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In the
Supreme Court of California

In Re: FARM RAISED SALMON CASES

After Decision by the Court of Appeal
Second Appellate District, Division Three
Case No. B182901

**Application for Status as Amicus Curiae
and Amicus Curiae Brief**

In support of Plaintiffs and Appellants Jennifer Kanter et al.

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APPLICATION FOR STATUS AS *AMICUS CURIAE*

To the Honorable Ronald M. George, Chief Justice:

Pursuant to California Rules of Court 8.200(c)(1), the Center for Food Safety (CFS) respectfully requests permission to file an amicus brief to support Plaintiffs and Petitioners Jennifer Kanter, et al. in the above captioned case.

CFS is a tax exempt, non-profit, membership organization with approximately 50,000 members, incorporated in the District of Columbia. CFS has offices in Washington D.C. and California. The California office is located at 2601 Mission St., Suite 803, San Francisco, CA 94110. Since the organization's founding in 1997, CFS has addressed the environmental, economic, ethical, human health and social concerns raised by the development and commercialization of agricultural and food production technologies, including aquaculture (fish farming).

Over the last decade, CFS has developed particular expertise in the technical, legal and policy issues concerning aquaculture. For example, in 2005, CFS published a seminal report which catalogued the human health and environmental impacts associated with the artificial dyes, antibiotics and the accumulation of contaminants in farmed fish. (Center for Food Safety, THE CATCH WITH SEAFOOD: THE HUMAN HEALTH IMPACTS OF DRUGS & CHEMICALS USED BY THE AQUACULTURE INDUSTRY, 2005 (hereinafter "CFS, THE CATCH WITH SEAFOOD") (*available at*

<http://www.centerforfoodsafety.org/pubs/Aquaculture%20report%20FINAL%206.7.2005.PDF> (last visited May 2, 2007).)

CFS seeks to protect human health and the environment by ensuring that agriculture and aquaculture products are thoroughly safety tested prior to marketing, and if on the market, are properly labeled. CFS has long been involved in the legal and policy debates concerning the labeling of foods made with technologies such as genetic engineering, irradiation, and aquaculture. CFS has consistently sought to encourage full public participation in defining policy issues presented by modern food production technologies such as aquaculture, and to provide consumers with a means of identifying such products.

CFS regularly represents the public on government decision-making related to issues in aquaculture. (See The Center for Food Safety website, “Aquaculture”, <http://www.centerforfoodsafety.org/aquacultur.cfm> (last visited May 1, 2007).) CFS works in collaboration with other environmental organizations as well as commercial and recreational fishing organizations to activate and educate federal agencies, consumers, chefs, grocers, fish retailers and legislators on the need to protect seafood consumers and our water environments from the dangers posed by existing aquaculture practices.

Accordingly, CFS respectfully requests status as *Amicus Curiae* and seeks to assist the Court in deciding questions relating to CFS’ expertise in

aquaculture, environmental protection and consumer human health and safety issues. In particular, the attached amicus curiae brief will assist the Court in this case by showing:

1. Consumers have a right to know that artificial dyes have been added to farmed salmon;
2. California law protects California consumers' right to know that farmed salmon contains artificial dyes;
3. California consumers' right to know that farmed salmon contains artificial dye is compromised by the pervasive mislabeling of farmed salmon and the failure of the federal government to enforce federal labeling laws;
4. The artificial dyes used to color farmed salmon pose significant health risks to those who consume farmed salmon;
5. Farmed salmon contains higher levels of antibiotics and toxins than wild salmon, posing further human health risks which consumers have the right to avoid;
6. Farmed salmon is of poorer nutritional quality than wild salmon, and consumers have the right to choose which salmon they purchase;
7. Farmed salmon has significant environmental impacts which consumers have the right to avoid; and

8. Federal enforcement of federal labeling laws have failed, thus state enforcement of state labeling laws is essential to ensure that consumers' right to know is vindicated.

ARGUMENT

INTRODUCTION

Currently, consumers are confronted with a difficult task at the supermarket – how to know what they are getting when they buy salmon. It is essential that farm raised salmon dyed with artificial chemicals be properly labeled as “artificially colored,” “color added,” or the equivalent, so that consumers can make informed purchasing choices that affect their families’ health and the broader environment. Consumers have a right to know that their seafood is artificially dyed. If made aware that farmed salmon contains artificial and potentially harmful dyes, consumers would often opt to pay more for wild salmon. Furthermore, consumers sensitive to artificial ingredients or artificial dyes specifically may wish to avoid canthaxanthin and astaxanthin, the chemicals used to color salmon, for health reasons.

While the legal issues in this appeal are narrowly focused on whether the Federal Food, Drug, and Cosmetic Act (“FFDCA”) 21 U.S.C § 337(a) preempts citizen enforcement of California’s Sherman Food, Drug, and Cosmetic Law (“Sherman Law”) (Health and Safety Code § 109875 *et seq.*), California citizens’ right to know the content of their food is at stake. In this particular case concerning salmon, the issue is of particular

significance, given the critical differences between farmed and wild salmon.

