LAYS SC-A	1	1	347	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	11-SA-LAYS SC-A	1	1	338	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	11-SD-LAYS SC-A	1	1	409	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	12-LA-LAYS SC-A	1	1	383	12
LAYS Sour Cream & Onion Artificially Flavored Potato Chips	12-SA-LAYS SC-A	1	1	307	12

BP014597

LAY'S Sour Cream & Onion Artificially Flavored Potato Chips	12-SD-LAYS SC-A	1	1	369	12
LAY'S Sour Cream & Onion Artificially Flavored Potato Chips	13-LA-LAYS SC-A	1	1	322	12
LAY'S Sour Cream & Onion Artificially Flavored Potato Chips	13-SA-LAYS SC-A	1	1	304	12
LAY'S Sour Cream & Onion Artificially Flavored Potato Chips	13-SD-LAYS SC-A	1	1	362	12
LAY'S Sour Cream & Onion Artificially Flavored Potato Chips	14-LA-LAYS SC-A	1	1	341	12
LAY'S Sour Cream & Onion Artificially Flavored Potato Chips	14-SA-LAYS SC-A	1	1	288	12
LAY'S Sour Cream & Onion Artificially Flavored Potato Chips	14-SD-LAYS SC-A	1	1	395	12
LAY'S Sour Cream & Onion Artificially Flavored Potato Chips	15-SA-LAYS SC-A	1	1	289	12
LAY'S Sour Cream & Onion Artificially Flavored Potato Chips	15-SD-LAYS SC-A	1	1	372	12
LAY'S STAX® Original Potato Crispe	01-LA-LAYS ST-A	2	1	875	13
LAY'S STAX® Original Potato Crispe	01-SA-LAYS ST-A	2	1	1400	13
LAY'S STAX® Original Potato Crispe	01-SD-LAYS ST-A	2	1	909	13
LAY'S STAX® Original Potato Crispe	02-SD-LAYS ST-A	2	1	1220	13
LAY'S STAX® Original Potato Crispe	03-LA-LAYS ST-A	2	1	768	13
LAY'S STAX® Original Potato Crispe	03-SA-LAYS ST-A	2	1	1110	13
LAY'S STAX® Original Potato Crispe	03-SD-LAYS ST-A	2	1	1360	13
LAY'S STAX® Original Potato Crispe	04-LA-LAYS ST-A	2	1	1200	13
LAY'S STAX® Original Potato Crispe	04-SA-LAYS ST-A	2	1	779	13
LAY'S STAX® Original Potato Crispe	04-SD-LAYS ST-A	2	1	1030	13
LAY'S STAX® Original Potato Crispe	05-LA-LAYS ST-A	2	1	1490	13
LAY'S STAX® Original Potato Crispe	05-SA-LAYS ST-A	2	1	863	13
LAY'S STAX® Original Potato Crispe	05-SD-LAYS ST-A	2	1	803	13
LAY'S STAX® Original Potato Crispe	06-LA-LAYS ST-A	2	1	1469	13
LAY'S STAX® Original Potato Crispe	06-SA-LAYS ST-A	2	1	845	13
LAY'S STAX® Original Potato Crispe	06-SD-LAYS ST-A	2	1	1180	13
LAY'S STAX® Original Potato Crispe	07-LA-LAYS ST-A	2	1	911	13
LAY'S STAX® Original Potato Crispe	07-SA-LAYS ST-A	2	1	791	13
LAY'S STAX® Original Potato Crispe	07-SD-LAYS ST-A	2	1	769	13
LAY'S STAX® Original Potato Crispe	08-LA-LAYS ST-A	2	1	1390	13
LAY'S STAX® Original Potato Crispe	08-SA-LAYS ST-A	2	1	1240	13
LAY'S STAX® Original Potato Crispe	08-SD-LAYS ST-A	2	1	911	13
LAY'S STAX® Original Potato Crispe	09-LA-LAYS ST-A	2	1	1560	13
LAY'S STAX® Original Potato Crispe	09-SA-LAYS ST-A	2	1	1030	13
LAY'S STAX® Original Potato Crispe	09-SD-LAYS ST-A	2	1	1150	13
LAY'S STAX® Original Potato Crispe	10-LA-LAYS ST-A	2	1	1290	13
LAY'S STAX® Original Potato Crispe	10-SA-LAYS ST-A	2	1	1100	13
LAY'S STAX® Original Potato Crispe	11-LA-LAYS ST-A	2	1	968	13
LAY'S STAX® Original Potato Crispe	11-SA-LAYS ST-A	2	1	1120	13
LAY'S STAX® Original Potato Crispe	11-SD-LAYS ST-A	2	1	1500	13
LAY'S STAX® Original Potato Crispe	12-LA-LAYS ST-A	2	1	1420	13
LAY'S STAX® Original Potato Crispe	12-SA-LAYS ST-A	2	1	1000	13
LAY'S STAX® Original Potato Crispe	12-SD-LAYS ST-A	2	1	777	13
LAY'S STAX® Original Potato Crispe	13-LA-LAYS ST-A	2	1	1290	13
LAY'S STAX® Original Potato Crispe	13-SA-LAYS ST-A	2	1	1940	13
LAY'S STAX® Original Potato Crispe	13-SD-LAYS ST-A	2	1	1410	13
LAY'S STAX® Original Potato Crispe	14-LA-LAYS ST-A	2	1	1360	13
LAY'S STAX® Original Potato Crispe	14-SA-LAYS ST-A	2	1	795	13
LAY'S STAX® Original Potato Crispe	14-SD-LAYS ST-A	2	1	1590	13
LAY'S STAX® Original Potato Crispe	15-SA-LAYS ST-A	2	1	1210	13
LAY'S STAX® Original Potato Crispe	15-SD-LAYS ST-A	2	1	1140	13
Miss Vickies Jalapeno Flavored Potato Chips	01-LA-MV JL-A	1	1	147	14
Miss Vickies Jalapeno Flavored Potato Chips	02-LA-MV JL-A	1	1	111	14
Miss Vickies Jalapeno Flavored Potato Chips	05-LA-MV JL-A	1	1	300	14
Miss Vickies Jalapeno Flavored Potato Chips	06-SD-MV JL-A	1	1	163	14
Miss Vickies Jalapeno Flavored Potato Chips	07-SD-MV JL-A	1	1	241	14
Miss Vickies Jalapeno Flavored Potato Chips	09-LA-MV JL-A	1	1	314	14
Miss Vickies Jalapeno Flavored Potato Chips	10-SD-MV JL-A	1	1	136	14
Miss Vickies Jalapeno Flavored Potato Chips	11-LA-MV JL-A	1	1	179	14
Miss Vickies Jalapeno Flavored Potato Chips	12-LA-MV JL-A	1	1	237	14
Miss Vickies Original Potato Chips	01-SA-MV OR-A	1	1	374	15
Miss Vickies Original Potato Chips	02-SA-MV OR-A	1	1	212	15
Miss Vickies Original Potato Chips	03-LA-MV OR-A	1	1	149	15
Miss Vickies Original Potato Chips	03-SA-MV OR-A	1	1	223	15
Miss Vickies Original Potato Chips	04-LA-MV OR-A	1	1	133	15
Miss Vickies Original Potato Chips	04-SA-MV OR-A	1	1	288	15
Miss Vickies Original Potato Chips	06-LA-MV OR-A	1	1	267	15
Miss Vickies Original Potato Chips	07-LA-MV OR-A	1	1	281	15

BP014598

Miss Vickies Original Potato Chips	07-SA-MV CR-A	1	1	213	15
Miss Vickies Original Potato Chips	08-SA-MV CR-A	1	1	223	15
Miss Vickies Original Potato Chips	10-LA-MV CR-A	1	1	234	15
Miss Vickies Original Potato Chips	11-SA-MV CR-A	1	1	154	15
Miss Vickies Original Potato Chips	12-SA-MV CR-A	1	1	142	15
Miss Vickies Original Potato Chips	13-LA-MV CR-A	1	1	156	15
Miss Vickies Original Potato Chips	13-SA-MV CR-A	1	1	203	15
RUFFLES Regular Potato Chips	01-LA-RUFF RG-A	1	1	282	22
RUFFLES Regular Potato Chips	01-SA-RUFF RG-A	1	1	247	22
RUFFLES Regular Potato Chips	01-SD-RUFF RG-A	1	1	476	22
RUFFLES Regular Potato Chips	02-LA-RUFF RG-A	1	1	229	22
RUFFLES Regular Potato Chips	02-SA-RUFF RG-A	1	1	253	22
RUFFLES Regular Potato Chips	02-SD-RUFF RG-A	1	1	382	22
RUFFLES Regular Potato Chips	03-LA-RUFF RG-A	1	1	181	22
RUFFLES Regular Potato Chips	03-SA-RUFF RG-A	1	1	234	22
RUFFLES Regular Potato Chips	03-SD-RUFF RG-A	1	1	438	22
RUFFLES Regular Potato Chips	04-LA-RUFF RG-A	1	1	232	22
RUFFLES Regular Potato Chips	04-SA-RUFF RG-A	1	1	247	22
RUFFLES Regular Potato Chips	04-SD-RUFF RG-A	1	1	592	22
RUFFLES Regular Potato Chips	05-LA-RUFF RG-A	1	1	175	22
RUFFLES Regular Potato Chips	05-SA-RUFF RG-A	1	1	252	22
RUFFLES Regular Potato Chips	05-SD-RUFF RG-A	1	1	906	22
RUFFLES Regular Potato Chips	06-LA-RUFF RG-A	1	1	272	22
RUFFLES Regular Potato Chips	06-SA-RUFF RG-A	1	1	227	22
RUFFLES Regular Potato Chips	06-SD-RUFF RG-A	1	1	432	22
RUFFLES Regular Potato Chips	07-LA-RUFF RG-A	1	1	252	22
RUFFLES Regular Potato Chips	07-SA-RUFF RG-A	1	1	302	22
RUFFLES Regular Potato Chips	07-SD-RUFF RG-A	1	1	541	22
RUFFLES Regular Potato Chips	08-LA-RUFF RG-A	1	1	327	22
RUFFLES Regular Potato Chips	08-SA-RUFF RG-A	1	1	235	22
RUFFLES Regular Potato Chips	08-SD-RUFF RG-A	1	1	469	22
RUFFLES Regular Potato Chips	09-LA-RUFF RG-A	1	1	311	22
RUFFLES Regular Potato Chips	09-SA-RUFF RG-A	1	1	355	22
RUFFLES Regular Potato Chips	09-SD-RUFF RG-A	1	1	688	22
RUFFLES Regular Potato Chips	10-LA-RUFF RG-A	1	1	284	22
RUFFLES Regular Potato Chips	10-SA-RUFF RG-A	1	1	239	22
RUFFLES Regular Potato Chips	10-SD-RUFF RG-A	1	1	312	22
RUFFLES Regular Potato Chips	11-LA-RUFF RG-A	1	1	289	22
RUFFLES Regular Potato Chips	11-SA-RUFF RG-A	1	1	250	22
RUFFLES Regular Potato Chips	11-SD-RUFF RG-A	1	1	342	22
RUFFLES Regular Potato Chips	12-LA-RUFF RG-A	1	1	282	22
RUFFLES Regular Potato Chips	12-SA-RUFF RG-A	1	1	230	22
RUFFLES Regular Potato Chips	12-SD-RUFF RG-A	1	1	379	22
RUFFLES Regular Potato Chips	13-LA-RUFF RG-A	1	1	295	22
RUFFLES Regular Potato Chips	13-SA-RUFF RG-A	1	1	282	22
RUFFLES Regular Potato Chips	13-SD-RUFF RG-A	1	1	582	22
RUFFLES Regular Potato Chips	14-LA-RUFF RG-A	1	1	304	22
RUFFLES Regular Potato Chips	14-SA-RUFF RG-A	1	1	283	22
RUFFLES Regular Potato Chips	14-SD-RUFF RG-A	1	1	898	22
RUFFLES Regular Potato Chips	15-SA-RUFF RG-A	1	1	222	22
RUFFLES Regular Potato Chips	15-SD-RUFF RG-A	1	1	858	22
Kettle Chips Lightly Salted	01-SD-KT LS-A	1	2	2090	8
Kettle Chips Lightly Salted	02-SA-KT LS-A	1	2	2100	8
Kettle Chips Lightly Salted	03-LA-KT LS-A	1	2	827	8
Kettle Chips Lightly Salted	03-SA-KT LS-A	1	2	3140	8
Kettle Chips Lightly Salted	03-SD-KT LS-A	1	2	1140	8
Kettle Chips Lightly Salted	04-LA-KT LS-A	1	2	1980	8
Kettle Chips Lightly Salted	04-SA-KT LS-A	1	2	1620	8
Kettle Chips Lightly Salted	05-LA-KT LS-A	1	2	702	8
Kettle Chips Lightly Salted	05-SA-KT LS-A	1	2	1620	8
Kettle Chips Lightly Salted	05-SD-KT LS-A	1	2	1980	8
Kettle Chips Lightly Salted	06-LA-KT LS-A	1	2	2300	8
Kettle Chips Lightly Salted	06-SA-KT LS-A	1	2	2280	8
Kettle Chips Lightly Salted	07-LA-KT LS-A	1	2	4750	8
Kettle Chips Lightly Salted	07-SD-KT LS-A	1	2	829	8
Kettle Chips Lightly Salted	08-SA-KT LS-A	1	2	1390	8
Kettle Chips Lightly Salted	08-SD-KT LS-A	1	2	2180	8

BP014599

Kettle Chips Lightly Salted	09-LA-KT LS-A	1	2	2030	6
Kettle Chips Lightly Salted	09-SD-KT LS-A	1	2	2500	6
Kettle Chips Lightly Salted	10-LA-KT LS-A	1	2	4340	6
Kettle Chips Lightly Salted	10-SA-KT LS-A	1	2	2870	6
Kettle Chips Lightly Salted	10-SD-KT LS-A	1	2	3160	6
Kettle Chips Lightly Salted	11-SA-KT LS-A	1	2	1850	6
Kettle Chips Lightly Salted	11-SD-KT LS-A	1	2	2700	6
Kettle Chips Lightly Salted	12-LA-KT LS-A	1	2	782	6
Kettle Chips Lightly Salted	12-SA-KT LS-A	1	2	1960	6
Kettle Chips Lightly Salted	12-SD-KT LS-A	1	2	2120	6
Kettle Chips Lightly Salted	13-SA-KT LS-A	1	2	2450	6
Kettle Chips Lightly Salted	13-SD-KT LS-A	1	2	2960	6
Kettle Chips Lightly Salted	14-SA-KT LS-A	1	2	2040	6
Kettle Chips Lightly Salted	14-SD-KT LS-A	1	2	1870	6
Kettle Chips Lightly Salted	15-SA-KT LS-A	1	2	1950	6
Kettle Chips Lightly Salted	15-SD-KT LS-A	1	2	2020	6
Kettle Chips New York Cheddar with Herbs	02-SA-KT NY-A	1	2	2650	7
Kettle Chips New York Cheddar with Herbs	03-LA-KT NY-A	1	2	2190	7
Kettle Chips New York Cheddar with Herbs	03-SA-KT NY-A	1	2	2100	7
Kettle Chips New York Cheddar with Herbs	03-SD-KT NY-A	1	2	2610	7
Kettle Chips New York Cheddar with Herbs	04-LA-KT NY-A	1	2	3370	7
Kettle Chips New York Cheddar with Herbs	04-SA-KT NY-A	1	2	1880	7
Kettle Chips New York Cheddar with Herbs	05-LA-KT NY-A	1	2	2960	7
Kettle Chips New York Cheddar with Herbs	05-SA-KT NY-A	1	2	2630	7
Kettle Chips New York Cheddar with Herbs	05-SD-KT NY-A	1	2	1910	7
Kettle Chips New York Cheddar with Herbs	06-LA-KT NY-A	1	2	846	7
Kettle Chips New York Cheddar with Herbs	06-SA-KT NY-A	1	2	1740	7
Kettle Chips New York Cheddar with Herbs	07-LA-KT NY-A	1	2	2540	7
Kettle Chips New York Cheddar with Herbs	07-SD-KT NY-A	1	2	2630	7
Kettle Chips New York Cheddar with Herbs	08-SA-KT NY-A	1	2	1800	7
Kettle Chips New York Cheddar with Herbs	08-SD-KT NY-A	1	2	3010	7
Kettle Chips New York Cheddar with Herbs	09-LA-KT NY-A	1	2	3790	7
Kettle Chips New York Cheddar with Herbs	09-SA-KT NY-A	1	2	2010	7
Kettle Chips New York Cheddar with Herbs	09-SD-KT NY-A	1	2	1720	7
Kettle Chips New York Cheddar with Herbs	10-LA-KT NY-A	1	2	3800	7
Kettle Chips New York Cheddar with Herbs	10-SA-KT NY-A	1	2	2640	7
Kettle Chips New York Cheddar with Herbs	10-SD-KT NY-A	1	2	2220	7
Kettle Chips New York Cheddar with Herbs	11-SA-KT NY-A	1	2	1890	7
Kettle Chips New York Cheddar with Herbs	11-SD-KT NY-A	1	2	2570	7
Kettle Chips New York Cheddar with Herbs	12-LA-KT NY-A	1	2	795	7
Kettle Chips New York Cheddar with Herbs	12-SA-KT NY-A	1	2	2490	7
Kettle Chips New York Cheddar with Herbs	12-SD-KT NY-A	1	2	2300	7
Kettle Chips New York Cheddar with Herbs	13-SA-KT NY-A	1	2	2370	7
Kettle Chips New York Cheddar with Herbs	13-SD-KT NY-A	1	2	2600	7
Kettle Chips New York Cheddar with Herbs	14-SA-KT NY-A	1	2	1980	7
Kettle Chips New York Cheddar with Herbs	15-SA-KT NY-A	1	2	2890	7
Kettle Chips Sea Salt and Vinegar	02-SA-KT SV-A	1	2	2640	8
Kettle Chips Sea Salt and Vinegar	03-LA-KT SV-A	1	2	802	8
Kettle Chips Sea Salt and Vinegar	03-SA-KT SV-A	1	2	2160	8
Kettle Chips Sea Salt and Vinegar	04-LA-KT SV-A	1	2	1040	8
Kettle Chips Sea Salt and Vinegar	04-SA-KT SV-A	1	2	1220	8
Kettle Chips Sea Salt and Vinegar	05-LA-KT SV-A	1	2	692	8
Kettle Chips Sea Salt and Vinegar	05-SA-KT SV-A	1	2	2640	8
Kettle Chips Sea Salt and Vinegar	05-SD-KT SV-A	1	2	1780	8
Kettle Chips Sea Salt and Vinegar	06-LA-KT SV-A	1	2	531	8
Kettle Chips Sea Salt and Vinegar	06-SA-KT SV-A	1	2	1780	8
Kettle Chips Sea Salt and Vinegar	08-SA-KT SV-A	1	2	1430	8
Kettle Chips Sea Salt and Vinegar	08-SD-KT SV-A	1	2	1860	8
Kettle Chips Sea Salt and Vinegar	09-LA-KT SV-A	1	2	1440	8
Kettle Chips Sea Salt and Vinegar	09-SA-KT SV-A	1	2	1700	8
Kettle Chips Sea Salt and Vinegar	09-SD-KT SV-A	1	2	1480	8
Kettle Chips Sea Salt and Vinegar	10-LA-KT SV-A	1	2	2640	8
Kettle Chips Sea Salt and Vinegar	10-SA-KT SV-A	1	2	1780	8
Kettle Chips Sea Salt and Vinegar	10-SD-KT SV-A	1	2	5130	8
Kettle Chips Sea Salt and Vinegar	11-SA-KT SV-A	1	2	1980	8
Kettle Chips Sea Salt and Vinegar	11-SD-KT SV-A	1	2	2020	8
Kettle Chips Sea Salt and Vinegar	12-LA-KT SV-A	1	2	692	8

BP014600

Kettle Chips Sea Salt and Vinegar	12-SA-KT SV-A	1	2	1660	B
Kettle Chips Sea Salt and Vinegar	13-SA-KT SV-A	1	2	1660	B
Kettle Chips Sea Salt and Vinegar	13-SD-KT SV-A	1	2	2220	B
Kettle Chips Sea Salt and Vinegar	14-SA-KT SV-A	1	2	2080	B
Kettle Chips Sea Salt and Vinegar	14-SD-KT SV-A	1	2	1890	B
Kettle Chips Sea Salt and Vinegar	15-SA-KT SV-A	1	2	1990	B
Kettle Chips Sea Salt and Vinegar	15-SD-KT SV-A	1	2	1840	B
cape cod potato chips	LNCE-8941-A-0001	1	3	179	2
cape cod potato chips	LNCE-8941-A-0002	1	3	226	2
cape cod potato chips	LNCE-8941-A-0003	1	3	221	2
cape cod potato chips	LNCE-8941-A-0004	1	3	231	2
cape cod potato chips	LNCE-8941-A-0005	1	3	248	2
cape cod potato chips	LNCE-8941-A-0006	1	3	219	2
cape cod potato chips	LNCE-8941-A-0007	1	3	212	2
cape cod potato chips	LNCE-8941-A-0008	1	3	234	2
cape cod potato chips	LNCE-8941-A-0009	1	3	229	2
cape cod potato chips	LNCE-8941-A-0010	1	3	220	2
cape cod potato chips	LNCE-8941-A-0011	1	3	183	2
cape cod potato chips	LNCE-8941-A-0012	1	3	249	2
cape cod potato chips	LNCE-8941-A-0013	1	3	213	2
cape cod potato chips	LNCE-8941-A-0014	1	3	238	2
cape cod potato chips	LNCE-8941-A-0015	1	3	214	2
cape cod potato chips	LNCE-8941-A-0016	1	3	271	2
cape cod potato chips	LNCE-8941-A-0017	1	3	456	2
cape cod potato chips	LNCE-8941-A-0018	1	3	220	2
cape cod potato chips	LNCE-8941-A-0019	1	3	231	2
cape cod potato chips	LNCE-8941-A-0020	1	3	232	2
cape cod potato chips	LNCE-8941-A-0021	1	3	194	2
cape cod potato chips	LNCE-8941-A-0022	1	3	194	2
cape cod potato chips	LNCE-8941-A-0023	1	3	191	2
cape cod potato chips	LNCE-8941-A-0024	1	3	211	2
cape cod potato chips	LNCE-8941-A-0025	1	3	266	2
cape cod potato chips	LNCE-8941-A-0026	1	3	461	2
cape cod potato chips	LNCE-8941-A-0027	1	3	224	2
cape cod potato chips	LNCE-8941-A-0028	1	3	345	2
cape cod potato chips	LNCE-8941-A-0029	1	3	204	2
cape cod potato chips	LNCE-8941-A-0030	1	3	244	2
cape cod potato chips	LNCE-8941-A-0031	1	3	234	2
cape cod potato chips	LNCE-8941-A-0032	1	3	193	2
cape cod potato chips	LNCE-8941-A-0033	1	3	304	2
cape cod potato chips	LNCE-8941-A-0034	1	3	238	2
cape cod potato chips	LNCE-8941-A-0035	1	3	212	2
cape cod potato chips	LNCE-8941-A-0036	1	3	188	2
cape cod potato chips	LNCE-8941-A-0037	1	3	223	2
cape cod potato chips	LNCE-8941-A-0038	1	3	261	2
cape cod potato chips	LNCE-8941-A-0039	1	3	195	2
cape cod potato chips	LNCE-8941-A-0040	1	3	206	2
cape cod potato chips	LNCE-8941-A-0041	1	3	204	2
cape cod potato chips	LNCE-8941-A-0042	1	3	227	2
cape cod potato chips	LNCE-8941-A-0043	1	3	217	2
cape cod potato chips	LNCE-8941-A-0044	1	3	208	2
cape cod potato chips	LNCE-8941-A-0045	1	3	288	2
cape cod potato chips	LNCE-8941-A-0046	1	3	260	2
cape cod potato chips	LNCE-8941-A-0047	1	3	232	2
cape cod potato chips	LNCE-8941-A-0048	1	3	232	2
cape cod potato chips	LNCE-8941-A-0049	1	3	286	2
cape cod potato chips	LNCE-8941-A-0050	1	3	246	2
cape cod potato chips	LNCE-8941-Y-0001	1	3	457	2
cape cod potato chips	LNCE-8941-Y-00010	1	3	323	2
cape cod potato chips	LNCE-8941-Y-00015	1	3	333	2
cape cod potato chips	LNCE-8941-Y-00023	1	3	324	2
cape cod potato chips	LNCE-8941-Y-0005	1	3	443	2
cape cod potato chips 40% reduced fat	LNCE-8083-A-0001	1	3	455	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0002	1	3	542	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0003	1	3	366	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0004	1	3	422	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0005	1	3	396	3

BP014601

cape cod potato chips 40% reduced fat	LNCE-8083-A-0006	1	3	288	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0007	1	3	303	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0008	1	3	313	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0008	1	3	331	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0010	1	3	455	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0011	1	3	334	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0012	1	3	347	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0013	1	3	380	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0014	1	3	335	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0015	1	3	433	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0016	1	3	354	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0017	1	3	299	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0018	1	3	352	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0019	1	3	500	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0020	1	3	329	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0021	1	3	320	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0022	1	3	377	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0023	1	3	288	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0024	1	3	404	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0025	1	3	306	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0026	1	3	322	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0027	1	3	479	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0028	1	3	443	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0029	1	3	464	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0030	1	3	360	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0031	1	3	493	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0032	1	3	486	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0033	1	3	373	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0034	1	3	447	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0035	1	3	358	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0036	1	3	654	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0037	1	3	382	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0038	1	3	505	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0039	1	3	319	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0040	1	3	338	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0041	1	3	439	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0042	1	3	374	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0043	1	3	367	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0044	1	3	329	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0045	1	3	369	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0046	1	3	327	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0047	1	3	424	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0048	1	3	402	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0049	1	3	445	3
cape cod potato chips 40% reduced fat	LNCE-8083-A-0050	1	3	436	3
cape cod potato chips 40% reduced fat	LNCE-8083-Y-00012	1	3	239	3
cape cod potato chips 40% reduced fat	LNCE-8083-Y-0002	1	3	264	3
cape cod potato chips 40% reduced fat	LNCE-8083-Y-00021	1	3	253	3
cape cod potato chips 40% reduced fat	LNCE-8083-Y-00025	1	3	270	3
cape cod potato chips 40% reduced fat	LNCE-8083-Y-0007	1	3	305	3
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0001	1	3	279	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0002	1	3	243	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0003	1	3	233	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0004	1	3	393	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0005	1	3	280	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0006	1	3	260	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0007	1	3	272	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0008	1	3	228	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0009	1	3	274	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0010	1	3	425	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0011	1	3	220	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0012	1	3	454	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0013	1	3	312	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0014	1	3	301	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0015	1	3	220	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0016	1	3	204	4
cape cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0017	1	3	244	4

BP014602

pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0018	1	3	223	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0019	1	3	345	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0020	1	3	298	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0021	1	3	303	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0022	1	3	204	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0023	1	3	213	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0024	1	3	220	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0025	1	3	248	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0026	1	3	223	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0027	1	3	257	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0028	1	3	231	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0029	1	3	202	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0030	1	3	185	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0031	1	3	282	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0032	1	3	203	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0033	1	3	313	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0034	1	3	160	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0035	1	3	209	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0036	1	3	206	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0037	1	3	227	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0038	1	3	236	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0039	1	3	324	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0040	1	3	319	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0041	1	3	218	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0042	1	3	258	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0043	1	3	274	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0044	1	3	234	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0045	1	3	210	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0048	1	3	256	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0047	1	3	238	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0048	1	3	248	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0049	1	3	223	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-A-0050	1	3	197	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-Y-00012	1	3	178	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-Y-00017	1	3	172	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-Y-00024	1	3	187	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-Y-00003	1	3	182	4
pepe cod potato chips jalapeno and aged cheddar	LNCE-8951-Y-00008	1	3	185	4
pepe cod potato chips robust russet	LNCE-8947-A-00001	1	3	7250	5
pepe cod potato chips robust russet	LNCE-8947-A-00002	1	3	8200	5
pepe cod potato chips robust russet	LNCE-8947-A-00003	1	3	6350	5
pepe cod potato chips robust russet	LNCE-8947-A-00004	1	3	7600	5
pepe cod potato chips robust russet	LNCE-8947-A-00005	1	3	8360	5
pepe cod potato chips robust russet	LNCE-8947-A-00006	1	3	8860	5
pepe cod potato chips robust russet	LNCE-8947-A-00007	1	3	9480	5
pepe cod potato chips robust russet	LNCE-8947-A-00008	1	3	7310	5
pepe cod potato chips robust russet	LNCE-8947-A-00009	1	3	10700	5
pepe cod potato chips robust russet	LNCE-8947-A-0010	1	3	8480	5
pepe cod potato chips robust russet	LNCE-8947-A-0011	1	3	6770	5
pepe cod potato chips robust russet	LNCE-8947-A-0012	1	3	7960	5
pepe cod potato chips robust russet	LNCE-8947-A-0013	1	3	9000	5
pepe cod potato chips robust russet	LNCE-8947-A-0014	1	3	7080	5
pepe cod potato chips robust russet	LNCE-8947-A-0015	1	3	7390	5
pepe cod potato chips robust russet	LNCE-8947-A-0016	1	3	7930	5
pepe cod potato chips robust russet	LNCE-8947-A-0017	1	3	9730	5
pepe cod potato chips robust russet	LNCE-8947-A-0018	1	3	9780	5
pepe cod potato chips robust russet	LNCE-8947-A-0019	1	3	7970	5
pepe cod potato chips robust russet	LNCE-8947-A-0020	1	3	8280	5
pepe cod potato chips robust russet	LNCE-8947-A-0021	1	3	8320	5
pepe cod potato chips robust russet	LNCE-8947-A-0022	1	3	8320	5
pepe cod potato chips robust russet	LNCE-8947-A-0023	1	3	8150	5
pepe cod potato chips robust russet	LNCE-8947-A-0024	1	3	8760	5
pepe cod potato chips robust russet	LNCE-8947-A-0025	1	3	8690	5
pepe cod potato chips robust russet	LNCE-8947-A-0026	1	3	8690	5
pepe cod potato chips robust russet	LNCE-8947-A-0027	1	3	6670	5
pepe cod potato chips robust russet	LNCE-8947-A-0028	1	3	7060	5
pepe cod potato chips robust russet	LNCE-8947-A-0029	1	3	5810	5

BP014603

cape cod potato chips robust russel	LNCE-8947-A-0030	1	3	6090	5
cape cod potato chips robust russel	LNCE-8947-A-0031	1	3	8500	5
cape cod potato chips robust russel	LNCE-8947-A-0032	1	3	7090	5
cape cod potato chips robust russel	LNCE-8947-A-0033	1	3	7830	5
cape cod potato chips robust russel	LNCE-8947-A-0034	1	3	6360	5
cape cod potato chips robust russel	LNCE-8947-A-0035	1	3	8590	5
cape cod potato chips robust russel	LNCE-8947-A-0036	1	3	4160	5
cape cod potato chips robust russel	LNCE-8947-A-0037	1	3	7830	5
cape cod potato chips robust russel	LNCE-8947-A-0038	1	3	6390	5
cape cod potato chips robust russel	LNCE-8947-A-0039	1	3	6990	5
cape cod potato chips robust russel	LNCE-8947-A-0040	1	3	5510	5
cape cod potato chips robust russel	LNCE-8947-A-0041	1	3	7650	5
cape cod potato chips robust russel	LNCE-8947-A-0042	1	3	6020	5
cape cod potato chips robust russel	LNCE-8947-A-0043	1	3	6590	5
cape cod potato chips robust russel	LNCE-8947-A-0044	1	3	8000	5
cape cod potato chips robust russel	LNCE-8947-A-0045	1	3	6040	5
cape cod potato chips robust russel	LNCE-8947-A-0046	1	3	7570	5
cape cod potato chips robust russel	LNCE-8947-A-0047	1	3	6770	5
cape cod potato chips robust russel	LNCE-8947-A-0048	1	3	7070	5
cape cod potato chips robust russel	LNCE-8947-A-0049	1	3	8490	5
cape cod potato chips robust russel	LNCE-8947-A-0050	1	3	7710	5
cape cod potato chips robust russel	LNCE-8947-Y-0001	1	3	4430	5
cape cod potato chips robust russel	LNCE-8947-Y-00011	1	3	4190	5
cape cod potato chips robust russel	LNCE-8947-Y-00016	1	3	4200	5
cape cod potato chips robust russel	LNCE-8947-Y-00021	1	3	3870	5
cape cod potato chips robust russel	LNCE-8947-Y-0008	1	3	4330	5
Pringles Original	D1-LA-PR CG-A	2	4	759	19
Pringles Original	01-SA-PR CG-A	2	4	378	19
Pringles Original	01-SD-PR CG-A	2	4	781	19
Pringles Original	02-SA-PR CG-A	2	4	996	19
Pringles Original	02-SD-PR CG-A	2	4	634	19
Pringles Original	03-LA-PR CG-A	2	4	722	19
Pringles Original	03-SA-PR CG-A	2	4	720	19
Pringles Original	03-SD-PR CG-A	2	4	919	19
Pringles Original	04-LA-PR CG-A	2	4	851	19
Pringles Original	04-SA-PR CG-A	2	4	875	19
Pringles Original	05-LA-PR CG-A	2	4	813	19
Pringles Original	05-SA-PR CG-A	2	4	834	19
Pringles Original	05-SD-PR CG-A	2	4	836	19
Pringles Original	06-LA-PR CG-A	2	4	996	19
Pringles Original	06-SA-PR CG-A	2	4	1040	19
Pringles Original	06-SD-PR CG-A	2	4	869	19
Pringles Original	07-LA-PR CG-A	2	4	873	19
Pringles Original	07-SA-PR CG-A	2	4	1790	19
Pringles Original	07-SD-PR CG-A	2	4	738	19
Pringles Original	08-LA-PR CG-A	2	4	867	19
Pringles Original	08-SA-PR CG-A	2	4	791	19
Pringles Original	08-SD-PR CG-A	2	4	1040	19
Pringles Original	09-LA-PR CG-A	2	4	1230	19
Pringles Original	09-SA-PR CG-A	2	4	948	19
Pringles Original	10-LA-PR CG-A	2	4	1060	19
Pringles Original	10-SA-PR CG-A	2	4	792	19
Pringles Original	10-SD-PR CG-A	2	4	1180	19
Pringles Original	11-LA-PR CG-A	2	4	935	19
Pringles Original	11-SA-PR CG-A	2	4	820	19
Pringles Original	11-SD-PR CG-A	2	4	1040	19
Pringles Original	12-LA-PR CG-A	2	4	1750	19
Pringles Original	12-SA-PR CG-A	2	4	609	19
Pringles Original	12-SD-PR CG-A	2	4	1300	19
Pringles Original	13-LA-PR CG-A	2	4	752	19
Pringles Original	13-SA-PR CG-A	2	4	1720	19
Pringles Original	14-LA-PR CG-A	2	4	1230	19
Pringles Original	14-SA-PR CG-A	2	4	1060	19
Pringles Original	14-SD-PR CG-A	2	4	1040	19
Pringles Original	15-SA-PR CG-A	2	4	996	19
Pringles Original	16-SD-PR CG-A	2	4	1000	19
Pringles Pizza	01-SA-PR PZ-A	2	4	849	20

BP014604

Pringles Pizza	01-SD-PR PZ-A	2	4	1790	20
Pringles Pizza	02-SA-PR PZ-A	2	4	958	20
Pringles Pizza	02-SD-PR PZ-A	2	4	858	20
Pringles Pizza	03-LA-PR PZ-A	2	4	518	20
Pringles Pizza	03-SA-PR PZ-A	2	4	913	20
Pringles Pizza	03-SD-PR PZ-A	2	4	948	20
Pringles Pizza	04-LA-PR PZ-A	2	4	993	20
Pringles Pizza	04-SA-PR PZ-A	2	4	1030	20
Pringles Pizza	04-SD-PR PZ-A	2	4	917	20
Pringles Pizza	05-SA-PR PZ-A	2	4	1160	20
Pringles Pizza	05-SD-PR PZ-A	2	4	825	20
Pringles Pizza	06-SA-PR PZ-A	2	4	1160	20
Pringles Pizza	07-SA-PR PZ-A	2	4	981	20
Pringles Pizza	07-SD-PR PZ-A	2	4	999	20
Pringles Pizza	08-SA-PR PZ-A	2	4	1080	20
Pringles Pizza	08-SD-PR PZ-A	2	4	1110	20
Pringles Pizza	08-LA-PR PZ-A	2	4	1900	20
Pringles Pizza	09-SA-PR PZ-A	2	4	1480	20
Pringles Pizza	10-LA-PR PZ-A	2	4	1080	20
Pringles Pizza	10-SA-PR PZ-A	2	4	1270	20
Pringles Pizza	10-SD-PR PZ-A	2	4	918	20
Pringles Pizza	11-LA-PR PZ-A	2	4	1080	20
Pringles Pizza	11-SA-PR PZ-A	2	4	1130	20
Pringles Pizza	11-SD-PR PZ-A	2	4	1020	20
Pringles Pizza	12-LA-PR PZ-A	2	4	1400	20
Pringles Pizza	12-SA-PR PZ-A	2	4	883	20
Pringles Pizza	13-LA-PR PZ-A	2	4	806	20
Pringles Pizza	13-SA-PR PZ-A	2	4	978	20
Pringles Pizza	14-LA-PR PZ-A	2	4	1150	20
Pringles Pizza	14-SA-PR PZ-A	2	4	1170	20
Pringles Pizza	15-SA-PR PZ-A	2	4	830	20
Pringles Pizza	15-SD-PR PZ-A	2	4	981	20
Pringles Pizza	01-LA-PR SC-A	2	4	1380	21
Pringles Sour Cream and Onion	01-SA-PR SC-A	2	4	1190	21
Pringles Sour Cream and Onion	01-SD-PR SC-A	2	4	580	21
Pringles Sour Cream and Onion	02-SA-PR SC-A	2	4	1180	21
Pringles Sour Cream and Onion	02-SD-PR SC-A	2	4	1050	21
Pringles Sour Cream and Onion	03-LA-PR SC-A	2	4	826	21
Pringles Sour Cream and Onion	03-SA-PR SC-A	2	4	513	21
Pringles Sour Cream and Onion	03-SD-PR SC-A	2	4	953	21
Pringles Sour Cream and Onion	04-LA-PR SC-A	2	4	1280	21
Pringles Sour Cream and Onion	04-SA-PR SC-A	2	4	597	21
Pringles Sour Cream and Onion	04-SD-PR SC-A	2	4	910	21
Pringles Sour Cream and Onion	05-LA-PR SC-A	2	4	858	21
Pringles Sour Cream and Onion	05-SA-PR SC-A	2	4	981	21
Pringles Sour Cream and Onion	05-SD-PR SC-A	2	4	864	21
Pringles Sour Cream and Onion	06-LA-PR SC-A	2	4	822	21
Pringles Sour Cream and Onion	06-SA-PR SC-A	2	4	905	21
Pringles Sour Cream and Onion	06-SD-PR SC-A	2	4	765	21
Pringles Sour Cream and Onion	07-LA-PR SC-A	2	4	585	21
Pringles Sour Cream and Onion	07-SA-PR SC-A	2	4	1050	21
Pringles Sour Cream and Onion	07-SD-PR SC-A	2	4	763	21
Pringles Sour Cream and Onion	08-LA-PR SC-A	2	4	647	21
Pringles Sour Cream and Onion	08-SA-PR SC-A	2	4	599	21
Pringles Sour Cream and Onion	08-SD-PR SC-A	2	4	578	21
Pringles Sour Cream and Onion	09-LA-PR SC-A	2	4	1100	21
Pringles Sour Cream and Onion	09-SA-PR SC-A	2	4	507	21
Pringles Sour Cream and Onion	09-SD-PR SC-A	2	4	843	21
Pringles Sour Cream and Onion	10-LA-PR SC-A	2	4	658	21
Pringles Sour Cream and Onion	10-SA-PR SC-A	2	4	823	21
Pringles Sour Cream and Onion	10-SD-PR SC-A	2	4	877	21
Pringles Sour Cream and Onion	11-LA-PR SC-A	2	4	480	21
Pringles Sour Cream and Onion	11-SA-PR SC-A	2	4	720	21
Pringles Sour Cream and Onion	11-SD-PR SC-A	2	4	1050	21
Pringles Sour Cream and Onion	12-LA-PR SC-A	2	4	1140	21
Pringles Sour Cream and Onion	12-SA-PR SC-A	2	4	682	21
Pringles Sour Cream and Onion	12-SD-PR SC-A	2	4	650	21

BP014605

Pringles Sour Cream and Onion	13-LA-PR SC-A	2	4	805	21
Pringles Sour Cream and Onion	13-SA-PR SC-A	2	4	1070	21
Pringles Sour Cream and Onion	13-SD-PR SC-A	2	4	877	21
Pringles Sour Cream and Onion	14-LA-PR SC-A	2	4	1040	21
Pringles Sour Cream and Onion	14-SA-PR SC-A	2	4	1080	21
Pringles Sour Cream and Onion	14-SD-PR SC-A	2	4	725	21
Pringles Sour Cream and Onion	15-SA-PR SC-A	2	4	759	21
Pringles Sour Cream and Onion	15-SD-PR SC-A	2	4	583	21

BP014606

Exhibit C

(For use if Settling Defendant provides sign warnings pursuant to Paragraph 3.3)

**THIS COMMUNICATION APPLIES ONLY TO
RETAIL LOCATIONS IN CALIFORNIA**

Frito-Lay, Inc. has entered into a consent judgment with the Attorney General for the State of California regarding the presence of acrylamide in [Potato Crisp Products and/or Potato Chip Products] sold by retailers at retail locations in California.