Wild salmon get their distinctive pink to reddish color from naturally occurring pigments present in crustaceans and other organisms that wild salmon feed on in their natural environment. Farmed salmon, by contrast, eat commercial feed containing synthetic pigments. (Buttle, L.G., et al., *The effect of feed pigment type on flesh pigment deposition and colour in farmed Atlantic salmon, Salmo salar L.*, 32 *Aquaculture Research* 2, 103-111.) Without these artificial dyes, farmed salmon would have an unappealing pale white color, easily distinguishable from its wild counterparts caught in natural settings with more pristine waters. (Congressional Research Service, SEAFOOD MARKETING: COMBATING FRAUD AND DECEPTION, April 11, 2007, p. 3 (*available at* http://openers.cdt.org/rpts/RS22642_20070411.pdf (last visited May 2, 2007).)

The human consumption of astaxanthin and canthaxanthin poses health risks, and dying farmed salmon can deceive consumers to believe they have purchased wild salmon, the more nutritious and more environmentally sound alternative. The United States Food and Drug Administration (“FDA”) has acknowledged this risk and therefore requires labeling of all salmon containing canthaxanthin and astaxanthin. (21 U.S.C. § 343(k).) California has adopted identical requirements as a matter

of state law. (Cal. Health and Saf. Code § 110740.) However, some supermarkets are not complying. (Consumer Reports, *Salmon Scam: Consumer Reports Analysis Reveals that Farm Raised Salmon is Often Sold as 'Wild,'* August 2006, available at http://www.consumerreports.org/cro/cu-press-room/pressroom/2006/eng0608sal_ov.htm?resultPageIndex=1&resultIndex=1&searchTerm=Salmon%20Label (last visited May 2, 2007).)

Government enforcement has failed because the agencies are overworked, under-funded and understaffed. (*See infra* Section IV.) Thus, citizens in this case initiated enforcement themselves. Under California law, citizens have that right under California's Unfair Competition Law (Cal. Bus. & Prof. Code, § 17200 *et seq.*), the Consumer Legal Remedies Act, (Civ. Code, § 1750 *et seq.*), California's False Advertising law, (Cal. Bus. & Prof. Code, § 17500 *et seq.*), and negligent misrepresentation. Without these critical citizen-driven mechanisms, consumers in California will continue to be deceived when they buy salmon, and will continue to be unknowingly subject to the human health effects associated with the artificial chemicals used to farmed salmon. California citizens' right to know about the health and environmental effects related to the food they eat should be vindicated by granting Appellants' relief in this appeal.

I. CONSUMERS HAVE A RIGHT TO KNOW THAT ARTIFICIAL DYES HAVE BEEN ADDED TO SALMON

The public “have a right to know what they are buying.” (*Paraco, Inc. v. Department of Agriculture* (1953) 118 Cal. App. 2d 348, 353-354) Pursuant to the ‘consumer’s right to know,’ “the public has a basic right to know any fact it deems important about food or a commodity being forced to make a purchasing decision.” (Frederick H. Degnan, *The Food Label and the Right-to-Know*, 52 Food & Drug L.J. 49, 50 (1997).) In the context of salmon, consumers have a right to know whether artificial dyes have been added to salmon. State and federal legislation protect this right to know by requiring that artificially colored salmon be labeled as such. (Cal. Health and Safety Code § 110740; 21 U.S.C. § 343(k).)

Additionally, the Codex Alimentarius, the internationally recognized standard setting body for foods, food production and food safety, has established the right to know in the labeling context as a general principle: “Prepackaged food shall not be described or presented on any label or in any labeling in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character in any respect.” (Codex Alimentarius, GENERAL STANDARD FOR THE LABELLING OF PREPACKAGED FOODS, § 3 General Principles, *available at*

<http://www.fao.org/docrep/005/y2770e/y2770e02.htm> (last visited May 1, 2007).)

In California, the right to know has been applied to the labeling of salmon dyed with artificial coloring in the California Sherman Law with labeling requirements identical to those in the FFDCA.

A. California Law Protects a Consumer's Right to Know that Salmon Contains Artificial Dyes

California law provides that any food which contains artificial coloring without stating that fact on its label is “misbranded.” (Cal. Health & Saf. Code § 110740 (2007).) With respect to salmon specifically, California law requires that merchants selling salmon containing astaxanthin or canthaxanthin must divulge that fact to consumers. (Cal. Health & Saf. Code § 110090.) California’s labeling requirements for the disclosure of color additives in salmon are identical to federal regulations. (Cal. Health & Saf. Code § 110090 (“All color additive regulations and any amendments to the regulations adopted pursuant to the federal act...are the color additive regulations of this state.”).)