Under the terms of this consent judgment, Frito-Lay, Inc. is providing the enclosed sign warnings to retailers to be posted in retail stores selling any of the [Potato Crisp Products and/or Potato Chip Products] identified below in California. In the consent judgment, Frito-Lay, Inc. obtained a conditional release on your behalf. For the release to continue to be effective after the date of this letter, you need to comply with the directions in this communication.

We request that you post these signs on your shelf(ves) or in your aisle(s) where the identified products are sold. For stores less with than 7,500 square feet of retail space and no more than two cash registers, the sign may be placed at each cash register instead of on the shelf(ves) or in the aisle(s).

Please sign and return the written acknowledgement below to acknowledge that you have received the signs and that they will be posted in accordance with these specifications until you receive written instruction from Frito-Lay, Inc. to the contrary.

Thank you for your cooperation. If you need more signs or have any questions, such as the appropriate sign locations for your specific retail store(s), please contact _____.

Acknowledged by:

(Signature)
(Print Name)
(Company/Store Location)
(Date)

List of Products

Exhibit D

(For use if Settling Defendant provides sign warnings pursuant to Paragraph 3.3)

**THIS COMMUNICATION APPLIES ONLY TO
RETAIL LOCATIONS IN CALIFORNIA**

On [Date], Frito-Lay, Inc. sent you a letter enclosing sign warnings for posting in your store(s) in California pursuant to a consent judgment entered into between Frito-Lay, Inc. and the Attorney General for the State of California regarding the presence of acrylamide in [Potato Crisp Products and/or Potato Chip Products] sold by retailers at retail locations in California.

These signs are to be posted on your shelf(ves) or in your aisle(s) where any of the [Potato Crisp Products and/or Potato Chip Products] identified below are sold in your stores in California. For stores with less than 7,500 square feet of retail space and no more than two cash registers, the sign may be placed at each cash register instead of on the shelf(ves) or in the aisle(s).

As stated in our prior letter, Frito-Lay, Inc. obtained a conditional release in the consent judgment on your behalf. For the release to be effective after the date of the prior letter, you need to comply with the directions in this communication.

We have not received your written acknowledgement that you have received the signs and that your store(s) will post these signs. Please sign and return the written acknowledgement below to acknowledge that you have received the signs and that they will be posted in accordance with these specifications until you receive written instruction from Frito-Lay, Inc. to the contrary.

Thank you for your cooperation. If you need more signs or have any questions, such as the appropriate sign locations for your specific retail store(s), please contact _____.

Acknowledged by:

(Signature)
(Print Name)
(Company/Store Location)
(Date)

List of Products

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EXHIBIT H

1 KAMALA D. HARRIS
 Attorney General of California
 2 LAURA J. ZUCKERMAN
 Deputy Attorney General
 State Bar No. 161896
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 Deputy Attorney General
 State Bar No. 197054
 6 1515 Clay Street, 20th Floor
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 7 Oakland, CA 94612-0550
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 8 Fax: (510) 622-2270
 9 E-mail: Laura.Zuckerman@doj.ca.gov

**ENDORSED
 FILED
 ALAMEDA COUNTY**

AUG 31 2011

K. McCoy, Exec. Off./Clerk

*Attorneys for People of the State of California
 ex rel. Kamala D. Harris, Attorney General of the
 State of California*

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
 FOR THE COUNTY OF ALAMEDA**

15 PEOPLE OF THE STATE OF CALIFORNIA
 16 *ex rel.* KAMALA D. HARRIS, ATTORNEY
 GENERAL OF THE STATE OF
 17 CALIFORNIA,

18 Plaintiff,

19 v.

20 SNYDER'S OF HANOVER, INC., BIRDS
 EYE FOODS, INC., CORAZONAS FOOD,
 21 INC., FRITO-LAY, INC., GRUMA
 CORPORATION, H.J. HEINZ COMPANY,
 22 L.P., KETTLE FOODS, INC., LANCE, INC.,
 RESERVE BRANDS, INC., SNAK KING
 23 CORPORATION, and DOES 1 through 100,

24 Defendants.

CASE NO.: RG 09455286

ASSIGNED FOR ALL PURPOSES TO:

JUDGE: Hon. Steven A. Brick
 DEPT: 17

~~PROPOSED~~ CONSENT JUDGMENT
 AS TO DEFENDANT SNAK KING
 CORPORATION

Date: August 31, 2011
 Time: 3:00 p.m.
 Dept: 17
 Judge: Honorable Steven A. Brick

Reservation No.: R-1205019

Trial Date: None set.
 Action Filed: June 1, 2009

1 **1. INTRODUCTION**

2 1.1. On June 1, 2009, the People of the State of California *ex rel.* the Attorney
3 General of the State of California (the “People” or the “Attorney General”) filed a
4 ~~complaint for civil penalties and injunctive relief for violations of Proposition 65 and~~
5 unlawful business practices in the Superior Court for the County of Alameda. The People’s
6 Complaint alleges that the Defendants failed to provide clear and reasonable warnings that
7 ingestion of the products identified in the Complaint would result in exposure to
8 acrylamide, a chemical known to the State of California to cause cancer, in violation of the
9 Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section
10 25249.6 et seq., also known as “Proposition 65.” The Complaint also alleges that these acts
11 constitute unlawful acts in violation of the Unfair Competition Law, pursuant to Business
12 and Professions Code sections 17200 et seq.

13 1.2. Snak King Corporation (“Settling Defendant”) is among the Defendants
14 named in the Complaint. Settling Defendant has generally denied all material allegations of
15 the Complaint, and has asserted numerous affirmative defenses. Without limiting any other
16 denials, Settling Defendant specifically denies that any of its products requires a Proposition
17 65 warning or otherwise causes harm to any person. Both the People and Settling
18 Defendant shall be referred to as a “Party” to this Consent Judgment, and collectively they
19 shall be referred to herein as the “Parties” to this Consent Judgment.

20 1.3. Settling Defendant is a Delaware corporation that employs more than ten
21 employees, and has employed more than ten employees at times relevant to the allegations
22 of the Complaint, and that manufactures, distributes and/or sells products in the State of
23 California and has done so in the past.

24 1.4. Covered Products.

25 (a) The products covered by this Consent Judgment are those snack food products
26 manufactured and/or sold by Settling Defendant or its Affiliates (as defined in Paragraph 8)
27 that are identified in the attached Exhibit A (hereinafter, “Covered Products”).
28

1 (b) Settling Defendant will submit to the Office of the Attorney General, prior to
2 the Effective Date, information about all of the Covered Products identified as private label
3 products on Exhibit A, including, but not limited to, brand names and customers, which
4 ~~Settling Defendant deems to be confidential, proprietary, or trade secret information.~~ This
5 information, as updated from time to time, is referred to herein as “Confidential Private
6 Label Information.” Settling Defendant shall provide to the Attorney General updates to the
7 Confidential Private Label Information at least annually by January 31 of each year until
8 such time that Settling Defendant no longer has a duty under this Consent Judgment to test
9 the Covered Products. Products that Settling Defendant identifies in the most recent
10 Confidential Private Label Information submitted to the Attorney General each year as
11 corresponding to the private label products listed on Exhibit A shall be Covered Products
12 for the purposes of this Consent Judgment.

13 (c) All Confidential Private Label Information provided to the Attorney General,
14 whether before or after the Effective Date, is deemed to be Protected Information under the
15 Protective Order entered in this case on March 12, 2010 (“Protective Order”). For the
16 purposes of this Consent Judgment, all elements of the Protective Order shall apply to
17 Confidential Private Label Information, except that (a) Paragraphs 6, 7, 9, 16, and 17 of the
18 Protective Order do not apply to Confidential Private Label Information; and (b)
19 Confidential Private Label Information need not be consecutively Bates-numbered. Further,
20 to the extent the Court modifies the Protective Order upon motion by any party to this
21 action in accordance with Paragraph 18 of the Protective Order, such modification shall not
22 apply to the application of the Protective Order to this Consent Judgment without the
23 written consent of Settling Defendant.

24 (d) The Attorney General acknowledges that the Confidential Private Label
25 Information is deemed by Snak King to be, among other things, proprietary and trade secret
26 information that should be exempt from disclosure under the California Public Records Act
27 (Gov’t Code, §§ 6250 et seq.) or other applicable public record or freedom of information
28 law and that should be protected by the privilege set forth in Evidence Code § 1060 to the

1 fullest extent possible. Notwithstanding anything herein or in the Protective Order to the
2 contrary, (1) the People shall disclose Confidential Private Label Information if requested to
3 do so by Settling Defendant, and (2) the People shall return to Settling Defendant or destroy
4 ~~all Confidential Private Label Information submitted within four years after the Target~~
5 Level has been achieved, or five years from the Effective Date, whichever is later.

6 (e) After the Effective Date, should Settling Defendant introduce for sale to
7 consumers in California a processed snack food product not described in Exhibit A and
8 desire to incorporate such product(s) into this consent judgment, then Settling Defendant
9 shall give notice of such new product(s) ("New Product") to the Attorney General in the
10 form of a revised version of Exhibit A, in addition to providing any information necessary
11 to identify private label products. Should the Attorney General object to such notice within
12 45 days following receipt of such notice, then the Parties shall proceed in accordance with
13 Paragraph 5.1; otherwise, this Consent Judgment shall be deemed to be modified to include
14 such product as a Covered Product. Among other factors that may be considered by the
15 Attorney General when determining if an objection is warranted are acrylamide
16 concentrations in the proposed New Product(s), the product Group appropriate for the New
17 Product(s), and the effect incorporation of the New Product(s) will have on averaging or
18 sales-weighting allocations used to determine achievement of the Target Level.

19 1.5. For purposes of this Consent Judgment only, the People and Settling
20 Defendant stipulate that this Court has jurisdiction over the allegations of violations
21 contained in the People's Complaint and personal jurisdiction over Settling Defendant as to
22 the acts alleged in the People's Complaint, that venue is proper in the County of Alameda,
23 and that this Court has jurisdiction to enter this Consent Judgment as a full and final
24 resolution of all claims which were or could have been raised in the Complaint based on the
25 facts alleged therein.

26 1.6. The People and Settling Defendant stipulate to the entry of this Consent
27 Judgment as a full and final settlement of all claims that were raised, or could have been
28 raised, in the Complaint (except as specified in Paragraph 8 herein) arising out of the facts

1 or conduct alleged therein. Except as expressly set forth herein, nothing in this Consent
2 Judgment shall prejudice, waive or impair any right, remedy, or defense the Attorney
3 General or Settling Defendant may have in any other or in future legal proceedings
4 ~~unrelated to these proceedings. However, this paragraph shall not diminish or otherwise~~
5 affect the obligations, responsibilities, and duties of the Parties under this Consent
6 Judgment.

7 1.7. By stipulating to the entry of this Consent Judgment and agreeing to provide
8 the relief and remedies specified herein, Settling Defendant does not admit (a) that it has
9 violated, or threatened to violate, Proposition 65 or Business and Professions Code sections
10 17200 et seq., or any other law or legal duty; or (b) that the chemical acrylamide in food
11 poses any risk to human health. The Parties recognize that acrylamide is naturally formed
12 when certain foods, such as the snack food products at issue in this case, are heated, and that
13 levels of acrylamide formation are due to a variety of factors, including (among others)
14 heating time and temperature.

15 1.8. The Effective Date of this Consent Judgment shall be the date on which this
16 Consent Judgment is entered as a judgment by this Court, except that the confidentiality
17 provisions of Paragraphs 1.4(c) and (d) and 2.3(e) will go into effect on execution by the
18 Parties of the Stipulation for Entry of this [Proposed] Consent Judgment.

19 **2. INJUNCTIVE RELIEF: ACRYLAMIDE REDUCTION**

20 2.1. *Target Level and Compliance Date.*

21 Settling Defendant shall reduce the level of acrylamide in its Covered Products
22 shipped for sale in California after August 31, 2011 (the "Compliance Date") to 281 parts
23 per billion, calculated pursuant to the protocol described in Paragraph 2.3 (the "Target
24 Level"), or be subject to the provisions of Paragraph 3. In the interim, Settling Defendant
25 shall continue its program of research, development, and implementation of technologies
26 and methods intended to reduce the presence of acrylamide in the Covered Products shipped
27 for sale in California. Settling Defendant shall endeavor in good faith, using commercially
28 and technologically reasonable efforts, to achieve the Target Level in the Covered Products

1 shipped for sale in California by the Compliance Date.

2 2.2. "Shipped for sale in California" means Covered Products that Settling
3 Defendant either directly ships into California for sale in California or that it sells to a
4 distributor who Settling Defendant knows will sell the Covered Products to consumers in
5 California. Where a retailer or distributor sells products both in California and other states,
6 Settling Defendant shall take commercially reasonable steps to ensure that, after the Target
7 Level has been reached, the only Covered Products that are sold in California are either (i)
8 Covered Products for which Settling Defendant has complied with Paragraph 2; or (ii)
9 Covered Products for which Settling Defendant has complied with Paragraph 3.

10 2.3. *Standard and Verification.*

11 (a) Testing for acrylamide shall be performed using either GC/MS (Gas
12 Chromatrography/Mass Spectrometry), LC-MS/MS (Liquid Chromatograph-Mass
13 Spectrometry/Mass Spectrometry), or any other testing method agreed upon by the Parties
14 to this Consent Judgment.

15 (b) For each Type identified within each Group in Exhibit A, Settling Defendant
16 shall collect at least five (5) random samples. The samples within a Type shall be collected
17 over no less than a ten-day period. Each sample shall be from a unique stock keeping unit
18 ("SKU"). If a Type has fewer than five (5) SKUs, each SKU within that Type shall be
19 sampled at least once. In any event, if Settling Defendant produces fewer than five (5)
20 SKUs in a particular Type during the period of time Settling Defendant has chosen to
21 conduct such sampling (which period must be at least 60 days long), then each SKU in that
22 Type produced during such period shall be sampled at least once. Further, for each Type,
23 the sampling requirements set forth above shall apply to each location that supplies that
24 Type of Covered Product to California.

25 (c) To comply with the Target Level, testing conducted in accordance with the
26 protocol set forth in Paragraph 2.3(a) of samples selected in accordance with the protocol
27 set forth in Paragraph 2.3(b) must establish both of the following:

28 (1) The sales-weighted arithmetic mean of acrylamide levels for the

1 Covered Products (“Sales-Weighted Arithmetic Mean Concentration”) is at or below 281
2 parts per billion with a 95% confidence level, i.e., $p < 0.05$. The Sales-Weighted Arithmetic
3 Mean Concentration is to be calculated using the following formula: Multiply the
4 ~~arithmetic mean acrylamide concentration of each Group (as set forth in Exhibit A) shipped~~
5 for sale in California by that Group’s fraction of total sales volume (net of returns) for all
6 Groups of Covered Products shipped for sale in California, and thereafter sum all such
7 adjusted concentrations for all Groups to be shipped for sale in California. For purposes of
8 this Paragraph, a Group’s arithmetic mean acrylamide concentration is to be determined by
9 summing the mean acrylamide concentration of each Type of product within the Group and
10 dividing the sum by the number of Types of products in the Group for which a sample has
11 been collected.

12 (2) The arithmetic mean acrylamide concentration in each Group of
13 Covered Products (as set forth in Exhibit A) is no more than 25% higher than 281 parts per
14 billion with a 95% confidence level, i.e., $p < 0.05$. For purposes of this Paragraph, a Group’s
15 arithmetic mean acrylamide concentration is to be determined by summing the mean
16 acrylamide concentration of each Type of product within the Group and dividing the sum by
17 the number of Types of products in the Group for which a sample has been collected.

18 (d) The sales volume of Covered Products in California for each Group and all
19 Groups, as shown in attached Exhibit A, shall be calculated as follows: (1) For a customer
20 with stores in California and other states, actual sales may be provided by the customer or,
21 if the customer does not provide such information to Settling Defendant, an estimate of
22 sales shall be calculated on the basis of publicly-available information by multiplying the
23 total sales to the customer by the ratio of the number of the customer’s retail outlets in
24 California compared with the total number in the United States. (2) For a retail or
25 distribution customer selling only in California, the sales shall be the total sales to such
26 customer. (3) For a distribution customer with distribution in California and other states,
27 estimated sales shall be calculated by multiplying the total sales to the customer by the ratio
28 of the customer’s distribution volume of Covered Products in California compared with its

1 total distribution volume of Covered Products in the United States; provided that Settling
2 Defendant shall use commercially reasonable efforts to obtain such information from each
3 distribution customer, and to the extent any distribution customer does not provide such
4 information to Settling Defendant, then California sales to that distribution customer shall
5 be estimated by applying the average 'California to national sales ratio' established for
6 Settling Defendant's sales of Covered Products to its other distribution customers that have
7 provided such information. The total California sales volume of Covered Products shall be
8 an aggregate of the sales of each of the 3 categories as calculated above in this Paragraph
9 2.3(d).

10 (e) All test results of acrylamide concentrations (without identifying private label
11 customers), once provided to the Attorney General, shall be public documents, but nothing
12 in this Consent Judgment shall preclude Settling Defendant from claiming business
13 confidentiality as to, and designating as Protected Information, sales volume (including
14 fractions of total sales volume accounted for by each Group), revenue, or profits
15 (collectively, "Business Confidential Information"). For the purposes of this Consent
16 Judgment, all elements of the Protective Order shall apply to Business Confidential
17 Information that is designated Protected Information, except that (a) Paragraphs 6, 7, 9, 16,
18 and 17 of the Protective Order do not apply to Business Confidential Information; and (b)
19 Business Confidential Information need not be consecutively Bates-numbered. The
20 Attorney General acknowledges that the Business Confidential Information, whether
21 submitted to the Attorney General before or after the Effective Date, is deemed by Snak
22 King to be, among other things, both Protected Information and proprietary and trade secret
23 information that should be exempt from disclosure under the California Public Records Act
24 (Gov't Code, §§ 6250 et seq.) or other applicable public record or freedom of information
25 law and that should be protected by the privilege set forth in Evidence Code § 1060 to the
26 fullest extent possible. Notwithstanding anything to the contrary herein or in the Protective
27 Order, at any time after four years after the Target Level has been achieved, or five years
28 from the Effective Date, whichever is later, upon Snak King's request, the People shall

1 return to Settling Defendant or destroy all Business Confidential Information Snak King has
2 submitted.

3 (f) If Settling Defendant's test results demonstrate that the Target Level has been
4 ~~achieved on or before the Compliance Date for the Covered Products shipped for sale in~~
5 California, then, on or before September 30, 2011, it shall provide the Attorney General
6 with written notice of compliance, including the calculation required to demonstrate
7 achievement of the Target Level, and test results (provided separately from any sales or
8 revenue data or related calculations, or identification of "private label" retailers).

9 Thereafter, Settling Defendant shall be required to test the Covered Products according to
10 the protocol described in this Paragraph 2.3 on two additional occasions only – once during
11 the first year and once during the second year after the Target Level has been achieved,
12 provided there is at least a nine-month interval between these two testing occasions. If
13 those additional tests confirm that the Target Level has been achieved for all of the Covered
14 Products shipped for sale in California, as determined by the protocol set forth in this
15 Paragraph 2.3, then Settling Defendant shall have no further duty to test the Covered
16 Products.

17 (g) If Settling Defendant has not achieved the Target Level by the Compliance
18 Date (including any extensions provided under Paragraph 2.4) for all of the Covered
19 Products shipped for sale in California, it shall provide warnings for the Covered Products
20 shipped for sale in California as provided herein in Paragraph 3. Settling Defendant may
21 continue testing of the Covered Products until tests demonstrate that the Target Level has
22 been achieved for all of the Covered Products shipped for sale in California, at which time,
23 upon providing the Attorney General with written notice of compliance, including the
24 calculation required to demonstrate achievement of the Target Level, and test results
25 (provided separately from any sales or revenue data or related calculations), Settling
26 Defendant shall have no further duty to warn.

27 (h) After Settling Defendant has demonstrated that the Target Level has been
28 achieved, if the Attorney General believes that the Target Level has not been achieved, the

1 Parties shall meet and confer. If, after such meet and confer, the Attorney General
2 continues to believe that the Target Level has not been achieved, the Attorney General may
3 apply to the Court for enforcement of this Consent Judgment based on results of the
4 ~~Attorney General's own testing showing that the Target Level has not been achieved. Any~~
5 data used by the Attorney General for this purpose must be the result of testing and analysis
6 performed by methods consistent with Paragraph 2.3(a) and include as many samples of
7 each Covered Product as are required by Paragraph 2.3(b). A prima facie showing of
8 violation based on such test results may be rebutted by a showing of achievement of the
9 Target Level made in compliance with all aspects of the testing and sampling protocol
10 under Paragraph 2.3.

11 2.4. *Extension of Compliance Date.* Settling Defendant may request a grace
12 period extending the Compliance Date by a period of up to three (3) months by notifying
13 the Attorney General at least ninety (90) days before the Compliance Date. The Attorney
14 General will consider the extension for good cause shown based on Settling Defendant's
15 diligence in reducing acrylamide levels in Covered Products as well as reported progress at
16 the time of the requested extension. If the Attorney General denies the extension, Settling
17 Defendant may apply to the Court to extend the Compliance Date and the Court may grant
18 the requested extension, upon timely application, for good cause shown based on Settling
19 Defendant's diligence and good faith efforts to reduce acrylamide in Covered Products as
20 well as reported progress at the time the request for extension is considered.

21 2.5. *Technology Licensing.*

22 The requirements in this Consent Judgment are not contingent upon the use of any
23 particular method to achieve the Target Level, but Settling Defendant shall license any
24 patented technology owned by Settling Defendant used to meet the Target Level, whether
25 existing or in the future, to others for use in other food products, at a commercially
26 reasonable price and using other commercially reasonable terms.

27 **3. INJUNCTIVE RELIEF: CLEAR AND REASONABLE WARNINGS**

28 3.1. If Settling Defendant does not achieve the Target Level by the Compliance

1 Date (including any extensions provided under Paragraph 2.4), Settling Defendant shall,
2 within 30 days and until such time as it achieves the Target Level:

3 (a) provide warnings by placing a warning label as described in Paragraph 3.2 (or
4 ~~Paragraph 3.4, if applicable) on the package of all Covered Products shipped for sale in~~
5 California that Settling Defendant would need to exclude from the calculations in Paragraph
6 2.3(c) in order to achieve the Target Level; or, at Settling Defendant's option,

7 (b) provide warnings by providing signs as described in Paragraph 3.3 (or
8 Paragraph 3.4, if applicable) for all Covered Products shipped for sale in California that
9 Settling Defendant would need to exclude from the calculations in Paragraph 2.3(c) in order
10 to achieve the Target Level; or, at Settling Defendant's option,

11 (c) cease selling such Covered Product(s) shipped for sale in California that
12 Settling Defendant would need to exclude from the calculations in Paragraph 2.3(c) in order
13 to achieve the Target Level.

14 3.2. *Label Warnings.* A label warning placed on the package of a Covered
15 Product pursuant to Paragraph 3.1(a) shall either (a) conform to the requirements for the
16 "safe harbor" warning methods set out in Cal. Code Regs., tit. 27, sections 25601 et seq.,
17 and, at Settling Defendant's option, may also state that acrylamide is the chemical in
18 question; or (b) provide substantially the same information as set forth for sign warnings in
19 Paragraph 3.3(b).

20 3.3. *Sign Warnings.*

21 (a) *Form of Sign.* A warning sign shall be rectangular and at least 36 square
22 inches in size, with the word "WARNING" centered one-half of an inch from the top of the
23 sign in ITC Garamond bold condensed type face all in one-half inch capital letters. The
24 body of the warning message shall be in ITC Garamond bold condensed type face. For the
25 body of the warning message, left and right margins of at least one-half of an inch, and a
26 bottom margin of at least one-half inch shall be observed. Larger signs shall bear
27 substantially the same proportions of type size and spacing to sign dimension as a sign that
28 is 36 square inches in size.

1 (b) *Text of Sign.* Unless modified by agreement of the Parties to this Consent
2 Judgment, or as provided in Paragraph 3.4, the sign shall contain the following text (text in
3 brackets is optional):

4 **WARNING**

5 This product contains acrylamide, a chemical known to the State of California to
6 cause cancer [and reproductive toxicity¹]. Acrylamide is not added to this food, but
7 is created when this food and certain other foods, such as French fries, chips and
8 crisps, crackers, and cookies, are cooked at high temperatures. The FDA has not
9 advised people to stop eating these snack food products or any other foods
containing acrylamide as a result of cooking. For more information, see the FDA's
website at www.fda.gov.

10 (c) *Placement of Sign.* To the extent that Settling Defendant is required to
11 provide a warning under this Consent Judgment and chooses to do so by providing signs, it
12 shall instruct retailers that the sign shall be posted as follows: on the shelf(ves) or in the
13 aisle(s) where the Covered Products for which the warning is being provided are sold;
14 unless the store has less than 7,500 square feet of retail space and no more than two cash
15 registers, in which case it may be placed at each cash register. In addition, if the store
16 operates a customer service desk or similar central facility, the sign shall also be posted at
17 that location.

18 (d) *Distribution.* Settling Defendant (or its agent) shall provide signs to retailers
19 who operate retail locations in California that are collectively responsible for at least 70
20 percent of Settling Defendant's sales in the State of California of Covered Products for
21 which the warning is being provided. Signs shall be provided with a letter substantially as
22 provided in Exhibit B, in which posting instructions are provided. The letter shall request
23 that the receiving retailer provide Settling Defendant a written acknowledgment that the
24 sign will be posted. Settling Defendant shall send a follow up letter substantially as
25 provided in Exhibit C to the same retailers who were sent the original letter and who did not

26 _____
27 ¹ The language in brackets must be added if the Covered Product(s) contain
28 acrylamide in levels exceeding the Maximum Allowable Dose Level.

1 send any acknowledgment. Settling Defendant (or its agent) shall maintain files
2 demonstrating compliance with this provision, including the letters sent and receipts of any
3 acknowledgments from retailers, which shall be provided to the Attorney General on
4 written request.

5 (e) *Effect of Prior or Subsequent Signage.* To the extent that Settling Defendant
6 is required to provide a warning under this Consent Judgment and chooses to provide signs,
7 but warning signs are in place as a result of obligations of parties other than Settling
8 Defendant, Settling Defendant may rely on such prior signage (or, in the case of signage
9 posted after the Compliance Date, subsequent signage) to satisfy its warning obligations
10 under this Consent Judgment if the signs in place materially satisfy the requirements of this
11 Section 3 for Covered Products. If the prior or subsequent signs do not materially satisfy
12 the requirements of this Section 3 for Covered Products, the Parties shall negotiate in good
13 faith regarding a modification of the required type, size, placement and language set forth in
14 Paragraph 3.3(a) – (d) in consideration of the signs already in place.

15 3.4. *Alternative Warning Language.* If any other defendant in this action is
16 allowed to provide warnings using language set forth in another consent judgment entered
17 in this case that differs from the language required by this Consent Judgment, then after the
18 Compliance Date Settling Defendant may, after providing 60 days' written notice to the
19 Attorney General, use the same warning language set forth in that other consent judgment
20 for labels or the text of signs, to the extent that such language is applicable to the Covered
21 Products, provided that the Attorney General does not make a written objection within thirty
22 days of the Attorney General's receipt of the proposed change in warning language.
23 Settling Defendant may file an application with this Court in order to resolve any objection
24 received from the Attorney General. Nothing in this Section 3.4 shall limit or otherwise
25 affect Settling Defendant's right to seek a modification of this Consent Judgment in
26 accordance with Section 5 herein.

27 3.5. *Option to Provide Warnings.*

28 (a) With respect to the Covered Products, Settling Defendant may opt to provide

1 warnings under Paragraph 3.1 and cease its acrylamide reduction efforts under Paragraph 2
2 if either or both of the following conditions have been satisfied with respect to the Covered
3 Products: (i) acrylamide warnings covering one or more products manufactured and sold by
4 other companies that are of the same type as the Covered Products appear on packages of
5 such products accounting for 20% of sales of all such products in California that are not
6 produced by Settling Defendant, based on IRI sales data; and/or (ii) non-package acrylamide
7 warnings specifically mentioning one or more such products appear at 500 or more store
8 locations in California. Nothing in this Section 3.5(a) shall limit or otherwise affect Settling
9 Defendant's right in accordance with Section 3.3 (e) to rely on prior or subsequent signage.

10
11 (b) If Settling Defendant believes either or both conditions has/have occurred
12 with respect to the Covered Products, it shall give notice of such to the Attorney General,
13 together with documentation evidencing such occurrence. Following such notice, Settling
14 Defendant and the Attorney General will promptly meet and confer regarding the situation,
15 and following a meet and confer period of no longer than 30 days, Settling Defendant, by
16 giving further notice of at least 30 days to the Attorney General, which the Attorney
17 General may extend, at the Attorney General's option, by up to 60 days, may elect to (i)
18 cease acrylamide reduction efforts with respect to the Covered Products; (ii) provide the
19 warnings required by Paragraph 3.1(a) or 3.1(b) for the Covered Products or otherwise rely
20 on signage consistent with Paragraph 3.3(e); and (iii) within 30 days make all remaining
21 payments required by Paragraph 4, if applicable, with respect to the Covered Products.

22 3.6. *Extra-Territorial Effect.* Nothing in this Consent Judgment requires that
23 warnings be given for any Covered Products that are not shipped for sale in California.

24 4. PAYMENTS

25 4.1. *Initial Civil Penalty.* Within 30 days of the Effective Date, Settling Defendant
26 shall pay a civil penalty of \$75,000 pursuant to Health & Safety Code section 25249.7,
27 subdivision (b). This payment shall be divided in accordance with Health & Safety Code
28 section 25249.12, subdivisions (c) and (d), with \$56,250 (75% of the penalty) to be

1 deposited in the Safe Drinking Water and Toxic Enforcement Fund, and \$18,750 (25% of
2 the penalty) to be paid to the Office of the Attorney General.

3 (a) The 75% share of the penalty to be deposited in the Safe Drinking Water and
4 ~~Toxic Enforcement Fund shall be paid by check payable to the Office of Environmental~~
5 Health Hazard Assessment, with the check to bear the notation "Proposition 65 – AG
6 Matter ID OK2009900946."

7 (b) The 25% share of the penalty to be paid to the Office of the Attorney General
8 shall be paid by check payable to the "California Department of Justice – Litigation Deposit
9 Fund." The check shall bear on its face "Proposition 65 Recoveries Fund" and the Attorney
10 General's internal reference number for this matter (OK2009900946). The money paid to
11 the Attorney General's Office pursuant to this paragraph shall be administered by the
12 California Department of Justice and shall be used by the Environment Section of the Public
13 Rights Division of the Attorney General's Office, until all funds are exhausted, for any of
14 the following purposes: (1) implementation of the Attorney General's authority to protect
15 the environment and natural resources of the State pursuant to Government Code section
16 12600 et seq. and as Chief Law Officer of the State of California pursuant to Article V,
17 section 13 of the California Constitution; (2) enforcement of laws related to environmental
18 protection, including, but not limited to, Chapters 6.5 and 6.95, Division 20, of the
19 California Health & Safety Code; (3) enforcement of the Unfair Competition Law, Business
20 & Professions Code section 17200 et seq., as it relates to protection of the environment and
21 natural resources of the State of California; and (4) other environmental actions that benefit
22 the State and its citizens as determined by the Attorney General. Such funding may be used
23 for the costs of the Attorney General's investigation, filing fees and other court costs,
24 payment to expert witnesses and technical consultants, purchase of equipment, laboratory
25 analyses, personnel costs, travel costs, and other costs necessary to pursue environmental
26 actions investigated or initiated by the Attorney General for the benefit of the State of
27 California and its citizens. The payment, and any interest derived therefrom, shall solely
28 and exclusively augment the budget of the Attorney General's Office as it pertains to the

1 Environment Section of the Public Rights Division and in no manner shall supplant or cause
2 any reduction of any portion of the Attorney General's budget.

3 4.2. *Final Civil Penalties.* As a further incentive for early achievement in
4 ~~acrylamide reduction, Settling Defendant shall pay an additional civil penalty ("Final Civil~~
5 Penalty") to the Attorney General pursuant to Health & Safety Code section 25249.12 of
6 \$200,000 no later than September 30, 2011, but if Settling Defendant has achieved the
7 Target Level before the Compliance Date for all Covered Products shipped for sale in
8 California, such Final Civil Penalty shall be waived. This payment, if made, shall be
9 divided in accordance with Health & Safety Code section 25249.12, subdivisions (c) and
10 (d), with \$150,000 (75% of the penalty) to be deposited in the Safe Drinking Water and
11 Toxic Enforcement Fund, and \$50,000 (25% of the penalty) to be paid to the Office of the
12 Attorney General.

13 (a) The 75% share of the penalty to be deposited in the Safe Drinking Water and
14 Toxic Enforcement Fund shall be paid by check payable to the Office of Environmental
15 Health Hazard Assessment, with the check to bear the notation "Proposition 65 – AG
16 Matter ID OK2009900946."

17 (b) The 25% share of the penalty to be paid to the Office of the Attorney General
18 shall be paid by check payable to the "California Department of Justice – Litigation Deposit
19 Fund." The check shall bear on its face "Proposition 65 Recoveries Fund" and the Attorney
20 General's internal reference number for this matter (OK2009900946). The money paid to
21 the Attorney General's Office pursuant to this paragraph shall be administered by the
22 California Department of Justice and shall be used by the Environment Section of the Public
23 Rights Division of the Attorney General's Office, until all funds are exhausted, for any of
24 the following purposes: (1) implementation of the Attorney General's authority to protect
25 the environment and natural resources of the State pursuant to Government Code section
26 12600 et seq. and as Chief Law Officer of the State of California pursuant to Article V,
27 section 13 of the California Constitution; (2) enforcement of laws related to environmental
28 protection, including, but not limited to, Chapters 6.5 and 6.95, Division 20, of the

1 California Health & Safety Code; (3) enforcement of the Unfair Competition Law, Business
2 & Professions Code section 17200 et seq., as it relates to protection of the environment and
3 natural resources of the State of California; and (4) other environmental actions that benefit
4 ~~the State and its citizens as determined by the Attorney General. Such funding may be used~~
5 for the costs of the Attorney General's investigation, filing fees and other court costs,
6 payment to expert witnesses and technical consultants, purchase of equipment, laboratory
7 analyses, personnel costs, travel costs, and other costs necessary to pursue environmental
8 actions investigated or initiated by the Attorney General for the benefit of the State of
9 California and its citizens. The payment, and any interest derived therefrom, shall solely
10 and exclusively augment the budget of the Attorney General's Office as it pertains to the
11 Environment Section of the Public Rights Division and in no manner shall supplant or cause
12 any reduction of any portion of the Attorney General's budget.

13 4.3. *Enforcement Fund Payment.* Within 30 days of the Effective Date, Settling
14 Defendant shall pay \$15,000 to be used by the Attorney General for the enforcement of
15 Proposition 65. This payment shall be made by check payable to the "California
16 Department of Justice." The check shall bear on its face "Proposition 65 Enforcement
17 Fund" and the Attorney General's internal reference number for this matter
18 (OK2009900946). Funds paid pursuant to this paragraph shall be placed in an interest-
19 bearing Special Deposit Fund established by the Attorney General. These funds, including
20 any interest, shall be used by the Attorney General, until all funds are exhausted, for the
21 costs and expenses associated with the enforcement and implementation of Proposition 65,
22 including investigations, enforcement actions, and other litigation or activities as
23 determined by the Attorney General to be reasonably necessary to carry out his duties and
24 authority under Proposition 65. Such funding may be used for the costs of the Attorney
25 General's investigation, filing fees and other court costs, payment to expert witnesses and
26 technical consultants, purchase of equipment, travel, purchase of written materials,
27 laboratory testing, sample collection, or any other cost associated with the Attorney
28 General's duties or authority under Proposition 65. Funding placed in the Special Deposit

1 Fund pursuant to this paragraph, and any interest derived therefrom, shall solely and
2 exclusively augment the budget of the Attorney General's Office and in no manner shall
3 supplant or cause any reduction of any portion of the Attorney General's budget.

4 ~~4.4. Delivery.~~ The payments required by this Consent Judgment shall be made as
5 follows:

6 (a) All payments required by Paragraphs 4.1(a) and 4.2(a) shall be sent directly
7 to:

8 Senior Accounting Officer – MS 19-B
9 Office of Environmental Health Hazard Assessment
10 P.O. Box 4010
11 Sacramento, CA 95812-0410

12 (b) All payments required by Paragraphs 4.1(b), 4.2(b), and 4.3 shall be made
13 through the delivery of separate checks to the attention of Laura J. Zuckerman, Deputy
14 Attorney General, California Department of Justice, 1515 Clay Street, 20th Floor, Oakland,
15 CA 94612, with a copy of the checks and cover letter to be sent to Robert Thomas, Legal
16 Analyst, California Department of Justice, 1515 Clay Street, 20th Floor, Oakland, CA
17 94612.

18 **5. MODIFICATION OF CONSENT JUDGMENT**

19 5.1. *Procedure for Modification.* Except as provided in Paragraph 1.4, this
20 Consent Judgment may be modified by written agreement of the Attorney General and
21 Settling Defendant, after noticed motion, and upon entry of a modified consent judgment by
22 the Court thereon, or upon motion of the Attorney General or Settling Defendant as
23 provided herein or as otherwise provided by law, and upon entry of a modified consent
24 judgment by the Court. Before either the Attorney General or Settling Defendant files an
25 application with the Court for a modification to this Consent Judgment, the Parties agree
26 that they will meet and confer on a proposed modification. If a proposed modification is
27 agreed upon, then Settling Defendant and the Attorney General will present the
28 modification to the Court by means of a stipulated modification to this Consent Judgment.
Otherwise, the Party seeking the modification shall bear the burden of establishing that the

1 modification is appropriate, either because of the occurrence of a condition set forth in this
2 Consent Judgment or as otherwise provided by law. Bases for a motion to modify under
3 this Paragraph 5 shall include, but are not limited to, the basis for a motion to modify under
4 Paragraph 5.6 herein.

5 5.2 *Other Settlements.*

6 (a) If the Attorney General agrees or has agreed in a settlement or judicially
7 entered consent judgment with another manufacturer of processed snack foods on terms, as
8 drafted or as implemented, that (i) are materially more beneficial to Settling Defendant than
9 those set forth in this Consent Judgment as to the Compliance Date, or the form, manner or
10 content of warning, or (ii) allow tortilla chips, pretzels, popcorn, extruded snacks, or other
11 chip products with a designated Target Level higher than 281 ppb to be shipped for sale
12 and/or sold in California without a warning, this may provide grounds for Settling
13 Defendant to seek modification pursuant to Paragraph 5.1.

14 (b) If the Attorney General agrees or has agreed in a settlement or judicially
15 entered consent judgment that some or all of the products sold by other companies that are
16 similar to the Covered Products do not require a warning under Proposition 65 (based on the
17 presence of acrylamide), or if a court of competent jurisdiction renders a final judgment,
18 and the judgment becomes final, that some or all of the products sold by other companies
19 that are similar to the Covered Products do not require a warning for acrylamide under
20 Proposition 65, then Settling Defendant may seek a modification of this Consent Judgment
21 to eliminate its duties to warn and/or other duties related to the reduction of acrylamide
22 levels as to its similar products.

23 5.3. *Change in Proposition 65.* If Proposition 65 or its implementing regulations
24 are changed from their terms as they exist on the date of entry of this Consent Judgment,
25 either Party or both Parties may seek modification of this Consent Judgment through
26 stipulated or noticed motion as follows:

27 (a) If the change establishes that warnings for acrylamide in Covered Products
28 are not required, Settling Defendant may seek a modification of this Consent Judgment to

1 eliminate its duties to warn and/or its duty to reduce acrylamide levels.

2 (b) If the change establishes that the warnings provided by this Consent Judgment
3 would not comply with Proposition 65 or its implementing regulations, either Party may
4 seek a modification of this Consent Judgment to conform the judgment to the change in law.

5 (c) If the change would provide a new form, manner, or content for an optional or
6 safe-harbor warning, Settling Defendant shall meet and confer with the Attorney General
7 and, following agreement (if one is reached), jointly apply to the Court for approval of a
8 plan for implementing warnings in such manner. If no agreement is reached, Settling
9 Defendant may seek a modification of this Consent Judgment to provide a new form,
10 manner, or content for an optional or safe-harbor warning. In the absence of agreement
11 between the Parties, it shall be Settling Defendant's burden to establish that the proposed
12 warning complies with any new safe harbor method of providing warnings for food that is
13 applicable to Covered Products, or that the warning is provided in a manner that complies
14 with the law and is at least as effective (i.e., is not materially less informative or likely to be
15 seen, read, and understood) as the forms of warning otherwise required by this Consent
16 Judgment.

17 5.4. *Necessary Technology Unavailability.* If Settling Defendant is unable to
18 reduce acrylamide levels in the Covered Products below the Target Level but would be able
19 to do so but for a failure by any other defendant to this action to comply with, or act
20 consistently with, technology licensing requirements in any settlement in this action with
21 the Attorney General, then Settling Defendant shall be deemed to have good cause to seek a
22 modification to this Consent Judgment that extends the Compliance Date. For the purposes
23 of this Section 5.4, "any other defendant to this action" shall include (a) such defendant, and
24 each of its affiliates, subsidiaries or any other entity in which such defendant has a direct or
25 indirect financial interest of 50% or more, and/or (b) any entity referenced in (a) above in
26 this Paragraph 5.4 that controls the patent or other intellectual property rights in such
27 technologies.