The purpose of the state and federal requirements that artificially colored salmon be labeled is to avoid economic fraud in the sale of salmon and inform the consumer that the salmon contains artificial color. (*See* 63 Fed. Reg. 14814, 14816 and 60 Fed. Reg. 18736, 18738.) With respect to

the rationale for the requirement that salmon containing canthaxanthin be labeled accordingly, the FDA stated:

the presence of a color additive must be declared on any bulk container of food containing a color additive that is held at a retail establishment.... The ingredient label would prevent economic fraud in salmonid fish containing added canthaxanthin because the ingredient label would notify the consumer that the fish is artificially colored. Without such ingredient labeling, food compromising salmonid fish with added canthaxanthin would be deemed to be misbranded....

(63 Fed. Reg. at 14816.) The FDA makes similar statements with regards to the rationale for requiring that salmon colored with astaxanthin be labeled as such. (*See* 60 Fed. Reg. at 18738 (“To prevent economic fraud in salmonid fish containing added astaxanthin, the regulation required declaration of the presence of the color additive ... for labeling of bulk foods.”).) These federal labeling requirements, adopted in full by the State of California, (Cal. Health and Saf. Code §§ 110660, 110740, 110765), make clear that the consumer is entitled by California law to know about the presence of artificial dye in salmon.

B. The California Courts Have Long Recognized the Consumer’s Right to Know what Food They are Buying

California courts have long recognized that consumers “have a right to know what they are buying.” (*Paraco*, 118 Cal. App. 2d at 353-354.) In *Paraco*, the court held that reclaimed motor oil must be labeled as such, irrespective of any difference in quality with motor oil that has never before been used, stating “it is deceptive and fraudulent, through concealment, to

sell a man against his will what he does not want to buy and thinks he is not getting.” (118 Cal. App. 2d at 355.)

The reasoning in *Paraco* applies with equal force in the context of food labeling. The California Supreme Court has repeatedly upheld this right in the food labeling context. (See e.g., *In re Application of Bear* (Cal. 1932) 216 Cal. 536; *Ex Parte Hayes* (Cal. 1933) 134 Cal. App. 312; see also *Coffee-Rich, Inc. v. Fielder* (1972) 27 Cal. App. 3d 792.) *In re Application of Bear* upheld a statute designed to protect the consumer from fraud in the sale of egg products. (*In re Application of Bear*, 216 Cal. at 538.) The Supreme Court established the right to know where an egg importer failed to label imported egg product. There, the Court stated:

While there is some evidence in the record tending to show that eggs imported from China are wholesome and equal to the domestic product...[s]urely if the foreign egg is entirely fresh and wholesome when placed upon our market, it can stand upon its own merits and win its way to popular favor under its true designation.

(*Id.* (quoting *Parrott v. Benson*, 114 Wash. 117, 121 (Wash. 1921).) In *Ex Parte Hayes*, where appellant had been convicted of mislabeling grapefruit under the California Fruit, Nut and Vegetable Standardization Act of 1931, the Court affirmed the violation because mislabeling was “entirely a question of deception and the buyer has the right to know what he is purchasing.” (134 Cal. App. at 318 (citing *In re Bear*.) In a more recent case, the Second District Court upheld the validity of a state milk labeling

requirement, *inter alia*, because it preserves “the public’s right to know what nature of food it is being persuaded to digest.” (*Coffee-Rich, Inc.*, 27 Cal. App. 3d at 817.)

Thus, just as the courts have recognized the right to know the origin of grapefruits, egg products, and milk products, the Court in this case should also recognize the consumers’ right to know the origin and nature of the salmon they purchase.

C. Consumer Right to Know is Compromised by the Mislabeling of Salmon with Artificial Color Added

Without strict enforcement of applicable labeling requirements, a consumers’ right to know the origin and nature of the salmon they purchase will be compromised. “When purchasing salmon, color is one of the first things a consumer will consider.” (Anderson, S. *Salmon Color and the Consumer*, IIFET 2002 Proceedings, available at <http://oregonstate.edu/dept/iifet/2000/papers/andersons.pdf> (last visited Apr. 28, 2007).) Consumers perceive that redder salmon is fresher, has better flavor, and is of higher quality than paler salmon. (*Id.*) Contrary to popular belief, salmon color does not itself indicate freshness or quality. Rather, these desirable factors are attributable to salmon that spend their lives in the wild. A survey conducted by the New Jersey Department of Agriculture and Rutgers University found that seventy-eight percent of participants preferred wild seafood and only nine percent preferred farm-

raised. (New Jersey Department of Agriculture, Fish and Seafood Program and Rutgers, Department of Agricultural, Food and Resource Economics, IDENTIFICATION AND EVALUATION OF VIABLE MARKET OPPORTUNITIES FOR ORGANICALLY-GROWN AQUATIC PRODUCTS: RESULTS FROM THE FOCUS GROUP MEETINGS, December 2005, p. 11, *available at* <http://www.jerseyseafood.nj.gov/Organic%20AquaFocusReport.pdf> (last visited Apr. 28, 2007).)