28 5.5 *Correspondence with the Federal Government.* If Settling Defendant

1 corresponds in writing to an agency or branch of the United States Government in
2 connection with the application of Proposition 65 to acrylamide in food products, then so
3 long as such correspondence does not fall within one of the exemptions to the Freedom of
4 Information Act, Settling Defendant shall provide the Attorney General with a copy of such
5 communication as soon as practicable, but not more than 10 days after sending or receiving
6 the correspondence; provided, however, that this Paragraph shall not apply to
7 correspondence solely to or from trade associations or other groups of which Settling
8 Defendant is a member, nor shall this Paragraph apply if Settling Defendant is no longer
9 required to test for acrylamide under this Consent Judgment.

10 5.6. *Federal Preemption.* If a court of competent jurisdiction or an agency of the
11 federal government (including, but not limited to, the U.S. Food and Drug Administration)
12 states, through any regulation or legally binding act, that federal law has preemptive effect
13 on any of the requirements of this Consent Judgment, including, but not limited to
14 precluding Settling Defendant from providing any of the warnings set forth in this Consent
15 Judgment or the manner in which such warnings are given, then Settling Defendant may
16 seek to modify this Consent Judgment to bring it into compliance with or avoid conflict
17 with federal law. The modification shall not be granted unless this Court concludes, in a
18 final judgment or order, that such modification is necessary to bring this Consent Judgment
19 into compliance with or avoid conflict with federal law. Specifically, a determination that
20 the provision of some, but not all, forms of warning described in Paragraph 3 above is not
21 permitted shall not relieve Settling Defendant of the duty to provide one of the other
22 warnings described under this judgment for which such determination has not been made.

23 **6. ENFORCEMENT**

24 The People may, by motion or application for an order to show cause before this
25 Court, enforce the terms and conditions contained in this Consent Judgment. In any such
26 proceeding, the People may seek whatever fines, costs, penalties, or remedies are provided
27 by law for failure to comply with this Consent Judgment, and where said violations of this
28 Consent Judgment constitute subsequent violations of Proposition 65 or other laws

1 independent of this Consent Judgment and/or those alleged in the Complaint, the People are
2 not limited to enforcement of this Consent Judgment, but may seek in another action
3 whatever fines, costs, penalties, or remedies are provided for by law for failure to comply
4 with Proposition 65 or other laws. In any action brought by the People alleging subsequent
5 violations of Proposition 65 or other laws, Settling Defendant may assert any and all
6 defenses that are available.

7 **7. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

8 Each signatory to the Parties' stipulation for entry of this Consent Judgment has
9 certified that he or she is fully authorized by the Party he or she represents to stipulate to
10 this Consent Judgment, to enter into and execute the stipulation on behalf of the Party
11 represented, and legally to bind that Party.

12 **8. CLAIMS COVERED**

13 This Consent Judgment is a full, final, and binding resolution between the People
14 and Settling Defendant, of any alleged violation of Proposition 65 or its implementing
15 regulations, Business & Professions Code sections 17200 et seq., and any other statutory,
16 regulatory or common law duty or requirement, and fully and finally resolves all claims
17 that have been or could have been asserted in the Complaint against Settling Defendant, for
18 failure to provide clear and reasonable warnings of exposure to acrylamide from the
19 consumption of the Covered Products, as well as any other claim that was alleged or could
20 have been asserted based on the facts or conduct alleged in the Complaint as to the Covered
21 Products, whether based on actions committed by Settling Defendant or by any entity or
22 person to whom it distributes or sells, and/or has distributed or sold, directly or indirectly,
23 Covered Products, or by any entity or person that has sold or sells the Covered Products to
24 consumers in the State of California, including but not limited to distributors, wholesalers
25 and retailers. Compliance with the terms of this Consent Judgment, as it may be modified,
26 resolves, as to Covered Products, including new products incorporated as Covered Products
27 under Paragraph 1.4, any issue or claim, now, in the past, and in the future, concerning
28 compliance with the requirements of Proposition 65 and its implementing regulations as to

1 the duty to warn about acrylamide in Covered Products shipped for sale in California, and
2 Business & Professions Code sections 17200 et seq. with regard to the same, by (1) Settling
3 Defendant, its parents, shareholders, directors, officers, divisions, subdivisions, subsidiaries,
4 ~~sister companies, affiliates, franchisees, cooperative members, and licensees, including, but~~
5 not limited to, Snak King Distributing, LLC, and Jensen Manufacturing Company, Inc.
6 (collectively, "Released Persons"); (2) the Released Persons' distributors, wholesalers, and
7 retailers who have sold or sell Covered Products; (3) any other entity or person in the chain
8 of distribution who has sold or sells the Covered Products; and (4) the predecessors,
9 successors, and assigns of any of them (subparts (1) – (4) above, collectively, "Affiliates").
10 The preceding sentence does not apply to, or resolve any claims against, retailers who, after
11 the Compliance Date, do not post signs sent to them pursuant to Paragraph 3.3(c) and (d).

12 **9. RETENTION OF JURISDICTION**

13 This Court shall retain jurisdiction of this matter to implement and enforce this
14 Consent Judgment. Either Party may bring a motion pursuant to the Court's continuing
15 jurisdiction requesting that the Court give full effect to any provision of this Consent
16 Judgment.

17 **10. PROVISION OF NOTICE**

18 10.1. When any Party is entitled to receive any notice under this Consent Judgment,
19 the notice shall be sent by overnight courier service to the person and address set forth in
20 this Paragraph. Any Party may modify the person and address to whom the notice is to be
21 sent by sending the other Party notice by certified mail, return receipt requested. Said
22 change shall take effect on the date the return receipt is signed by the Party receiving the
23 change.

24 10.2. Notices shall be sent to:

25 ///

26 ///

27 ///

28 ///

1 For the People/the Attorney General:

2 Laura J. Zuckerman
3 Timothy E. Sullivan
4 Deputy Attorneys General
5 1515 Clay Street, 20th Floor
6 Oakland, CA 94612

7 For Snak King Corporation:

8 Barry Levin, Chief Exec. Officer *with a copy to:* Joshua A. Bloom
9 Snak King Corporation Barg Coffin Lewis & Trapp LLP
10 16150 East Stephens Street 350 California Street, 22nd Floor
11 City of Industry, CA 91745 San Francisco, CA 94104-1435

12 and: Lee Smith
13 Law Offices of Smith and Smith
14 501 South Beverly Drive, 3rd Floor
15 Beverly Hills, CA 90212-3002

16 **11. COURT APPROVAL**

17 This Consent Judgment shall be submitted to the Court for entry by noticed motion.
18 If this Consent Judgment is not approved by the Court, it shall be of no force or effect and
19 may not be used by the Attorney General or Settling Defendant for any purpose, except that
20 the confidentiality provisions of Paragraphs 1.4(c) and (d) and 2.3(e) shall continue to
21 apply.

22 **12. ENTIRE AGREEMENT**

23 12.1. This Consent Judgment contains the sole and entire agreement and
24 understanding of the Parties with respect to the entire subject matter hereof, and any and all
25 prior discussions, negotiations, commitments and understandings related hereto. No
26 representations, oral or otherwise, express or implied, other than those contained herein
27 have been made by any Party hereto. No other agreements not specifically referred to
28 herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

12.2. This Consent Judgment is the result of mutual drafting and no ambiguity
found herein shall be construed in favor of or against any Party.

///

1 **13. EXECUTION IN COUNTERPARTS**

2 The stipulations to this Consent Judgment may be executed in counterparts and by
3 means of facsimile or electronic mail by PDF document, which taken together shall be
4 deemed to constitute one document.

5 IT IS SO ORDERED, ADJUDGED, AND DECREED:

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Dated: **AUG 31 2011**

STEVEN A. BRICK

Hon. Steven A. Brick
Judge of the Superior Court

Exhibit A

COVERED PRODUCTS

CORN, GRAIN, AND LEGUME CHIPS AND STICKS

Group A. All corn, grain, and legume-based chips and sticks manufactured by Settling Defendant, including El Sabroso Guacachips, El Sabroso Jalapenitos, Private Label Tortilla Chips, Private Label Organic Blue Tortilla Chips, Private Label Organic Fiesta Tortilla Chips, Private Label Organic White Tortilla Chips, Whole Earth Really Seedy Tortilla Chips, El Sabroso Reduced Fat Tortilla Chips, Private Label Reduced Fat Tortilla Chips, Granny Goose Restaurant Style Tortilla Chips, Private Label Organic Yellow Rounds Tortilla Chips, El Sabroso Salsitas, El Sabroso Yellow Rounds Tortilla Chips, Granny Goose White Corn Tortilla Strips, Private Label White Corn Tortilla Strips, El Sabroso Chile Y Limon Churritos, El Sabroso Chile Y Limon Corn Chips, Granny Goose Corn Chips

Type 1: Triangle-shaped chips

Type 2: Round, rolled, and other non-triangle or non-strip-shaped chips

Type 3: Strip-shaped chips

Type 4: Corn chips and corn sticks (e.g., churritos)

POPCORN

Group B. All popcorn products, including Snak King Popcorn (Cheddar Cheese and Butter), Granny Goose Butter Popcorn, Kettle Corn, Whole Earth Lightly Salted Popcorn, Private Label Organic Popcorn (White Cheddar and Light Salt), Granny Goose Caramel Popcorn

Type 1: Popcorn (plain, flavored and kettle)

Type 2: Caramel and candy corn (with or without nuts)

EXTRUDED, PELLET, AND BAKED PRODUCTS

Group C. All extruded, pellet, and baked products (excluding baked products in Group A), including Private Label Lavash Chips, Private Label Salted Pita Chips, Whole Earth Salted Pita Chips, Private Label Hot Fries, Snak King Hot Fries, Private Label Puffed Rice or Corn, Snak King Cheese Puffs, Private Label Cheese Puffs, Private Label Rice Balls, Private Label Multigrain Chips, Private

Label Baked Cheese Curls, Granny Goose Cheese Blazin Curls, Snak King Baked Cheese Curls, Snak King Fried Cheese Curls, Snak King Hot Cheese Curls, Jensen Orchards Veggie Chips, Private Label Veggie Sticks, Private Label Mini Veggie Chips, El Sabroso Duros, Private Label Popped Chips

Type 1: Pita and lavash chips (all flavors)

Type 2: Puffs, fries, baked curls, and multigrain chips (all flavors)

Type 3: Fried curls (all flavors)

Type 4: Potato, vegetable, and other grain-based pellet chips and sticks (all flavors)

Type 5: Duros (all flavors)

PRETZELS

Group D. All pretzels

Type 1: Twists and sticks

OTHER

Group E. All pork rinds and “cracklins,” including El Sabroso Regular Pork Rinds, El Sabroso Regular Pork Rinds with Salsa, El Sabroso Hot & Spicy Pork Rinds, El Sabroso Regular Cracklins, and El Sabroso Hot & Spicy Cracklins.

Type 1: Pork rinds and “cracklins”

Exhibit B

(For use if Settling Defendant provides sign warnings pursuant to Paragraph 3.3)

**THIS COMMUNICATION APPLIES ONLY TO
RETAIL LOCATIONS IN CALIFORNIA**

Snak King Corporation has entered into a consent judgment with the Attorney General for the State of California regarding the presence of acrylamide in specified snack food products sold by retailers at retail locations in California.

Under the terms of this consent judgment, Snak King Corporation is providing the enclosed sign warnings to retailers to be posted in retail stores selling any of the specified snack food products identified below in California. In the consent judgment, Snak King Corporation obtained a conditional release on your behalf. For the release to continue to be effective after the date of this letter, you need to comply with the directions in this communication.

We request that you post these signs on your shelf(ves) or in your aisle(s) where the identified products are sold. For stores less with than 7,500 square feet of retail space and no more than two cash registers, the sign may be placed at each cash register instead of on the shelf(ves) or in the aisle(s). Additionally, stores that operate a customer service desk or similar central facility must also post a sign at that location.

Please sign and return the written acknowledgment below to acknowledge that you have received the signs and that they will be posted in accordance with these specifications until you receive written instruction from Snak King Corporation to the contrary.

Thank you for your cooperation. If you need more signs or have any questions, such as the appropriate sign locations for your specific retail store(s), please contact _____.

Acknowledged by:

(Signature)
(Print Name)
(Company/Store Location)
(Date)

List of Products

Exhibit C

(For use if Settling Defendant provides sign warnings pursuant to Paragraph 3.3)

**THIS COMMUNICATION APPLIES ONLY TO
RETAIL LOCATIONS IN CALIFORNIA**

On [Date], Snak King Corporation sent you a letter enclosing sign warnings for posting in your store(s) in California pursuant to a consent judgment entered into between Snak King Corporation and the Attorney General for the State of California regarding the presence of acrylamide in specified snack food products sold by retailers at retail locations in California.

These signs are to be posted on your shelf(ves) or in your aisle(s) where any of the specified snack food products identified below are sold in your stores in California. For stores with less than 7,500 square feet of retail space and no more than two cash registers, the sign may be placed at each cash register instead of on the shelf(ves) or in the aisle(s). Additionally, stores that operate a customer service desk or similar central facility must also post a sign at that location.

As stated in our prior letter, Snak King Corporation obtained a conditional release in the consent judgment on your behalf. For the release to be effective after the date of the prior letter, you need to comply with the directions in this communication.

We have not received your written acknowledgment that you have received the signs and that your store(s) will post these signs. Please sign and return the written acknowledgement below to acknowledge that you have received the signs and that they will be posted in accordance with these specifications until you receive written instruction from Snak King Corporation to the contrary.

Thank you for your cooperation. If you need more signs or have any questions, such as the appropriate sign locations for your specific retail store(s), please contact _____.

Acknowledged by:

(Signature)
(Print Name)
(Company/Store Location)
(Date)

List of Products

EXHIBIT I

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

APR 26 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

B&G FOODS NORTH AMERICA, INC.,

No. 20-16971

Plaintiff-Appellant,

D.C. No.

v.

2:20-cv-00526-KJM-DB

KIM EMBRY; NOAM GLICK,

Eastern District of California,
Sacramento

Defendants-Appellees.

ORDER

Before: GOULD, BENNETT, and R. NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc. [Dkt. 53].

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App.

P. 35.

The petition for rehearing en banc is DENIED.

EXHIBIT J

Proposition 65

Initial Statement of Reasons

Title 27, California Code of Regulations

**Proposed Amendments to Article 6:
Safe Harbor Clear and Reasonable Warnings for
Acrylamide Exposures from Food**

New subsection 25607.2(b)

September 24, 2021



**California Environmental Protection Agency
Office of Environmental Health Hazard Assessment**

Table of Contents

I. Summary..... 3

II. Background/Problem to be Addressed by the Proposed Rulemaking 3

 Food subject to warnings for acrylamide exposures..... 3

 Public health concern for acrylamide cancer risks from food consumption 4

III. Proposed amendment: Specific warning language for acrylamide exposure from food 7

IV. Necessity..... 9

V. Economic Impact Assessment Required by Gov. Code section 11346.3(b)..... 9

VI. Technical, Theoretical, and/or Empirical Study, Reports, or Documents Relied Upon 10

VII. Benefits of the Proposed Regulation 10

VIII. Reasonable Alternatives to the Regulation and the Agency’s Reasons for Rejecting Those Alternatives..... 11

IX. Reasonable Alternatives to the Proposed Regulatory Action that Would Lessen Any Adverse Impact on Small Business and the Agency’s Reasons for Rejecting Those Alternatives 11

X. Evidence Supporting Finding of No Significant Adverse Economic Impact on Business 11

XI. Efforts to Avoid Unnecessary Duplication or Conflicts with Federal Regulations Contained in the Code of Federal Regulations Addressing the Same Issues 11

XII. Appendices 11

 Appendix 1: Scientific evidence on acrylamide carcinogenicity 12

 Evidence on acrylamide carcinogenicity from animal studies..... 12

 Applicability of animal and other experimental studies of acrylamide to humans ... 13

 Inadequacy of human epidemiological studies for determining acrylamide carcinogenicity 16

 Appendix 2: Warning label from moon cakes sold at a Costco retailer in California..... 19

 Appendix 3: Proposition 65 Warning Website Fact Sheet 20

I. Summary

Proposition 65¹ requires businesses to provide a clear and reasonable warning before they knowingly and intentionally cause an exposure to a chemical listed as known to the state to cause cancer or reproductive toxicity.² The Office of Environmental Health Hazard Assessment (OEHHA) is the lead agency that implements Proposition 65³ and has the authority to promulgate and amend regulations to implement and further the purposes of the Act. OEHHA is proposing to adopt a new safe harbor warning regulation to provide more specific and descriptive language for warnings for exposure to acrylamide from food.

This proposed rulemaking would add a subsection to OEHHA's regulations in Title 27, California Code of Regs., section 25607.2⁴, that provide warning content for exposures to Proposition 65 listed chemicals in food. This proposed regulation would add an additional non-mandatory, safe harbor warning option for businesses that cause significant exposures to acrylamide from food⁵. Compliance with the regulation by businesses will reduce the potential for litigation concerning the sufficiency of warnings because the content and methods provided in the safe harbor regulations⁶ are deemed "clear and reasonable" by the lead agency for purposes of the Act. The content of the proposed warning is also intended to provide information to individuals who may be exposed to acrylamide in food that can help them make better informed decisions about those exposures.

II. Background/Problem to be Addressed by the Proposed Rulemaking

Food subject to warnings for acrylamide exposures

In August 2020, OEHHA began a rulemaking to adopt a regulation addressing exposures to listed chemicals in foods created by cooking or heat processing. When completed the regulation will establish specific levels deemed to be the lowest level currently feasible for specific categories of foods. The regulation would adopt such levels for acrylamide. Once the rulemaking is adopted, fewer foods will need a warning

¹ Health and Safety Code section 25249.5 et seq., The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as "Proposition 65". Hereafter referred to as "Proposition 65" or "the Act".

² Health and Safety Code section 25249.6.

³ The Safe Drinking Water and Toxics Enforcement Act of 1986, codified at Health and Safety Code Section 25249.5 et seq., commonly known as Proposition 65, herein referred to as the "Act" or "Proposition 65".

⁴ All references are to sections of Title 27, California Code of Regulations, unless otherwise indicated.

⁵ For carcinogens, a warning is not required when the person responsible can show the exposure poses no significant risk assuming lifetime exposure at the level in question (Health and Safety Code Section 25249.10). OEHHA adopted a No Significant Risk Level (NSRL) of 0.2 micrograms per day in Title 27, Cal. Code of Regs., section 25705. Exposures below this safe harbor level do not require warning.

⁶ Title 27, California Code of Regs., section 25601 et seq.

under Proposition 65, but some with high levels of exposure will still need warnings. Therefore, a specific safe harbor warning for these exposures is warranted.

OEHHA is also aware of the federal District Court decision in the *California Chamber of Commerce v Bonta* (CalChamber) case in which the California Chamber of Commerce challenged the existing safe harbor Proposition 65 warning as applied to acrylamide in food, arguing that such warnings are false and misleading and therefore, a violation of the First Amendment rights of its members.⁷ The District Court issued a preliminary injunction against the filing of new enforcement actions after March 29, 2021. The merits of that case will likely be heard in the District Court in Summer 2022. While the District Court enjoined the filing of new enforcement actions, businesses were not enjoined from providing a warning if they choose to do so. An intervenor in the case filed an appeal in the Ninth Circuit Court of Appeals, challenging entry of the preliminary injunction. The Ninth Circuit stayed the preliminary injunction to the extent it bars private enforcers from prosecuting actions enforcing Proposition 65's warning as applied to acrylamide.⁸

OEHHA's safe harbor regulations are non-mandatory guidance. OEHHA does not have enforcement authority under Proposition 65 and thus cannot enforce the Proposition 65 warning requirement for an exposure to any listed chemical, including acrylamide. The preliminary injunction in the CalChamber case, however, is still in effect as to enforcement actions brought by public prosecutors. Therefore, new enforcement actions can be brought by private enforcers against businesses.

OEHHA has considered the concerns expressed in the District Court's preliminary injunction order in developing the proposed regulation. The purpose of the proposed regulation is to provide an additional optional safe harbor warning for businesses that addresses the District Court's concerns as well as public health concerns.

The proposed warning would be adopted into the safe harbor regulations for foods which identify warnings specifically determined to be "clear and reasonable" for purposes of Proposition 65. It provides important information for consumers and protection for business who choose to use it.

Public health concern for acrylamide cancer risks from food consumption

Acrylamide is a chemical that is formed in certain plant-based foods during cooking or processing at high temperatures, such as frying, roasting, grilling, and baking. It was originally added to the Proposition 65 list of chemicals in 1990 as known to cause

⁷ Eastern District of California, Case No. 2:19-CV-02019-KJM-EFB.

⁸ Ninth Circuit Court of Appeals, Case No. 21-15745.

cancer, based on a finding by the US Environmental Protection Agency (US EPA) that acrylamide is a “probable human carcinogen.”⁹

In August 2002, scientists at Stockholm University published findings that acrylamide is created in certain foods when they are cooked, or heat processed at high temperatures.¹⁰ Shortly thereafter, enforcement actions for failure to warn about acrylamide exposures from foods began to be filed. Enforcement action by private parties under Proposition 65 begins with service of a notice of violation on the business, Attorney General, and other prosecutors. More than 1,200 such notices have been filed in California regarding unwarned exposures to acrylamide from a variety of food including French fries, potato chips, breads, cereals, and coffee.¹¹

There is no serious scientific debate about the carcinogenicity of acrylamide, or its potential for carcinogenicity in humans. There is extensive evidence of carcinogenicity from studies in animals and detailed mechanistic studies of human and animals. Acrylamide is unequivocally a carcinogen in animals that causes tumors in multiple sites in rats and mice of both sexes. An overview of the available experimental data is provided in Appendix A.