There are a variety of health reasons for choosing wild salmon over farmed salmon; wild salmon is more nutritious, lower in fat and lower in contaminants linked to various human illnesses. (See *infra* Section II.) There are also environmental reasons for choosing wild salmon over farmed salmon; salmon farming has significant environmental impacts including impacts on already threatened wild salmon populations. (See *infra* Section III.) When farmed salmon is dyed to look like wild salmon, the consumer can be deceived into believing they are buying a superior product.

II. FARMED SALMON PRESENT RISKS TO HUMAN HEALTH WHICH CONSUMERS HAVE THE RIGHT TO AVOID

Consuming farmed salmon poses human health risks that are not encountered when consuming wild salmon. As discussed in this section, studies have linked artificial salmon dyes to retinal damage, anemia and increased cancer risks among other health risks. Farmed salmon also

contain elevated levels of harmful chemicals, such as polychlorinated biphenyls (PCBs) and dioxins associated with increased cancer risk and many other human health risks. In addition, Farmed salmon are produced with elevated levels of antibiotics, creating more human health risks by developing resistance to the antibiotics through overuse. Farmed salmon are also known to be lower in nutritional content. Misbranding farmed salmon in stores violates consumers' right to know about these concerns that can affect their health if they unknowingly purchase and consume farmed salmon.

A. The Artificial Dyes Used to Color Salmon Pose Significant Health Risks

The artificial dyes used to color salmon pose significant health risks. Canthaxanthin, one of the two artificial dyes used to color farmed salmon, has been linked to several health problems. Because canthaxanthin is cheaper than astaxanthin, it is more likely to be used as a color additive. (Staniford, D., *Silent Spring of the Sea*, A STAIN UPON THE SEA: WEST COAST SALMON FARMING (Harbour Publ. 2004), 155-56. (“Scottish salmon farmers estimate that the switch to astaxanthin ‘could increase the cost of finished feed from around £65 per tonne to £80-85 per tonne’”).) It has been found to accumulate in the eyes of humans who consume it, forming “crystalline deposits arranged in a doughnut-shaped pattern surrounding the macula.” (Espaillat, A., *et al.*, *Canthaxanthine Retinopathy*, 9 Arch Fam

Med. (2000), 121-22.) Studies have linked this accumulation of canthaxanthin to adverse effects on the neurosensory retina, (Harnois, C. *et al.*, *Static perimetry in canthaxanthin maculopathy*, 106 *Arch Ophthalmol* 1 (1988), 58-60), decreases in visual acuity (Philipp W., *Carotenoid deposits in the retina*, 187 *Klin Monatsbl Augenheilkd* 5 (1985), 439-40), and dark adaptation (Harnois and Weber, U. *et al.*, *Carotenoid retinopathy, Morphologic and functional findings*, 186 *Klin Monatsbl Augenheilkd* 5 (1985), 351-4 (thirty patients who underwent long-term treatment with carotenoids showed “markedly dose-dependent prolongation of the duration of dark adaptation”).) After the European Union (EU) Scientific Committee on Food reported a link between canthaxanthin and retinal damage in 1997, the European Commission reduced the permissible level of canthaxanthin in salmon feed by over two thirds. (Staniford, D., *Silent Spring of the Sea* at 155.)

Canthaxanthin may be linked to additional health problems in humans. There has been one reported death attributed to the use of canthaxanthin as an oral tanning agent. (*Id.* at p. 154.) Concern has also been raised over canthaxanthin’s potential carcinogenicity. (*Id.*) An additional health risk posed by the use of artificial dyes in salmon involves their effect on children. Studies have linked the ingestion of synthetic food dyes to increases in hyperactivity in young children. (Bateman, B. *et al.*, *The effects of a double blind, placebo controlled, artificial food colourings*

and benzoate preservative challenge on hyperactivity in a general population sample of preschool children, 89 Arch Dis Child. 6 (2004), 506-11; Rowe, K.S., *Synthetic food colourings and 'hyperactivity': a double-blind crossover study*, 24 Aust Paediatr J. 2 (1988), 143-7.)

B. Farmed Salmon Contain Higher Levels of Toxins which Poses Human Health Risks

In addition to the human health risks associated with artificial salmon coloring, farmed salmon itself poses human health risks, including higher concentrations of PCBs, Dioxins, Malachite Green and other toxins.

Salmon are carnivorous fish that feed high up on the food chain.

(Hites, R.A. *et al. Global Assessment of Organic Contaminants in Farmed Salmon*, 303 Science 5655, (2004), 226-9.) Certain contaminants,

including PCBs, dioxins, and pesticides bioaccumulate¹ in the food chain such that high-level feeders like salmon contain relatively high levels of these contaminants. (*Id.*) Food accounts for 90% of human PCB exposure; fish such as salmon contain the highest PCB concentrations in human food.

(Roveda, A.M. *et al., Exposure to polychlorinated biphenyls (PCBs) in food and cancer risk: recent advances*, 62 Ig Sanita Pubbl. 6 (2006), 677-96 (article in Italian).) PCB exposure has been linked to a variety of health problems in humans, including increased risk of developing non-Hodgkin's

¹ Bioaccumulation refers to a process by which contaminants typically stored in fat cells accumulate and concentrate as they move up through the food chain, at the top of which sit humans. (CFS, THE CATCH WITH SEAFOOD, at 19.)

lymphoma (De Roos, A.J., *et al. Persistent organochlorine chemicals in plasma and risk of non-Hodgkin's lymphoma*, 65 *Cancer Res.* 23 (2005), 11214-26), cardiovascular disease, liver disease, and diabetes (Carpenter, D.O., *Polychlorinated biphenyls (PCBs): routes of exposure and effects on human health*, 21 *Rev Environ Health* 1 (2006), 1-23); deterioration in semen quality (Rozati R. *et al.*, *Role of environmental estrogens in the deterioration of male factor fertility*, 78 *Fertil Steril* 6 (2002), 1187-94); suppression of the immune system (Carpenter, D.O., *Polychlorinated biphenyls (PCBs): routes of exposure and effects on human health*, 21 *Rev Environ Health* 1 (2006), 1-23.); and alteration in thyroid and reproductive function. (*Id.*) PCB exposure also increases the risk that women will give birth to infants of low birth weight, and exposure “during fetal and early life, reduces IQ and alters behavior.” (*Id.*)²

Studies have also linked PCB exposure to various forms of cancer including breast, prostate, testicular, ovarian and uterine cancers. (Roveda, A.M. *et al.*, *Exposure to polychlorinated biphenyls (PCBs) in food and cancer risk: recent advances*, 62 *Ig Sanita Pubbl.* 6 (2006), 677-96 (article in Italian).) Experiments have reported that PCBs cause cancer in

² See also Perera, F. *et al.*, *Children's environmental health research—highlights from the Columbia Center for Children's Environmental Health*, 1076 *Ann N Y Acad Sci.* 1 (2006), 15-28. (“A growing body of evidence has been generated indicating that the fetus, infant, and young child are especially susceptible to environmental toxicants [including]...polychlorinated biphenyls (PCBs)”).

laboratory animals, specifically by promoting tumors in the liver and lungs of rats and mice. (Nakanishi, Y. and Shigematsu, N., *Carcinogenic effects of polychlorinated biphenyls (PCBs) and their derivatives, including carcinogenicity to the lung*, 82 *Fukuoka Igaku Zasshi* 5 (1991), 251-55 (article in Japanese).) Studies have also implicated PCBs as possible endocrine disruptors which cause infertility and other hormone-regulated disorders. (See e.g., Roveda *et al.* (2006).) Consistent with the concerns raised by these studies, the State of California identifies PCBs as chemicals known to cause cancer and reproductive toxicity. (State of California, Environmental Protection Agency, Office of Environmental Health and Hazard Assessment, Safe Drinking Water and Toxic Enforcement Act of 1986, “Chemicals Known to the State to Cause Cancer or Reproductive Toxicity,” December 8, 2006, p. 15 *available at* http://www.oehha.ca.gov/prop65/prop65_list/files/P65single120806.pdf (last visited May 1, 2007).)

Contaminant levels, including PCBs, dioxins and pesticides are significantly higher in farmed salmon than in wild salmon. (CFS, *THE CATCH WITH SEAFOOD*, at 17; Hites *et al.* (2004).) The Hites study analyzed over 700 farmed and wild salmon from around the world for PCBs, dioxins and other toxins, and found that “farmed salmon have significantly higher contaminant burdens than wild salmon.” (Hites *et al.* (2004).) A second study, also finding higher levels of PCBs, dioxins and

other toxins in farmed salmon as compared with wild, concluded that “health risks (based on a quantitative cancer risk assessment) associated with consumption of farmed salmon contaminated with PCBs...[and other contaminants] were higher than risks associated with exposure to the same contaminants in wild salmon.” (Foran, J.A., *Risk-based consumption advice for farmed Atlantic and wild Pacific salmon contaminated with dioxins and dioxin-like compounds*, 113 *Environ Health Perspect.* 5 (2005), 552-6.)

C. Antibiotics and Chemicals Used in Salmon Farming Pose Human Health Risks

The use of antibiotics also contributes to human health risks associated with farmed salmon. Farmed salmon are raised in confined pens in open waters. To control disease and parasite infestations common on salmon farms, salmon farmers treat their fish with large amounts of antibiotics, such as oxytetracyclin and amoxicillin, both prescribed by doctors for flu and other infections that affect humans (Staniford, D., *Silent Spring of the Sea* at 149-50), as well as chloramphenicol and nitrofurans, both known to cause human illness. (CFS, *THE CATCH WITH SEAFOOD*, at 12, 13.) When consumers eat fish treated with antibiotics, they may ingest harmful levels of unsafe antibiotics. (*Id.* at 12, 13; Rebecca Goldberg & Tracy Triplett, *MURKY WATERS: ENVIRONMENTAL EFFECTS OF AQUACULTURE IN THE U.S.*, Environmental Defense Fund, (1997), *available at*

http://www.environmentaldefense.org/documents/490_AQUA.pdf (last visited May 2, 2007).) Chloramphenicol, an antibiotic now banned by the U.S. and E.U., but still found in farmed salmon, is known to cause cancer, anemia and aplastic anemia (an often fatal condition causing bone marrow to stop producing red and white blood cells). (CFS, THE CATCH WITH SEAFOOD, at 13.) Nitrofurans, another banned antibiotic drug, also continues to be found in farmed salmon and is known to be carcinogenic. (*Id.* at 14.)