Based on this extensive evidence of carcinogenicity, several prominent authorities have described the potential for acrylamide to be a human carcinogen as follows:

- The International Agency for Research on Cancer (IARC):
 - probably carcinogenic to humans¹²
- The National Toxicology Program (NTP). NTP Report on Carcinogens (RoC):
 - reasonably anticipated to be a human carcinogen¹³
- US Environmental Protection Agency (US EPA):
 - likely to be carcinogenic to humans¹⁴
- National Institute of Occupational Safety and Health (NIOSH):
 - potential occupational carcinogen

⁹ National Service Center for Environmental Publications, *Acrylamide 79-06-1* (Sept. 8, 2021) <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100ZKZT.PDF?Dockey=P100ZKZT.PDF>

¹⁰ Tareke E, Rydberg P, Karlsson P, Eriksson S, Törnqvist M, *Analysis of Acrylamide, A Carcinogen Formed in Heated Foodstuffs*, Journal of Agricultural and Food Chemistry (Aug. 14, 2002) National Library of Medicine, <https://pubmed.ncbi.nlm.nih.gov/12166997/> (Sept. 8, 2021)

¹¹ Information available from California State Attorney General data on Proposition 65 Enforcement Reporting. (Sept. 7, 2021) <https://oag.ca.gov/prop65>

¹² <https://publications.iarc.fr/78> and <https://monographs.iarc.who.int/list-of-classifications>.

¹³ <https://ntp.niehs.nih.gov/ntp/roc/content/profiles/acrylamide.pdf>

¹⁴ https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/0286tr.pdf

- European Food Safety Agency (EFSA):
 - Acrylamide exposure “can potentially increase the risk of developing cancer for consumers in all age groups”¹⁵

Because of concerns over the potential carcinogenic risks to humans from consuming foods with acrylamide, several governmental organizations have called for or are recommending ways to reduce formation of acrylamide in food and human exposures to it through consumption of food.

- The US Food and Drug Administration issued:
 - *Guidance for Industry: Acrylamide in Foods* “to help growers, manufacturers, and food service operators reduce acrylamide levels in certain foods.”^{16,17}
 - Guidance to consumers: *You Can Help Cut Acrylamide in Your Diet*¹⁸, and “other resources that contain information about acrylamide and ways to reduce exposure from foods prepared at home.”¹⁹
- The European Union adopted:
 - A regulation, in 2017, establishing mitigation measures and benchmark levels for the reduction of the presence of acrylamide in food.²⁰
- The United Nation’s Joint FAO (Food and Agriculture Organization of the United Nations)/WHO (World Health Organization) Expert Committee on Food Additives (JECFA)²¹ recommended that:
 - “work to reduce exposure to acrylamide in food by minimizing its concentrations should continue.”
 - “information on the occurrence of acrylamide in food consumed in developing countries would be useful to conduct a dietary exposure assessment and consider appropriate mitigation strategies to minimize acrylamide concentrations in food.”

¹⁵ <https://www.efsa.europa.eu/en/topics/topic/acrylamide>

¹⁶ <https://www.fda.gov/food/cfsan-constituent-updates/fda-issues-final-guidance-industry-how-reduce-acrylamide-certain-foods>

¹⁷ FDA, *Guidance for Industry: Acrylamide in Foods*, US DHHS, FDA, Center for Food Safety and Applied Nutrition, March 2016. Available at: <https://www.fda.gov/media/87150/download>

¹⁸ <https://www.fda.gov/consumers/consumer-updates/you-can-help-cut-acrylamide-your-diet>

¹⁹ <https://www.fda.gov/food/chemical-contaminants-food/acrylamide>

²⁰ Official Journal of the European Union. Commission Regulation (EU) 2017/2158

²¹ JECFA, *Evaluation of Certain Contaminants in Food*, Seventy-second report, WHO Technical Report Series No. 959, page 9. Available at;

http://apps.who.int/iris/bitstream/handle/10665/44514/WHO_TRS_959_eng.pdf;jsessionid=1534D51FDA74049BA4DE24B406A3EB38?sequence=1

- FAO/WHO Codex Alimentarius issued:
 - Code of Practice for the Reduction of Acrylamide in Foods” (CAC/RCP 67-2009) “to provide national and local authorities, manufacturers and other relevant bodies with guidance to prevent and reduce formation of acrylamide in potato products and cereal products.”

These public health concerns underscore the importance of providing Proposition 65 warnings prior to significant exposures to acrylamide in food and indicate a need for a more specific and informative Proposition 65 warning for these exposures.

Although acrylamide was listed in 2011 under Proposition 65 as a reproductive toxicant because of NTP findings of adverse effects on developmental and the male reproductive system²², exposures through food sufficiently high to trigger the warning requirement are highly unlikely and so the regulatory proposal only covers the cancer endpoint.

III. Proposed amendment: Specific warning language for acrylamide exposure from food

OEHHA is proposing to amend the warning regulations for food exposures in section 25607.2, by adding subsection 25607.2(b) to provide optional, more specific warning content for acrylamide exposures from food. Currently, businesses can use the general food warning content found in subsection 25607.2(a). Both subsections (a) and (b) are completely voluntary alternatives for providing safe harbor warnings and both use the methods in Section 25607.1. A business may provide a warning using one of these provisions, or it may provide a warning using any other language it deems “clear and reasonable” as required by the Act. However, if a business chooses to use other warning content or methods, it may need to defend those choices in the event an enforcement action is filed against it.

The proposed amendment would not alter subsection (a).²³ Thus, a business that already uses warning language set forth in subsection (a) need not alter existing warnings for its products, because the warning it provides will continue to be deemed “clear and reasonable” as required by the Act.

There are two components to the warning content that are required in the alternative subsection (b) warning. These provide as follows:

²² NTP (2005). NTP-CERHR Monograph on the Potential Human Reproductive and Developmental Effects of Acrylamide. NIH Publication No. 05-4472. US Department of Health and Human Services, Public Health Service, National Institutes of Health, Bethesda, MD. Available from: https://ntp.niehs.nih.gov/ntp/ohat/acrylamide/acrylamide_monograph.pdf

²³ The warning set forth in subsection (a) as applied to acrylamide would read: “WARNING: Consuming this product can expose you to chemicals including acrylamide, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov/food.”

In proposed subsection (b)(1), to make it clear that the warning is being given under a California law, the warning begins with words “CALIFORNIA WARNING” in all capital letters and bold print for easy identification.

Proposed new subsection (b)(2) provides the acrylamide specific warning language as follows:

“Consuming this product can expose you to acrylamide, a probable human carcinogen formed in some foods during cooking or processing at high temperatures. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed. For more information including ways to reduce your exposure, see www.P65Warnings.ca.gov/acrylamide.”

The proposed warning language includes several elements to improve the usefulness and informativeness of the warning for the consumer. The proposed regulation:

- explains that the person must consume the product to be exposed to acrylamide.
- provides the description that acrylamide is “a probable human carcinogen” for context. As discussed above, this language is consistent with the findings of the authoritative entities that have evaluated the carcinogenicity of acrylamide. Specifically, there are a number of different but very similar narrative statements used by authoritative entities to describe the potential for acrylamide exposure to cause human cancer. In 1990, when acrylamide was added to the Proposition 65 list the US EPA used the terminology “probable human carcinogen” with respect to acrylamide.²⁴ In 2010 when US EPA re-evaluated acrylamide it used the new term adopted in its 2005 Carcinogen Risk Assessment Guidelines²⁵ “likely to be carcinogenic to humans.” Other Proposition 65 authoritative bodies²⁶ use similar statements to characterize acrylamide’s carcinogenic potential. IARC uses “probably carcinogenic to humans”, NIOSH uses “potential occupational carcinogen”, and NTP uses “reasonably anticipated to be a human carcinogen” (NTP).
- clarifies that the chemical is not intentionally added by the manufacturer, but it is formed during cooking or processing at high temperatures. OEHHA chose warning language that is easy for a consumer to understand. The term “processing at high temperatures,” is found on a warning label about acrylamide exposure for baked pastries sold at a Costco retailer in California.²⁷

²⁴ US EPA (2010) Toxicological Review of Acrylamide, page 255. Available at: https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/0286tr.pdf

²⁵ Ibid, page 167

²⁶ Title 27, California Code of Regs., Subsection 25306(l)

²⁷ See Appendix 2, label from moon cakes sold at a Costco retailer in California and purchased in August 2021.

- notes that the frequency and amount of the chemical consumed affect a person's individual cancer risk. Including information about the factors that can affect the personal cancer risk of an individual is intended to empower the consumer to make informed choices about their individual risk prior to exposure to the listed chemical.
- points consumers to a link/location on OEHHA's warning website where they can obtain guidance on how to reduce exposures and obtain additional information about the chemical. The fact sheet on the website²⁸ provides additional information such as the scientific evidence on why acrylamide is considered a carcinogen, ways a person is exposed to the chemical, and tips for reducing exposure like frying foods at lower temperatures and toasting bread to the lightest color acceptable.

Each of these statements is factual, including information from the listing record for acrylamide²⁹ and the supporting scientific information for the regulation establishing a no significant risk level (NSRL) for acrylamide.³⁰

The proposed warning includes the chemical name (acrylamide) as is required in other safe harbor warnings.³¹

IV. Necessity

OEHHA has determined that a tailored safe harbor warning for acrylamide exposures from food will provide clearer and more factual information for the benefit of the consumers who may be exposed. The proposed safe harbor language provides content that businesses can use to provide a warning if they choose to do so. It will also facilitate provision of safe harbor warnings for food in a manner that avoids the First Amendment concerns that have been raised about the more general consumer product warnings when used in the context of acrylamide exposures from foods.

V. Economic Impact Assessment Required by Gov. Code section 11346.3(b)

In compliance with Government Code section 11346.3, OEHHA has assessed all the elements pursuant to sections 11346.3(b)(1)(A) through (D).

Creation or elimination of jobs within the State of California

This regulatory action will not impact the creation or elimination of jobs within the State of California. The proposed regulation will help businesses comply with the requirements of Proposition 65 by providing nonmandatory guidance for businesses

²⁸ See Appendix 3, Proposition 65 Warning Website Fact Sheet

²⁹ See <https://www.p65warnings.ca.gov/chemicals/acrylamide>

³⁰ See <https://oehha.ca.gov/media/downloads/cnr/acrylamidensrl.pdf>

³¹ Title 27, Cal. Code of Regs., section 25601(b)

concerning how safe harbor warnings should be provided for exposures to acrylamide from food.

Creation of new businesses or elimination of existing businesses within the State of California

This regulatory action will not impact the creation of new businesses or the elimination of existing businesses within the State of California. The proposed regulation will help businesses comply with the requirements of Proposition 65 by providing non-mandatory guidance for businesses concerning how safe harbor warnings should be provided for exposures to acrylamide from food.

Expansion of businesses currently doing business within the State of California

This regulatory action will not impact the expansion of businesses within the State of California. The proposed regulation will provide non-mandatory guidance for businesses concerning how safe harbor warnings should be provided for exposures to acrylamide from food.

Benefits of the proposed regulation to the health and welfare of California residents, worker safety, and the state's environment

OEHHA has concluded that the public would benefit from the proposed amendments because they will provide a more specific warning option for businesses to use when they provide warnings for exposures to acrylamide. The action furthers the right-to-know purposes of the statute and therefore promotes public and worker health and safety.

VI. Technical, Theoretical, and/or Empirical Study, Reports, or Documents Relied Upon

Citations to documents relied on for this proposal are provided in this document. Copies of these documents will be included in the regulatory file for this action and are available from OEHHA upon request.

VII. Benefits of the Proposed Regulation

Regulated businesses that choose to follow the safe harbor provisions of the clear and reasonable warning regulations will likely benefit from the proposed amendments because they provide safe harbor protection for businesses causing exposures to acrylamide from food and provide businesses with an additional option for warning content that will be deemed "clear and reasonable." The health and welfare of California residents will likely benefit by increasing the public's ability to understand the warnings they receive for certain food they purchase. The public will also benefit from the link to the Proposition 65 warnings website where OEHHA provides scientific information about the carcinogenicity of acrylamide, how exposure occurs, how to reduce exposure,

and information on acrylamide in an easy-to-read facts sheet and readily accessible links to additional information.

VIII. Reasonable Alternatives to the Regulation and the Agency's Reasons for Rejecting Those Alternatives

OEHHA has determined there are no reasonable alternatives to the proposed regulatory action that would carry out the purposes of the Act. The proposed action provides an optional safe harbor warning that a business can choose to use or not.

IX. Reasonable Alternatives to the Proposed Regulatory Action that Would Lessen Any Adverse Impact on Small Business and the Agency's Reasons for Rejecting Those Alternatives

OEHHA has initially determined that no reasonable alternative considered by OEHHA, or that has otherwise been identified and brought to its attention, would be more effective in carrying out the proposed action, or would be as effective and less burdensome to small business, or would be more cost-effective and equally effective in implementing the statutory policy or other provision of law to small business. The current proposal furthers the purposes of Proposition 65 by providing non-mandatory guidance for businesses concerning how safe harbor warnings can be provided for exposures to acrylamide from food.

X. Evidence Supporting Finding of No Significant Adverse Economic Impact on Business

OEHHA does not anticipate that the regulation will have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposed regulatory action will provide non-mandatory guidance for businesses, including content for a warning for exposures to acrylamide from food.

XI. Efforts to Avoid Unnecessary Duplication or Conflicts with Federal Regulations Contained in the Code of Federal Regulations Addressing the Same Issues

Proposition 65 is a California law that has no federal counterpart. OEHHA has determined that the regulations do not duplicate and will not conflict with federal regulations.

XII. Appendices

Appendix 1: Scientific evidence on acrylamide carcinogenicity

Evidence on acrylamide carcinogenicity from animal studies

Acrylamide is a multisite carcinogen in animals, causing statistically significant increases in the incidence of tumors in male and female rats^{32,33,34} and male and female mice^{35,36,37,38}.

In the studies conducted prior to NTP's two-year cancer bioassays (2012)³⁹, acrylamide caused statistically significant increases in the incidence of tumors in male and female rats^{40,41} and male and female mice^{42,43,44}. In male rats, acrylamide induced tumors of the thyroid gland, testis, and central nervous system. In female rats, acrylamide induced tumors in the thyroid gland, oral cavity, mammary gland, uterus, clitoral gland, and the central nervous system. In studies of male mice examining only the lung, acrylamide produced lung tumors. In studies of female mice examining only the lung and skin, acrylamide produced lung and skin tumors.

In 2012, NTP published the technical report for two-year cancer bioassays conducted in F344/N rats and B6C3F1 mice⁴⁵. Under the conditions of these two-year drinking water studies, NTP (2012) concluded that:

- There was clear evidence of carcinogenic activity of acrylamide in male F344/N rats based on increased incidences of malignant mesothelioma of the epididymis and testis tunica, malignant schwannoma of the heart, and follicular cell

³² Johnson KA, Gorzinski SJ, Bodner KM, Campbell RA, Wolf CH, Friedman MA et al. (1986). Chronic toxicity and oncogenicity study on acrylamide incorporated in the drinking water of Fischer 344 rats. *Toxicol Appl Pharmacol* 85(2):154-168.

³³ Friedman MA, Dulak LH, Stedham MA (1995). A lifetime oncogenicity study in rats with acrylamide. *Fundam Appl Toxicol* 27(1):95-105.

³⁴ National Toxicology Program (NTP, 2012). Toxicology and Carcinogenesis Studies of Acrylamide in F344/N Rats and B6C3F1 Mice (Feed and Drinking Water Studies). TR No. 575. US Department of Health and Human Services, Public Health Service, National Institutes of Health, Bethesda, MD. Available from: https://ntp.niehs.nih.gov/ntp/htdocs/lt_rpts/tr575_508.pdf

³⁵ Bull RJ, Robinson M, Stober JA (1984b). Carcinogenic activity of acrylamide in the skin and lung of Swiss-ICR mice. *Cancer Lett* 24(2):209-212.

³⁶ Bull RJ, Robinson M, Laurie RD, Stoner GD, Greisiger E, Meier JR, Stober, J (1984a). Carcinogenic effects of acrylamide in Sencar and A/J mice. *Cancer Res* 44(1):107-111.

³⁷ Robinson M, Bull RJ, Knutsen GL, Shields RP, Stober J (1986). A combined carcinogen bioassay utilizing both the lung adenoma and skin papilloma protocols. *Environ Health Perspect* 68:141-145.

³⁸ NTP (2012), full citation provided in footnote 34.

³⁹ *Ibid.*

⁴⁰ Johnson et al. (1986), full citation provided in footnote 32.

⁴¹ Friedman et al. (1995), full citation provided in footnote 33.

⁴² Bull et al. (1984b), full citation provided in footnote 35.

⁴³ Bull et al. (1984a), full citation provided in footnote 36.

⁴⁴ Robinson et al. (1986), full citation provided in footnote 37.

⁴⁵ NTP (2012), full citation provided in footnote 34.

adenoma or carcinoma of the thyroid gland. An increased incidence of pancreatic islet adenoma was also considered related to acrylamide exposure.

- There was clear evidence of carcinogenic activity of acrylamide in female F344/N rats based on increased incidences of fibroadenoma of the mammary gland, squamous cell neoplasms (primarily papilloma) of the oral cavity (mucosa or tongue), mesenchymal neoplasms (fibroma, fibrosarcoma, or sarcoma) of the skin, and follicular cell neoplasms (adenoma or carcinoma) of the thyroid gland. Increased incidences of hepatocellular adenoma of the liver and carcinoma of the clitoral gland were also considered to be related to acrylamide exposure. The occurrence of malignant schwannoma of the heart may have been related to acrylamide exposure.
- There was clear evidence of carcinogenic activity of acrylamide in male B6C3F1 mice based on increased incidences of neoplasms (primarily adenoma) of the harderian gland, alveolar/bronchiolar neoplasms (primarily adenoma) of the lung and squamous cell neoplasms (primarily papilloma) of the forestomach.
- There was clear evidence of carcinogenic activity of acrylamide in female B6C3F1 mice based on increased incidences of harderian gland adenoma, alveolar/ bronchiolar adenoma of the lung, adenoacanthoma and adenocarcinoma of the mammary gland, benign granulosa cell neoplasms of the ovary, and malignant mesenchymal neoplasms of the skin. Increased incidences of squamous cell papilloma of the forestomach were also considered to be related to acrylamide exposure.

Glycidamide is the genotoxic metabolite for acrylamide in humans as well as in animals. In 2014, NTP published the technical report for two-year cancer bioassays on glycidamide in rats and mice⁴⁶. Similar to the findings from NTP (2012) on acrylamide, NTP's two-year cancer bioassays on glycidamide also concluded that there was clear evidence of carcinogenicity in multiple tumor sites in male and female rats and mice.

Applicability of animal and other experimental studies of acrylamide to humans

These animal studies provide strong support for a finding that acrylamide causes cancer in humans. It is a fundamental tenet of toxicology that the results of properly designed studies in experimental animals are applicable to humans. See also 29 C.F.R. § 1910.1220, app. A.6.1. (Federal Occupational Safety and Health Administration regulations): this principle applies “unless there is strong evidence that the mechanism for tumor formation is not relevant to humans”. In the case of acrylamide, the genotoxic mechanism of action through its metabolite glycidamide, has been proven to be applicable in humans.

⁴⁶ National Toxicology Program (NTP 2014). Toxicology and Carcinogenesis Studies of Glycidamide in F344/N Nctr Rats and B6C3F1/Nctr Mice (Drinking Water Studies). TR No. 588. US Department of Health and Human Services, Public Health Service, National Institutes of Health, Bethesda, MD. Available from: https://ntp.niehs.nih.gov/ntp/htdocs/lt_rpts/tr588_508.pdf

In a chapter within the widely respected reference *Patty's Toxicology*, Rachamin (2015)⁴⁷ discussed the value of animal studies in predicting human health risks:

“Studies of experimental animals provide the main source of data for assessing chemical safety. They provide information on the toxicity of a chemical under controlled experimental conditions (dose levels, effects measured, population size). Animal toxicity tests are particularly important because they provide an opportunity to identify toxic chemicals before people are actually exposed to them and, therefore, prevent potential adverse health effects.

In general, animal studies have a high predictive value for human health risks. Almost all known chemical carcinogens in humans cause cancer in some animal species. Further, it has been shown that exposure of animals to toxic agents in high doses is a valid method for discovering potential hazards to humans.”

The predictive value of animal studies is supported by the fact that mouse and human genomes are highly similar and share about 97.5% of their protein-coding DNA⁴⁸. In rats, almost all human genes that are associated with human diseases have orthologues in the rat genome, confirming that rats also are an excellent model for research on human health⁴⁹.

The IARC (2019) Preamble to the IARC Monographs on the Identification of Carcinogenic Hazards to Humans⁵⁰ states the following regarding the relevance of data from carcinogenicity studies in animals in assessing human cancer hazards:

“Although this observation cannot establish that all agents that cause cancer in experimental animals also cause cancer in humans, it is biologically plausible that agents for which there is sufficient evidence of carcinogenicity in experimental animals (see Part B, Section 6b) present a carcinogenic hazard to humans. Accordingly, in the absence of additional scientific information, such as strong evidence that a given agent causes cancer in experimental animals through a 6 species-specific mechanism that does not operate in humans (see Part B, Sections 4 and 6; Capen et al., 1999; IARC, 2003), these agents are considered to pose a potential carcinogenic hazard to humans.”

⁴⁷ Rachamin G (2015). Use of Toxicological Data in Evaluating Chemical Safety. In *Patty's Toxicology* (eds E. Bingham, B. Cohrssen and C.H. Powell). Available from:

<https://onlinelibrary.wiley.com/doi/10.1002/0471435139.tox010>

⁴⁸ Mural RJ, Adams MD, Myers EW, Smith HO, Miklos GL, Wides R, et al. (2002). A comparison of whole-genome shotgun-derived mouse chromosome 16 and the human genome. *Science* 296 (5573):1661-71.

⁴⁹ Rat Genome Sequencing Project Consortium (2004). Genome sequence of the Brown Norway rat yields insights into mammalian evolution. *Nature* 428, 493–521. Available from:

<https://doi.org/10.1038/nature02426>

⁵⁰ IARC (2019). Preamble to the IARC Monographs on the Identification of Carcinogenic Hazards to Humans. Lyon, France. Amended January 2019. Available from: <https://monographs.iarc.who.int/wp-content/uploads/2019/07/Preamble-2019.pdf>

In its Handbook for Preparing Report on Carcinogens Monographs⁵¹, NTP makes a similar statement:

“Neoplasms observed in experimental animals are considered to be relevant to humans unless there is compelling evidence indicating that they occur by a mechanism that does not operate in humans.”

US EPA routinely relies on long-term carcinogenicity in rodents in its risk assessment activities, and stated the following regarding applicability of animal studies and importance of mechanistic information in its 2005 Guidelines for Carcinogen Risk Assessment⁵²:

“In these cancer guidelines, tumors observed in animals are generally assumed to indicate that an agent may produce tumors in humans. Mode of action may help inform this assumption on a chemical-specific basis.”

“In the absence of sufficiently, scientifically justifiable mode of action information, EPA generally takes public health-protective, default positions regarding the interpretation of toxicologic and epidemiologic data: animal tumor findings are judged to be relevant to humans, and cancer risks are assumed to conform with low dose linearity.”

In summary, both animal toxicology studies and cell-based studies are essential to discerning whether chemicals cause cancer. In the case of acrylamide, the evidence is clear from both the animal cancer bioassays and mechanistic studies including studies using human cells. The genotoxicity of both acrylamide and its reactive metabolite glycidamide are well-studied. Acrylamide is a mutagen in *in vitro* studies and induces mutations in animal studies. It can also cause chromosomal and DNA damage in animal studies and mammalian *in vitro* studies⁵³. Although acrylamide appears to be a relatively weak mutagen in short-term mutagenicity assays, in humans, it causes mutations primarily through its metabolism to glycidamide, which is a much stronger mutagen. In addition, acrylamide can induce gene mutations by generating reactive oxygen species and oxidative DNA damage⁵⁴.

Besides the evidence in animals, genetic analysis of human cancers by scientists from IARC, National Center for Toxicological Research (NCTR), and other leading cancer

⁵¹ NTP (2015). National Toxicology Program Handbook for Preparing Report on Carcinogens Monographs. US Department of Health and Human Services. Available from: <https://ntp.niehs.nih.gov/whatwestudy/assessments/cancer/handbook/index.html>

⁵² US Environmental Protection Agency (US EPA 2005). Guidelines for Carcinogen Risk Assessment. Risk Assessment Forum, Washington, DC. EPA/630/P-03/001F. Available from: <https://www.epa.gov/risk/guidelines-carcinogen-risk-assessment>

⁵³ NTP (2012), full citation provided in footnote 34.

⁵⁴ European Food Safety Authority (EFSA 2015). EFSA Panel on Contaminants in the Food Chain (CONTAM). Scientific Opinion on acrylamide in food. *EFSA Journal* 13(6):4104. Available from: <https://www.efsa.europa.eu/en/efsajournal/pub/4104>

research institutions has revealed a potentially large contribution from acrylamide. Specifically, the unique mutational signature of glycidamide was found in one third of 1600 human tumor genomes, corresponding to 19 human tumor types from 14 organs. As mentioned above, glycidamide is the major reactive metabolite of acrylamide⁵⁵ and its major source of exposure in humans is through exposure to acrylamide. As pointed out by NTP (2014)⁵⁶, “[t]he major source of human exposure to glycidamide occurs through exposure to acrylamide either in occupational situations, through the diet, or by the use of tobacco products”. This study provides robust mechanistic evidence for the mutagenic effects of acrylamide exposure in humans⁵⁷.

Inadequacy of human epidemiological studies for determining acrylamide carcinogenicity

Thus far, epidemiological studies have yielded inconsistent and inconclusive data on the association between acrylamide exposure and cancers in humans. A major challenge in conducting dietary epidemiological studies is the difficulty in estimating dietary intake of acrylamide.

An essential element of epidemiological studies is the correct classification of the study subjects’ exposure. This is especially difficult in studies of dietary exposure to acrylamide. This difficulty is evident in those studies that utilize self-reported dietary assessments such as food frequency questionnaires or 24-hour dietary recalls. Self-reported dietary assessments are useful for assessing dietary patterns, but they were not designed for capturing chemical exposures⁵⁸. The content of acrylamide in foods is quite variable and depends on a number of factors, including ingredients, cooking method, length of cooking, temperature at which foods were processed, storage of food, micronutrient composition of the raw food, and other factors. Self-reported dietary assessments are not able to consider all these features, and therefore are not able to correctly categorize an individual’s exposure to acrylamide. Additionally, acrylamide is present in a wide range of foods, and self-reported dietary assessments likely underestimate actual acrylamide intake. Abt et al. (2019) note:

“The occurrence of acrylamide in a wide range of foods, and at variable levels, together with the variation in intake of foods containing acrylamide, present a challenge for accurately determining acrylamide exposure and complicate efforts

⁵⁵ Zhivagui M, Ng AWT, Ardin M, Churchwell MI, Pandey M, Renard C, et al. (2019). Experimental and pan-cancer genome analyses reveal widespread contribution of acrylamide exposure to carcinogenesis in humans. *Genome Res* 29(4):521-531. Available from: <https://genome.cshlp.org/content/29/4/521>

⁵⁶ NTP (2014), full citation provided in footnote 46.

⁵⁷ IARC (2019). Press Release N° 267. Experimental and pan-cancer genome analyses reveal widespread contribution of acrylamide exposure to carcinogenesis in humans. Lyon, France. March 7, 2019. Available from: https://www.iarc.who.int/wp-content/uploads/2019/03/pr267_E.pdf

⁵⁸ Virk-Baker MK, Nagy TR, Barnes S, Groopman J. (2014). Dietary acrylamide and human cancer: a systematic review of literature. *Nutr Cancer* 66(5):774-90.

to establish an association between acrylamide exposure from food and cancer risk.”⁵⁹

To understand if self-reported dietary assessments correctly estimate acrylamide exposure, Ferrari et al. (2013)⁶⁰ compared self-reported dietary assessments to acrylamide-hemoglobin adducts measured in blood, which is a biomarker of acrylamide exposure. The study found that estimates of acrylamide intake based on self-reported diet did not correlate well with biomarker levels, showing that self-reported dietary assessments are not able to accurately measure acrylamide exposure.

The consequence of this type of exposure misclassification is that it is difficult to detect an association, i.e., statistical power is reduced. Imprecise exposure measurement reduces the apparent relative risk and may generate misleading conclusions.

Acrylamide is ubiquitous in the diet. It is estimated that more than one-third of the calories consumed in the US comes from food that contains acrylamide. This makes study of dietary acrylamide exposures and cancer especially challenging with respect to the exposure misclassification issue. As noted by one prominent research group⁶¹,

“In the reviewed epidemiologic studies, the dietary acrylamide exposure assessment has been inadequate leading to potential misclassification. In addition, the case-control studies have reported nearly same magnitude of dietary acrylamide exposures among both cases and controls. For disease end-point such as cancer, the exposure assessment methods that could capture the long-term exposures are highly recommended. However, majority of the reviewed epidemiologic studies have rather estimated one-time point exposures from the baseline FFQs [food frequency questionnaires] with the huge assumption that the dietary acrylamide content as well as the individual exposures over time remained constant. This is especially worrisome since a number of new food items are introduced in the market each year. In addition, food consumption patterns can be influenced by factors such as seasonality, prices, sales, as well as social factors such as holidays etc. resulting in potential changes in dietary acrylamide exposure.”

“...Until we have the improved exposure assessment methods incorporated, the epidemiologic studies assessing relationship between dietary acrylamide and cancer will not have any meaningful interpretations.”

⁵⁹ Abt E, Robin LP, McGrath S, Srinivasan J, DiNovi M, Adachi Y, Chirtel S. (2019). Acrylamide levels and dietary exposure from foods in the United States, an update based on 2011-2015 data. *Food Addit Contam Part A Chem Anal Control Expo Risk Assess* 36(10):1475-1490.

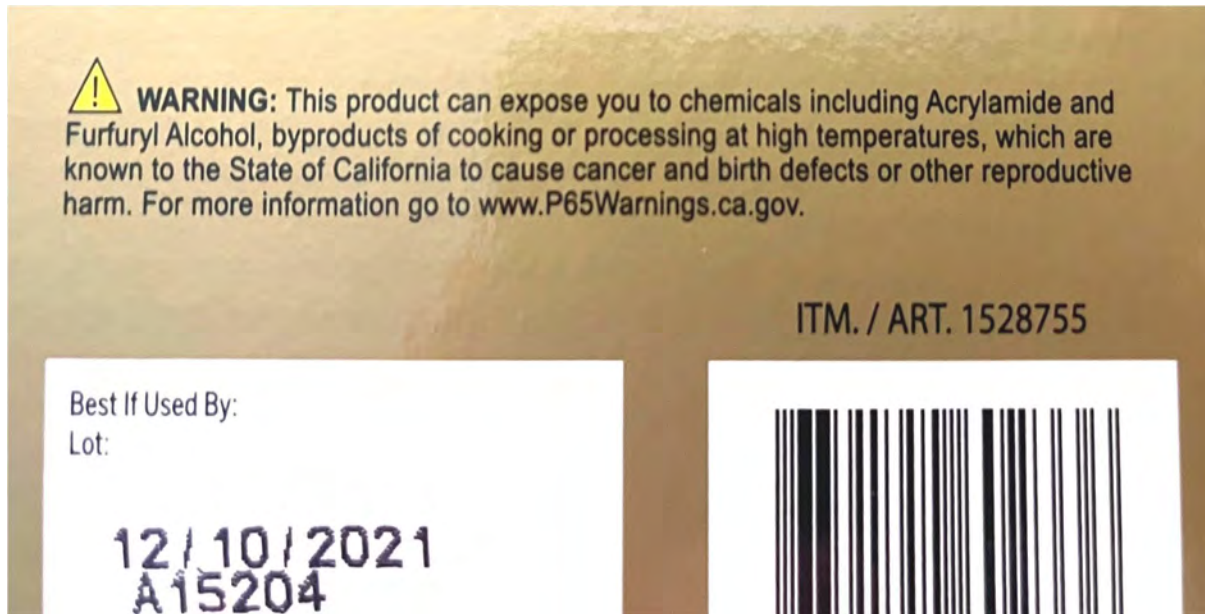
⁶⁰ Ferrari P, Freisling H, Duell EJ, Kaaks R, Lujan-Barroso L, Clavel-Chapelon F, et al. (2013). Challenges in estimating the validity of dietary acrylamide measurements. *Eur J Nutr* 52(5):1503-12.

⁶¹ Virk-Baker MK, Nagy TR, Barnes S, Groopman J. Dietary acrylamide and human cancer: a systematic review of literature. *Nutr Cancer*. 2014;66(5):774-790. doi:10.1080/01635581.2014.916323

Thus, it is crucial to integrate evidence from other data sources, i.e., animal, and mechanistic studies⁶².

⁶² NTP (2015), full citation provided in footnote 51.

Appendix 2: Warning label from moon cakes sold at a Costco retailer in California



Appendix 3: Proposition 65 Warning Website Fact Sheet



Proposition 65 Warnings
Office of Environmental Health Hazard Assessment
www.P65Warnings.ca.gov



Acrylamide

Why am I being warned about potential exposure to acrylamide?

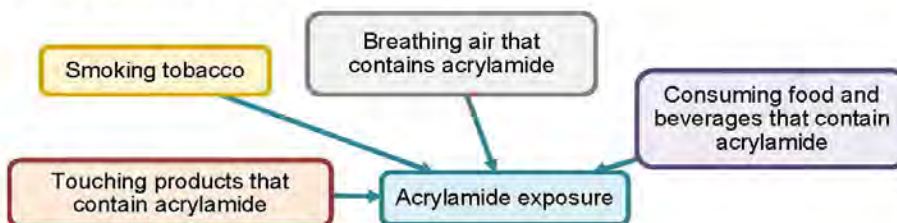


- Acrylamide is on the [Proposition 65](#) list because it can cause cancer. Exposure to acrylamide may increase the risk of cancer.
- Acrylamide is also on the Proposition 65 list because it can cause birth defects or other reproductive harm. It can affect the development of the fetus and can harm the male reproductive system. Levels in food are generally well below the levels currently believed to cause these harmful effects.
- Proposition 65 requires businesses to determine if they must provide a warning about significant exposure to [listed chemicals](#).

What is acrylamide?

- Acrylamide is a chemical that is formed in certain plant-based foods during cooking or processing at high temperatures, such as frying, roasting, grilling, and baking. Boiling or steaming foods does not create acrylamide.
 - ▶ Sources of acrylamide in the diet include french fries, potato chips, other fried and baked snack foods, roasted asparagus, canned sweet potatoes and pumpkin, canned black olives, roasted nuts, roasted grain-based coffee substitutes, prune juice, breakfast cereals, crackers, some cookies, bread crusts, and toast.
 - ▶ Researchers discovered the presence of acrylamide in fried, roasted, and other cooked foods in 2002. High temperatures during cooking convert sugars and other naturally occurring substances in these foods to acrylamide.
- [Tobacco smoke](#) contains acrylamide.
- Acrylamide is used for industrial purposes. It has been used in grouts and cements. It is also used to produce polyacrylamide.

How does exposure to acrylamide occur?



- During pregnancy, acrylamide can pass from mother to baby.

How can I reduce my exposure to acrylamide?

- Ⓡ Do not smoke. Do not allow children to breathe tobacco smoke.

The US Department of Health and Human Services recommends:

- ▶ Adopt a healthy, balanced eating plan that includes fruits, vegetables, lean meats, fish, high-fiber grains, and beans.
- ▶ Fry foods at 170 degrees Celsius (338 degrees Fahrenheit) or lower temperatures. *[The higher the frying temperature, the more acrylamide is formed].*
 - *[If you do not have a "deep fry" thermometer, dip a wooden chopstick or wooden spoon handle into the oil. If the oil slowly starts to bubble and the bubbles are small, then the oil is hot enough for frying. If the oil bubbles rapidly, with large bubbles, then the oil is too hot.]*
- ▶ Cook potato strips, such as french fries, to a golden yellow rather than a golden brown color. *[Longer cooking times result in greater formation of acrylamide.]*
- ▶ Toast bread to the lightest color acceptable.
- ▶ Soak raw potato slices in water for 15-30 minutes before frying or roasting. Drain and blot dry before cooking. *[Soaking in water removes some of the precursors to acrylamide formation.]*

- Ⓡ Do not store raw potatoes in the refrigerator. *[Cold temperatures increase the sugar content of potatoes. Sugars are precursors to acrylamide formation.]*

For more information:**General Fact Sheets and Resources**

- American Cancer Society
 - ▶ Acrylamide and Cancer Risk
<https://www.cancer.org/cancer/cancer-causes/acrylamide.html>

Acrylamide in Food

- US Department of Health and Human Services (HHS)
National Institutes of Health (NIH)
 - ▶ Acrylamide
<https://www.niehs.nih.gov/health/topics/agents/acrylamide/index.cfm>
 - ▶ Acrylamide and Cancer Risk
<https://www.cancer.gov/about-cancer/causes-prevention/risk/diet/acrylamide-fact-sheet>
- US Food and Drug Administration (FDA)
 - ▶ Acrylamide
<https://www.fda.gov/food/chemicals/acrylamide>

OEHHA

Acrylamide

Scientific Information on Acrylamide

- California Environmental Protection Agency (CalEPA)
Office of Environmental Health Hazard Assessment (OEHHA)
 - ▶ Characterization of Acrylamide Intake from Certain Foods
<http://oehha.ca.gov/media/downloads/crn/acrylamideintakereport.pdf>
- National Toxicology Program (NTP)
 - ▶ NTP-CERHR Monograph on the Potential Human Reproductive and Developmental Effects of Acrylamide
https://ntp.niehs.nih.gov/ntp/ohat/acrylamide/acrylamide_monograph.pdf

Proposition 65

- California Environmental Protection Agency (CalEPA)
Office of Environmental Health Hazard Assessment (OEHHA)
 - ▶ Proposition 65: Background
<https://www.p65warnings.ca.gov/fag>
 - ▶ Proposition 65: The List of Chemicals
<https://www.p65warnings.ca.gov/chemicals>
 - ▶ Proposition 65: Fact Sheets
<https://www.p65warnings.ca.gov/fact-sheets>

EXHIBIT K

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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE-CENTRAL JUDICIAL DISTRICT

CALSAFE RESEARCH CENTER, INC., a
California non-profit corporation

Plaintiff,

v.

EARTHLY TREATS, INC. (D/B/A/
REAL FOOD FROM THE GROUND UP);
and DOES 1 to 10,

Defendants.

Case No. 30-2021-01193600-CU-TT-CC

NOTICE OF RULING

Hearing Held: February 3, 2022

Time: 2:00 pm

Dept: CX102

Judge: Hon. Peter Wilson

Complaint filed: April 5, 2021

TO: ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on February 3, 2022, before Judge Peter Wilson, Department CX102, in the above-entitled Court, Dan Fiorito appeared on behalf of Plaintiff Calsafe Research Center, Inc. ("Plaintiff"). David Kwasniewski and Robert Petraglia appeared on behalf of Defendant Earthly Treats, Inc. ("Defendant"). The Court ordered as follows:

The Court issued a tentative ruling on February 2, 2022 DENYING Defendant's Motion for Terminating Sanctions based on spoliation of evidence. That ruling remains unchanged with the following clarification. The motion is DENIED without prejudice. The Defendant may bring another spoliation-related motion if Defendant believes it can demonstrate that the products tested by Plaintiff after the 60-day notice issued are not

NOTICE OF COURT RULING

1 fungible, or there is something unique about them as compared to the original product
2 tested in the 60-day notice.

3 Because this Court DENIED Defendant's Motion for Terminating Sanctions, Plaintiff's
4 Section 128.7 Motion regarding Defendant's Motion Terminating Sanctions is continued
5 until March 10, 2022, at 2:00 PM. Plaintiff is to evaluate its motion considering the
6 ruling from the Court.


7 The Court issued a tentative ruling on February 2, 2022, GRANTING Plaintiff's three (3)
8 Motions for Sanctions in the aggregate amount of \$7,200.00, and it is adopted as the
9 ruling of the Court. Defendant has 10 days from February 3, 2022 to provide code-
10 compliant responses to Plaintiff's discovery requests. If the Defendant elects not to
11 modify its responses by then, Plaintiff may renew its motions to compel and may seek
12 monetary sanctions if appropriate.

13 The Status Conference set for February 3, 2022, at 2:00 pm is continued until April 8,
14 2022 at 9:00 AM. The parties shall file a Joint Status Report no later than April 1, 2022.

15 Plaintiff shall file a Notice of Court Ruling.

16 Dated: February 4, 2022

17 **MANNING LAW, APC**

18 By: 
19 _____
20 Joseph R. Manning Jr., Esq.
21 Attorneys for Plaintiff
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PROOF OF SERVICE - CCP.1013A
STATE OF CALIFORNIA, COUNTY OF ORANGE

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of eighteen (18) years and not a party to the cause. My business address is 20062 S.W. Birch St., Suite 200, Newport Beach, CA 92660.