Additionally, there are serious concerns that the use of antibiotics in aquaculture may lead to antibiotic resistance in bacteria that cause human illness. (*Id.*) For example, one researcher reported that there appears to be “a clear impact between use of antibacterial drugs in aquaculture and development of antibiotic resistance in fish pathogenic bacteria.” (Henning Sorum, *Antibiotic Resistance in Aquaculture*, 92 *Acta Vet. Scand. Suppl.* 29 (1999).)

Lastly, malachite green, a chemical often used as a fabric dye, is also extensively used in aquaculture around the world to prevent fungal growth on fish eggs and as a treatment for parasitic infections. (CFS, THE CATCH WITH SEAFOOD, at 15.) While banned in the U.S., malachite green is commonly used abroad, found in farmed salmon consumed here in the U.S., and is known to cause damage to liver, spleen, kidneys and the heart;

is known to cause mutations in DNA; and is known to be carcinogenic to the liver, thyroid, and other organs. (*Id.* at 16)

D. Farmed Salmon is of Poorer Nutritional Quality than Wild Salmon

The nutritional content of farmed salmon is also substantially different from wild salmon. Salmon is generally regarded as a highly nutritious food, largely because of the beneficial Omega-3 fatty acids salmon contain. While both wild and farmed salmon contain Omega-3 fatty acids, wild salmon contains roughly three times more Omega-3 fatty acids than farmed salmon. (Hamilton, M.C., et. al., *Lipid composition and contaminants in farmed and wild salmon*, 39 *Environ Sci Technol.* 22 (2005), 8622-9.) Although farmed salmon contains fewer of these beneficial fats, they also contain more total fat than wild salmon. (*Id.*) Farmed salmon has been found to contain on average 16.6% total fat, whereas wild salmon contained on average 6.4% fat. (*Id.*) Based on these findings, wild salmon offers significant nutritional benefits over farmed salmon. Dying farmed salmon without informing consumers deceives consumers into believing their salmon purchase is as healthy a product as wild salmon, undermining the consumer's right to choose the more nutritious product.

Because of the substantial health concerns raised over contaminants found at higher levels in farmed salmon, consumers wishing to minimize

their health risk may decide to consume wild instead of farmed salmon. Without the legally required labels, making this choice is made more difficult if not impossible.³

III. SALMON FARMING HAS SIGNIFICANT ENVIRONMENTAL IMPACTS WHICH CONSUMERS HAVE THE RIGHT TO AVOID

Farm raised salmon also pose significant effects to the environment, which consumers may choose to avoid if given the choice. Far from the pristine image of anadromous salmon swimming upstream to spawn, retracing the path they took to the ocean years before, farmed salmon spend their entire lives in pens. Often overcrowded, these pens are havens for parasites and disease. (CFS, *THE CATCH WITH SEAFOOD*, at 11-16.) The open-net pens used in salmon farming, suspended within natural bodies of water, allow parasites and disease agents to escape into the marine environment, where they can infect already vulnerable wild salmon populations. Also, pesticides and other chemicals used to control infestations disperse beyond the open-net pens and contaminate the environment.

³ Recently enacted USDA regulations require Country of Origin Labeling (COOL), including the requirement that salmon be labeled as farmed or wild. (7 C.F.R. 60 *et seq.*) However, widespread mislabeling continues to cause confusion and deception in the salmon market place. (See, e.g., Consumer Reports, *Salmon Scam: Consumer Reports Analysis Reveals that Farm Raised Salmon is Often Sold as 'Wild,'* available at http://www.consumerreports.org/cro/cu-press-room/pressroom/2006/eng0608sal_ov.htm?resultPageIndex=1&resultIndex=1&searchTerm=Salmon%20Label (last visited May 2, 2007).)

To control parasite infestations common on salmon farms, salmon farmers treat their fish with large amounts of pesticides. (Staniford, D., *Silent Spring of the Sea* at 149-50.) Because farmed raised salmon are raised in open-net pens, these pesticides escape into the marine environment causing pollution and harm to marine species. (*Id.*)

Sea lice, a prevalent parasite in farmed salmon populations, stress the fish and make them more vulnerable to infections and death. (Davies, I.M. et al., *A review of the use of ivermectin as a treatment for sea lice (Ilepeophtheirus salmonis (Krøyer) and Caligus elongates Nordmann) infestation in farmed Atlantic salmon (Salmo salar L.)*, 31 *Aquaculture Research* 11 (2000), 869-83.) Sea lice infestations are treated with chemotherapeutants such as ivermectin, a neurotoxin which has been used to successfully treat parasites in terrestrial organisms. (*Id.*) The infested salmon are either bathed in ivermectin or fed the toxin in their feed. (*Id.*) Because salmon do not absorb ivermectin well, a large percentage is passed into the environment unchanged either in feces or uneaten food. (*Id.*) Ivermectin is toxic to some marine invertebrates and accumulates in sediments, posing a particular risk to species living therein. (*Id.*) Other antiparasitics used in salmon farming also pose toxic effects to marine life, including azamethiphos, cypermethrin, dichlorvos, emamectin benzoate, and teflubenzuron. (Staniford, D., *Silent Spring of the Sea* at 149.)

Further adding to the environmental impact of salmon farming, farmed salmon escape from aquaculture pens on salmon farms in all aquaculture areas in the world. (Naylor, R. *et al.*, *Fugitive Salmon: Assessing the Risks of Escaped Fish from Net-Pen Aquaculture*, 55 *BioScience* 5 (2005), 427-37.) Escaped farmed salmon can spread the diseases prevalent in the fish farm to wild salmon, threatening the health of already vulnerable wild salmon populations. (*Id.*) Moreover the escaped farmed salmon can interbreed and compete with wild salmon, further pressuring dwindling wild salmon populations. (*Id.*)

The environmental impacts caused by salmon farming are significant, and many consumers may wish to avoid purchasing and consuming such an environmentally destructive food. Dying farmed salmon to appear like wild salmon may deceive consumers into believing they are making an environmentally friendly purchase, when in fact they are unknowingly purchasing farmed salmon and supporting an industry that significantly harms the environment contrary to their personal choice. Thus, this Court should grant Appellants the relief necessary to enforce the California Sherman Law.

IV. CALIFORNIA'S CITIZEN ENFORCEMENT OF CALIFORNIA COLOR LABELING IS NECESSARY TO PROTECT CONSUMER'S RIGHT TO KNOW

The critical role of state food laws is demonstrated by the national food safety system as a whole, a mosaic of a diverse set of federal and state laws. In particular, over 200 state food safety and labeling laws fill in gaps across the country where federal food safety laws provide no protection.

(The Center for Science in the Public Interest, SHREDDING THE FOOD

SAFETY NET: A PARTIAL REVIEW OF 200 STATE FOOD SAFETY AND

LABELING LAWS CONGRESS IS POISED TO EFFECTIVELY KILL WITH H.R.

4167, March 2006 (*available at*

<http://www.cspinet.org/new/pdf/shredding.pdf> (last visited May 1, 2007).)

In California, at least ten separate laws govern food related issues as a matter of state law, including laws governing shellfish safety, milk safety, the content of alcohol in food, and others. (*Id.* at ii, iii.) In the case of labeling salmon with artificial color added, California contains its own state law requiring that information on food labels is accurate and not misleading, and specifically that artificially colored salmon be labeled to accurately reflect that fact. (Health and Safety Code § 110740.) The California legislature's adoption of the federal standards into California law is a clear sign of its intent to also enforce it as a matter of state law.

It is critical that California's labeling law be enforced as a matter of state law. If this Court requires that California's color labeling standards be enforced in the same manner as the federal equivalent standards, the practical result will be that nothing would be done: FDA, the federal agency responsible for enforcing federal salmon labeling laws, is admittedly not enforcing its salmon labeling laws. (Congressional Research Service, SEAFOOD MARKETING: COMBATING FRAUD AND DECEPTION, April 11, 2007, p. 5 (*available at* http://openers.cdt.org/rpts/RS22642_20070411.pdf (last visited May 2, 2007)); *Species Substitution: Labeling Law Not An FDA Priority*, Santa Monica Seafood SeaLog, April 2006 (*available at* <http://www.santamonicaseafood.com/docs/Sealogs/Sealog-04-2006.pdf>.) FDA has stated that it must give priority to other matters because of shrinking resources. (Center for Science in the Public Interest, FDA: THE SLEEPING WATCHDOG, June 27, 2006, *available at* http://cspinet.org/new/pdf/sleeping_watchdog.pdf (last visited May 1, 2007).) Given this lack of federal enforcement, Appellants in this case have stepped up to enforce the labeling requirements as a matter of California law, and should be afforded the right to do so.