On 2/4/22 I served the true copies of the foregoing document described as **NOTICE OF RULING** on the interested parties in this action, addressed as follows:

Noah Hagey, Esq.
Braunhagey & Borden LLP
351 California Street., 10th Floor
San Francisco CA, 98401
hagey@braunhagey.com

BY United States Postal Service: The documents were mailed as set forth above by U.S. Mail and placed in sealed, addressed envelopes on the above date and deposited into a U.S. Postal Service Mail box on the date set forth above, with postage thereon fully prepaid at Newport Beach, California prior to the time for collection on that day.

BY Electronic Mail. I caused each such document to be transmitted electronically to the parties at the e-mail address indicated. To the best of my knowledge, the transmission was reported as complete and no error was reported that it was not completed.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this affidavit was executed on 2/4/22



Linda Sanchez

EXHIBIT L

Defendant's Motion for Terminating Sanctions

Defendant Earthly Treats, Inc. ("Earthly Treats" or "Defendant") seeks terminating sanctions and monetary sanctions against Plaintiff because of the destruction of samples of the products at issue that were tested to determine if there was a violation of Proposition 65.

In summary, Defendant argues that because Plaintiff failed to instruct a testing laboratory to keep remainders of tested samples, Plaintiff is guilty of spoliation of evidence. Defendant claims that it has been substantially prejudiced since it cannot conduct its own tests to verify the test results and challenge the factual basis for the 60-day notices. As such, Defendant contends the only remedy is to terminate this lawsuit and impose monetary sanctions against Plaintiff for the attorney fees and costs in bringing the motion.

To establish spoliation, Defendant must establish Plaintiff was under a duty to preserve the evidence. The Discovery Act does not specifically prohibit the intentional destruction of evidence before a lawsuit has been filed or before a discovery request. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1419; Weil, et al. (The Rutter Group 2021) Cal. Practice Guide: Civ. Proc. Before Trial, §§8:19:14.) Nor has Defendant cited any specific authority imposing such a duty on Plaintiff.

Rather, Defendant cites the general definition of spoliation: "[T]he destruction or significant alteration of evidence or the failure to preserve evidence for another's use in pending or **future** litigation". (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223, emphasis added, citing *Willard v. Caterpillar, Inc.* (1995) 40 Cal.App.4th 892, 907, 48 Cal.Rptr.2d 607, overruled on other grounds in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 18, fn. 4, 74 Cal.Rptr.2d 248, 954 P.2d 511.)

While the circumstances here may fit the general definition of spoliation, Defendant has not cited any cases in which spoliation was found when evidence was destroyed by a third party **before** any lawsuit was actually filed. (See *Williams, supra*, 167 Cal.App.4th 1218-1219 [legal malpractice action in which plaintiff obtained his client files from defendant after filing his lawsuit and then let the files be destroyed by a third party storage facility when he did not pay the storage facility and did nothing to preserve the evidence despite warnings from the storage facility that it would remove the files]; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 492, 496-497 [plaintiff attached forged contract to her complaint, and permanently deleted relevant files on her computer after expressly agreeing not to touch her computer while discovery requests regarding the files and her deposition were pending]; *Leon v. IDX Systems Corp.* (9th Cir. 2006) 464 F.3d 951, 959 [destruction of electronic files by employee occurred after lawsuit had been filed and he was on notice such files were relevant to the lawsuit centering on legitimate grounds for firing him]; *U.S. v. Kitsap Physicians Service* (9th Cir. 2002) 314 F.2d 995, 1001 [no spoliation because defendants were not on notice documents were relevant to the lawsuit where documents were routinely destroyed in the normal course of business at least 2 years before the lawsuit was filed].)

Defendant also cites *People v. Rodrigues* (1994) 8 Cal.4th 1060 for the proposition that judicial proceedings do not need to be in progress for sanctions for spoliation. But *Rodrigues* is clearly distinguishable and did not involve spoliation. *Rodrigues* was a criminal action and the issue was whether the trial court properly gave a criminal jury instruction permitting the inference of consciousness of guilt when the evidence showed defendant asked his brother to lie about his arm injury before any judicial proceedings had occurred. (*Id.* at 1139.) This matter is not a criminal action, nor does the issue here involved any affirmative conduct to fabricate evidence.

In sum, Defendant has not sufficiently demonstrated Plaintiff was under a duty to preserve the evidence.

There is another more fundamental reason why no spoliation is shown here. Plaintiff's complaint alleges that Defendant's products have contained and continue to contain acrylamide. There is no suggestion in the operative complaint or in the papers filed in connection with this motion that there has been any change in the product ingredients or how they are prepared. There is no argument or even a suggestion that all the products in issue do not remain fully available for testing by any party in this case. The various spoliation cases referred to in the briefing all identify a particular item or items that once lost, could not be replicated in any manner. Here, Defendant could as effectively challenge the initial test results by testing the products initially subjected to testing as by testing products currently available. Unless and until there is a showing that the products in question have been fundamentally altered (i.e., ingredients or manner of production changed) since the original testing, there is no basis for a finding of legally actionable "spoliation" of evidence.

Accordingly, the Motion is DENIED. All requests for monetary sanctions are also DENIED.

Plaintiff's Motions to Compel

Plaintiff seeks to compel further responses to Special Interrogatories (SI) Nos. 1-36, Requests for Production of Documents (RPD) Nos. 1-103, and Request for Admissions (RFA) Nos. 1-20, 22-29, 31, 32, 35, 37-49, 51-52, 57-59, 61-69, 71-72, 76-91 and 95-97, and for monetary sanctions against Defendant.

On September 21, 2021, Defendant served its responses to the Discovery Requests. ROA 68, Jankowski Decl., ¶4 and Ex. B [SIs]; ROA 62, Jankowski Decl., ¶4 and Ex. B [RPDs]; ROA 55, Jankowski Decl., ¶3 and Ex. B [RFAs]. Defendant's responses to SIs and RPDs consisted only of objections and no substantive responses or documents were provided. Defendant's responses to RFAs also consisted of objections but Defendant also stated that it was without information sufficient to admit or deny the allegations in the RFAs and on that basis denied the RFAs.

Plaintiff then filed these motions, which were originally heard on December 16, 2021. At the hearing, since the parties failed to meaningfully engage in informal attempts to resolve this matter, the Court ordered them to meet and confer. ROA 142, 12/16/21 Minute Order.

Although the parties met and conferred by telephone, they did not resolve this dispute. However, Defendant did agree to supplement its responses and produce documents, and did so on January 21, 2022. Defendant did not provide any verifications. ROA 189, 195, 199, Jankowski Decl., at ¶¶6-9, Exs. A-C.

Plaintiff is correct that unverified responses are tantamount to no responses. (*Appleton v Superior Court* (1988) 206 Cal.App.3d 632, 636; *Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 817 fn. 4.) Accordingly, the Court GRANTS the motions to compel and orders Defendant to provide verified, Code-compliant responses, within 10 days. Defendant is reminded that in addition to verifications being required, all responses are required to be in full compliance with the unambiguous requirements of the Code of Civil Procedure. Plaintiff may renew these motions, and may seek monetary sanctions if appropriate, if the responses provided in response to this Order are still legally insufficient.

The Court GRANTS Plaintiff's request for monetary sanctions in the total amount of \$7,200 (\$2,250 for RFAs, \$2,700 for the RPDs and \$2,250 for the SIs) for the costs incurred in preparing the replies. Defendant's actions in serving unverified responses was not substantially justified and there are no other circumstances that make the imposition of monetary sanctions unjust.

Plaintiff is ordered to give notice as to all the motions.

The status conference remains on calendar. The Court notes that the parties failed to file a joint status conference report.

EXHIBIT M

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8 Attorneys for Defendant
 EARTHLY TREATS, INC.
 9 (D/B/A/ REAL FOOD FROM THE
 GROUND UP)

10
 11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 12 **COUNTY OF ORANGE-CENTRAL JUDICIAL DISTRICT**
 13

14
 15 CALSAFE RESEARCH CENTER, INC., a
 California non-profit corporation,
 16
 Plaintiff,
 17
 v.
 18 EARTHLY TREATS, INC. (D/B/A/ REAL
 FOOD FROM THE GROUND UP); GROCERY
 19 OUTLET, INC.; and DOES 1 to 10.
 20
 Defendants.

Case No.: 30-2021-01193600-CU-TT-CXC

**DEFENDANT EARTHLY TREATS,
 INC.’S NOTICE OF MOTION AND
 MOTION FOR TERMINATING
 SANCTIONS DUE TO SPOLIATION**

*[Filed Concurrently with Declaration of
 David H. Kwasniewski]*

Date: January 6, 2022
Time: 2:00 p.m.

Complaint Filed: April 5, 2021
Judge: Hon. Peter J. Wilson
Dept.: CX102

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NOTICE OF MOTION

TO PLAINTIFF AND PLAINTIFF’S ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 6, 2022 in Department CX102 of the Superior Court of the State of California, County of Orange, Defendant Earthly Treats, Inc. (d/b/a/ Real Food From The Ground Up) (“Earthly Treats” or “Defendant”) will move for terminating sanctions and monetary sanctions due to Plaintiff Calsafe Research Center, Inc.’s (“CRC” or “Plaintiff”) spoliation of evidence. The Motion will be based upon this Notice of Motion and Motion for Terminating Sanctions, the supporting Memorandum of Points and Authorities included herein, the Declaration of David H. Kwasniewski, the Court’s files and records in this action, and upon any further evidence and argument that the Court may receive at or before the hearing.

Dated: December 9, 2021

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

By: /s/ David H. Kwasniewski
David H. Kwasniewski

Attorneys for Defendant
EARTHLY TREATS, INC.
(D/B/A/ REAL FOOD FROM THE
GROUND UP)

1 Defendant Earthly Treats, Inc. (“Earthly Treats” or “Defendant”) respectfully submits this
2 Memorandum of Points and Authorities in support of its Motion for Terminating Sanctions.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 Plaintiff destroyed the most important piece of evidence in this entire case—the Earthly
5 Treats Cauliflower Crackers (“Crackers”) it alleges violate Proposition 65. *See* Am. Compl. ¶ 2.
6 Plaintiff purchased the products for the purpose of bringing a Proposition 65 claim, sent them to a
7 laboratory for testing, and then after the testing was complete, Plaintiff knowingly allowed the
8 products to be destroyed by the lab so they cannot be retested. The appropriate remedy for this
9 willful spoliation of evidence is terminating sanctions. *See Williams v. Russ*, 167 Cal. App. 4th
10 1215, 1223 (2008).

11 **I. FACTS**

12 Plaintiff initiated this action by submitting two Proposition 65 Notices of Violation.
13 Declaration of David H. Kwasniewski in Support of Motion for Terminating Sanctions
14 (“Kwasniewski Decl.”) Ex. A. In the Notices, Plaintiff alleges that Earthly Treats’s Crackers
15 contain acrylamide and lead and thus must bear a Proposition 65 warning. *Id.* The sole basis for
16 Plaintiff’s allegation that the Crackers contain acrylamide and lead is the result of tests performed
17 on fourteen boxes of Crackers by IEH Laboratories & Consulting Group (“IEH”). Kwasniewski
18 Decl. Exs. B (Supplemental Responses to Interrogatories Nos. 16, 19); C (Supplemental Responses
19 to Requests for Production No. 3); D (IEH test results).

20 On November 11, 2021, Plaintiff appeared for its deposition. Kwasniewski Decl. Ex. F.
21 During the deposition, Mr. Fairon testified that the lab that conducts all of CRC’s testing for
22 acrylamide and lead testing, IEH, destroys all products after they are tested:

23 Q Okay. So even though you know the lab results are going to be used or could be
24 used in litigation, you destroy the products after you test them, right?

25 A The lab destroys the products.

26 Tr. 24:4-7; 25:1-7 (objections omitted). Further, Mr. Fairon testified that he was not aware
27 that he had an obligation to preserve relevant evidence (Tr. 25:19-24), which is an obligation that
28 should have been communicated to Plaintiff by its attorneys. Following the deposition, Plaintiff

1 completed its document production, which consisted exclusively of the lab test results, pictures of
2 the products, and receipts for its purchases. *See* Kwasniewski Decl. Ex. C (Supplemental
3 Responses to Requests for Production No. 3).

4 On December 3, 2021, Earthly Treats notified Plaintiff that CRC had spoliated evidence
5 and requested that it dismiss its claims. Kwasniewski Decl. Ex. E. Plaintiff has not done so.

6 **II. ARGUMENT**

7 CRC's destruction of the Crackers upon which it based its 60-Day Notices, and this
8 litigation, is spoliation of evidence. "Spoliation of evidence means the destruction or significant
9 alteration of evidence or the failure to preserve evidence for another's use in pending or future
10 litigation." *Williams*, 167 Cal. App. 4th 1215, 1223 (2008). Such conduct is condemned because it
11 "can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of
12 the underlying cause of action. Destroying evidence can also increase the costs of litigation as
13 parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be
14 less accessible, less persuasive, or both." *Cedars-Sinai Med. Ctr. v. Super. Ct.*, 18 Cal. 4th 1, 18
15 n.4 (1998). Spoliation "is a misuse of the discovery process that is subject to a broad range of
16 punishment, including monetary, issue, evidentiary, and terminating sanctions." *Williams*, 167 Cal.
17 App. 4th 1215, 1223 (citing Code Civ. Proc. §§ 2023.010(d), 2023.030(a)-(d); *Cedars-Sinai*, 18
18 Cal. 4th at 12).

19 Spoliation warrants terminating sanctions when it is (1) willful and (2) prejudicial to the
20 opposing party. *See Williams*, 167 Cal. App. 4th 1215, 1223 (citing *R.S. Creative, Inc. v. Creative*
21 *Cotton, Ltd.*, 75 Cal. App. 4th 486, 497 (1999)); Code Civ. Proc. § 2023.030(d) (court may impose
22 terminating sanction for abuse of the discovery process by, among other things, dismissing the
23 claim or entire action.) Here, Plaintiff admits that it intentionally destroyed evidence, and that
24 destruction is prejudicial to Earthly Treats's defense since it deprives it of the ability to retest the
25 products—the very products on which Plaintiff predicates its claim.

26 **A. Plaintiff's Spoliation Was Willful.**

27 Plaintiff knowingly procured the products for the purpose of fomenting litigation, yet
28 allowed them to be destroyed after they were tested. This is intentional spoliation. Indeed,

1 Plaintiff has been sending products to IEH since some time in 2020, pursuant to a standing
2 agreement with IEH, for the purpose of assessing the products' compliance with Proposition 65,
3 filing 60-Day Notices, and ultimately bringing lawsuits. Kwasniewski Decl. Ex. F (Tr. 22:12-23:6,
4 24:8-11, 24:17-25). Yet, IEH destroys the products that CRC has it test, and CRC knows it.
5 Kwasniewski Decl. Ex. F (Tr. 24:4-7; 25:1-7.); B (Supplemental Responses to Interrogatory No. 8
6 ("The SUBJECT PRODUCT was destroyed after testing per lab policy.)) Here, CRC was aware
7 that it was testing the product for the purpose of preparing litigation against Earthly Treats and was
8 therefore on notice of its obligation to preserve evidence. *See Leon v. IDX Sys. Corp.*, 464 F.3d
9 951, 959 (9th Cir. 2006) ("A party's destruction of evidence qualifies as willful spoliation if the
10 party has 'some notice that the documents were potentially relevant to the litigation before they
11 were destroyed.'") (quoting *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir.
12 2002)); *see also People v. Rodrigues*, 8 Cal. 4th 1060, 1139 (1994) (sanction for spoliation "does
13 not require judicial proceedings to actually be in progress").

14 This case presents an even more extreme instance of intentional spoliation than the Court of
15 Appeal found warranted terminating sanctions in *William v. Russ*, 167 Cal. App. 4th 1215 (2008).
16 There, the plaintiff obtained his client file from his former attorney, filed a malpractice claim, and
17 then let the files be destroyed by abandoning it at a storage facility. *Id.* at 1218-19. While the
18 plaintiff copied select portions of the file, which he produced in discovery, he failed to inform the
19 defendant that the original, complete file had been destroyed years ago. *Id.* at 1224. The Court of
20 Appeal found these facts raised an inference that the plaintiff cherry-picked favorable information
21 from the file and then chose to stand by and allow the rest of the documents to be destroyed. *Id.*
22 The court also found that at least one reason the plaintiff did so was to prevent defendant from
23 obtaining other documents from the file that were unfavorable to plaintiff. *Id.*

24 Likewise, in this case, Plaintiff destroyed the Crackers after obtaining a test result, and
25 before Defendant could have a credible lab test the products to test the veracity of IEH's report and
26 the accuracy of IEH's testing methods. In short, Plaintiff cherry-picked the test results it felt
27 supported its claim and destroyed the evidence before Earthly Treats could acquire any potentially
28 unfavorable test results. This is precisely the "destr[uction of] fairness and justice," *Cedars-Sinai*,

1 18 Cal. 4th at 18 n.4, that has led courts to universally condemn spoliation and sanction plaintiffs
2 who engage in the practice.

3 **B. Plaintiff’s Spoliation Was Prejudicial.**

4 Plaintiff’s spoliation was prejudicial because it prevents Earthly Treats from meaningfully
5 challenging the test results on which its claims rest. Plaintiff based its 60-Day Notices, certificate
6 of merit, and complaints on evidence that was destroyed. Kwasniewski Decl. Ex. B (Supplemental
7 Response to Interrogatory No. 16, 19, 29); C (Supplemental Response to Requests for Production
8 Nos. 1, 3, 4, 5, 6, 7, 13); D (IEH lab report). At its deposition, Plaintiff confirmed that its decision
9 to submit a Notice of Violation of Proposition 65 is based on the lab report: “We—Calsafe
10 purchases products sold at retail stores in California. We then ship the products to a lab. We get
11 the lab results. If the lab results exceed the OEHHA limits, then we file a 60-Day Notice.”
12 Kwasniewski Decl. Ex. F (Tr. 18:17-21).

13 Now that the Crackers have been destroyed, Earthly Treats is unable to recreate Plaintiff’s
14 test or retest the same products using different methodologies. Accordingly, Earthly Treats cannot
15 test the allegations contained in Plaintiff’s Complaint or challenge the veracity and accuracy of
16 Plaintiff’s evidence. Where, as here, a party’s wrongdoing has a “substantial probability of
17 damaging the moving party’s ability to establish an essential element of his claim or defense[,]”
18 terminating sanctions are appropriate. *Williams*, 167 Cal. App. 4th 1215, 1227 (citing *Nat’l*
19 *Council Against Health Fraud, Inc. v. King Bio Pharms., Inc.*, 107 Cal. App. 4th 1336, 1346-47
20 (2003)). This is because “[w]ithout knowing the content and weight of the spoliated evidence, it
21 would be impossible for the jury to meaningfully assess what role the missing evidence would have
22 played in the determination of the underlying action. The jury could only speculate. . . .” *Cedars-*
23 *Sinai*, 18 Cal. 4th at 14; *see also Williams*, 167 Cal. 4th 1215, 1227 (2008) (terminating sanction
24 imposed for allowing destruction of relevant records.)

25 This case is similar to *R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 75 Cal. App. 4th 486
26 (1999). Plaintiff in that case sued on a contract the defendant alleged to have been forged.
27 Although plaintiff agreed to preserve documents on the computer on which the contract was
28 created, defendant later learned that plaintiff continued to delete documents—including documents

1 relating to the contract—after the litigation had commenced. The Court of Appeal concluded that
2 terminating sanctions were appropriate, finding that the case “presents a particularly egregious
3 example of an effort at discovery games by plaintiffs[,]” and that their failure to preserve the
4 computer that contained the evidence that was the source of their claim “went beyond
5 gamesmanship and intruded into the area of actual fraud.” *Id.* at 498. Similarly, here, Plaintiff
6 knows that it is IEH’s “policy” to destroy the evidence it uses to accuse defendants of Proposition
7 65 violations, and it did nothing to preserve the evidence. *See* Kwasniewski Decl. Ex. F (Tr. 24:4-
8 7; 25:1-7.); B (Supplemental Responses to Interrogatory No. 8).

9 **III. THE COURT SHOULD REQUIRE PLAINTIFF TO PAY EARTHLY TREATS’S**
10 **ATTORNEY’S FEES FOR HAVING TO BRING THIS MOTION**

11 “The court may impose a monetary sanction ordering that one engaging in the misuse of the
12 discovery process, or any attorney advising that conduct, or both pay the reasonable expenses,
13 including attorney’s fees, incurred by anyone as a result of that conduct.” Code Civ. Proc. §
14 2023.030(a). As discussed above, Plaintiff intentionally destroyed evidence to avoid having to
15 provide it in discovery, then declined to dismiss this case after Earthly Treats discovered the
16 spoliation. Earthly Treats should also be reimbursed for its costs and fees in connection with this
17 Motion in the amount of \$5,120, as discussed in the accompanying declaration. *See* Kwasniewski
18 Decl. ¶¶ 8-10.

19
20 Dated: December 9, 2021

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

21
22
23 By: /s/ David H. Kwasniewski
David H. Kwasniewski

24 Attorneys for Defendant
25 EARTHLY TREATS, INC.
26 (D/B/A/ REAL FOOD FROM THE
27 GROUND UP)
28