Given the threats from the food system that consumers face, the right of Appellants to enforce the salmon labeling laws in this case, as well as the right of future plaintiffs to enforce California's food protection laws should

be vindicated. According to the Center for Disease Control and Prevention, seventy-six million people contract a food borne illness in the United States every year, five thousand of which die. (United States Government Accountability Office, Testimony Before the Subcommittee on Agriculture, Rural Development, FDA, and Related Agencies, Committee on Appropriations, House of Representatives, Statement of David M. Walker, Comptroller General of the United States, “FEDERAL OVERSIGHT OF FOOD SAFETY: *High-Risk Designation Can Bring Needed Attention to Fragmented System*,” February 8, 2007, p. 1. (hereinafter “GAO Report: Fragmented Food System”).) Recent food safety crises involving *E-Coli* in spinach, *Salmonella* in peanut butter and poisoned pet-food have highlighted FDA’s gross enforcement failures. On April 24, 2007, Congress heard testimony from the families affected by the contaminated spinach disaster, in part to assess whether FDA has the capacity to protect the nation’s food supply. The hearings revealed that three people died from the tainted spinach and nearly two hundred were sickened. (Bridges, A., *Congress Examines Food Safety Cases*, Associated Press, April 26, 2007.)

“Broken” is the dramatic adjective Representative Henry Waxman of California used to describe the FDA at the April 24, 2007 spinach hearing. “The Food and Drug Administration lacks the staff, funding and enforcement authority needed to protect the U.S. food supply” said Waxman, noting that since 1998 outbreaks in fresh produce have doubled.

(Weise, E., *'Broken' FDA Can't Keep Food Safe*, Associated Press, April 26, 2007.) The Government Accountability Office (GAO) designated federal oversight of food safety a “high-risk” area to raise the priority and visibility of the need to transform federal oversight of food safety. (GAO Report: Fragmented Food System at 1.) Among the problems with federal oversight of food safety identified by the GAO were inconsistent oversight, ineffective coordination, and inefficient use of resources. (*Id.*)

In light of the urgency in addressing food-borne illness and the scarcity of FDA resources, checking supermarket salmon to see whether it is appropriately labeled is not one of FDA's priorities. (Center for Science in the Public Interest, FDA: THE SLEEPING WATCHDOG, June 27, 2006, *available at* http://cspinet.org/new/pdf/sleeping_watchdog.pdf (last visited May 1, 2007).) The Center for Science in the Public Interest specifically illustrates the lack of deceptive labeling enforcement at FDA in a recent report, stating:

Presently, only four people at FDA's headquarters are assigned to stopping deceptive labeling, and they say they only have time to respond to questions, not to be proactive. Even when FDA field inspectors scrutinize a manufacturing plant for food-safety violations, they superficially examine only a few labels. The most efficient way to inspect labels would be to comb grocery store shelves, but the FDA has not done that for several decades... According to a new report to Congress, the FDA reports that in a recent 15-month period it issued only 10 warning letters for deceptive food label claims...CSPI, which filed complaints with the FDA concerning claims on more than 100 products over the past 10 years, suspects that at any one time hundreds of labels bear deceptive nutrition-related claims.

(Id. (emphasis added).)

Given the lack of FDA resources to enforce its own laws and regulations to protect the American public, and the fact that California has as a matter of state law taken it upon itself to administer the labeling law at issue here, this Court should vindicate Appellants' right to enforce the labeling laws as a matter of state law, under California's Unfair Competition Law (Cal. Bus. & Prof. Code, § 17200 *et seq.*), the Consumer Legal Remedies Act (Civ. Code, § 1750 *et seq.*), California's False Advertising law (Cal. Bus. & Prof. Code, § 17500 *et seq.*), and negligent misrepresentation.

CONCLUSION

For the above reasons, *Amicus Curiae* Center for Food Safety requests the Court to find in favor of Appellants and vindicate the consumer right to know what is in the salmon they purchase and the right to enforce the Sherman Law as a matter of California law.

Dated: May 3, 2007

/s/ Kevin Golden
Kevin Golden

Attorney for Amicus Curiae
CENTER FOR FOOD SAFETY

CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, Rule 8.520 (c)]

This brief consists of 5,875 words as counted by the Microsoft Office Word 2003 word processing program used to generate this brief.

Dated: May 3, 2007

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DECLARATION OF SERVICE

In the Supreme Court of California

Case Number: S147171 / B182901 / JCCP No. 4329

Case Title: Jennifer Kanter, et al. v. Albertson's Inc., et al.

I, the undersigned, declare:

That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Alameda, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 2601 Mission Street, Suite 803, San Francisco, California 941110.

On May 4, 2007, I served the foregoing document(s) described as
Application for Status as Amicus Curiae and Amicus Curiae Brief
on all interested parties in this action as follows:

[X] **BY E-MAIL** By causing the above listed documents to be served by E-MAIL from Michal Kapitulnik to the e-mail addresses as follows: **See attached Service List.**

[X] **BY U.S. MAIL** By placing a true copy thereof enclosed in sealed envelopes addressed as follows: **See Attached Service List.** I am readily familiar with the organization's practice for collection and processing correspondence for mailing. Under that practice, this document will be deposited with the U.S. Postal Service on this date with postage thereon fully prepaid at San Francisco, California in the ordinary course of business.

I, Michal Kapitulnik, declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 4, 2007 at San Francisco, California.

/s/ Michal Kapitulnik
MICHAL KAPITULNIK

In the Supreme Court of California

Case No.: S174174

*Jennifer Kanter, et al. v.
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