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November 1, 2000

Food and Drug Administration  
Office of Field Programs  
Division of Enforcement Programs  
Outbreak Coordination Staff  
HFS-605  
200 C Street, S.W.  
Washington, DC 20204

re: StarLink corn

Dear Outbreak Coordination Staff:

We are writing in response to the Environmental Protection Agency's ("EPA") Notice of Assessment of Scientific Information Concerning StarLink Corn Cry9C Bt Corn Plant-Pesticide ("Notice"), docket control number PF-867B, asking that anyone having information concerning allegations of adverse effects in humans from ingestion of food that may have contained StarLink corn submit such information to this office. *See* 65 FR 65246. Pursuant to that request, we submit the following:

As set forth in our Second Amended Class Action Complaint (the "Complaint"), a copy of which is attached hereto, on September 21, 2000 our client, Wallace Wasson, suffered from an allergic reaction to StarLink corn that was present in Taco Bell Home Originals taco shells he consumed. Mr. Wasson's allergic reaction was diagnosed by physicians at the University of Chicago Hospitals. Furthermore, the remaining taco shells from his package of Taco Bell Home Originals were analyzed and confirmed to contain StarLink corn by multiple DNA extraction tests performed by Genetic ID, Inc. Mr. Wasson's unfortunate reaction to StarLink corn contrasts with the EPA's statement that "it is reasonable to conclude that there are not now and will not be in the future any 'at risk' consumers . . . no allergy has been attributed to Cry proteins." *See* Notice at 65 FR 65246, 65249.

**KRISLOV & ASSOCIATES, LTD.**

In light of Mr. Wasson's allergic reaction to StarLink corn, and additional human allergic reactions that have come to our attention, we respectfully urge that the Food and Drug Administration ("FDA") and the EPA deny Aventis CropScience USA's Petition for an Exemption from the Requirement of a Tolerance for the Genetically Engineered "Plant-Pesticide" Materials in StarLink Corn (the "Petition"). Aventis CropScience USA's Petition is seeking a four year time-limited tolerance exemption so that any StarLink corn in the food channels is cleared through the various processing and commercial food channels destined for human consumption. Due to the existing and potential allergenicity of StarLink corn and Cry9C protein, the granting of Aventis CropScience USA's Petition would enable StarLink Corn to legally enter the human food market and threaten the health and safety of food consumers.

In addition, we believe that granting Aventis CropScience USA's after-the-fact retroactive Petition will only encourage food manufacturers to ignore federal regulations in the future, since they will likely believe that they can get retroactive approval for non-approved food products and pesticides after the potentially dangerous food products have entered the human food chain. The granting of Aventis CropScience USA's retroactive Petition will only serve to undercut the EPA's and FDA's purpose of protecting human health through preventative public health measures.

Please feel free to call me if you have any questions or comments regarding this letter.

Sincerely,



William Bogot

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

MERRI PLACE and WALLACE WASSON,  
on behalf of themselves and all others  
similarly situated,

Plaintiffs,

v.

KRAFT FOODS, INC., AZTECA MILLING,  
L.P., and AVENTIS CROPSCIENCE USA  
HOLDING, INC.

Defendants.

No. 00 CH 14114

JURY TRIAL DEMANDED

**SECOND AMENDED CLASS ACTION COMPLAINT**

Plaintiffs, individually and on behalf of all others similarly situated, complain as follows:

**Nature of Action**

1. This case is a class action by purchasers of Taco Bell Home Originals taco shells ("Taco Bell taco shells") and other foodstuffs against Kraft Foods, Inc. ("Kraft"), Azteca Milling, L.P. ("Azteca"), and Aventis CropScience USA Holding, Inc. ("Aventis") arising from the defendants' knowing or reckless participation in the production and distribution of Taco Bell taco shells and other foodstuffs that illegally contained trace elements of a genetically engineered corn marketed by biotechnology company Aventis under the name of Starlink. Starlink corn's genetic modification enables the corn to produce its own pesticide that contains a potentially harmful protein known as Cry9C.

2. Defendants knowingly or recklessly participated in the supply, production, advertising, marketing and selling of millions of boxes of Taco Bell taco shells (Taco Bell Home Originals 12 Taco Shells, Taco Bell Home Originals 18 Taco Shells, Taco Bell Home Originals Dinner) and other foodstuffs which omitted disclosing that they contained trace elements of Starlink and which plaintiff and the class members unknowingly purchased and ingested. The Taco Bell taco shells are sold by Kraft and made with corn flour supplied by Azteca.

### **Jurisdiction and Venue**

3. This Court has jurisdiction over this litigation under Illinois Code of Civil Procedure, 735 ILCS 5/2-209(a)(1), (2), by the defendants' transacting business and committing torts in Illinois as set forth herein; under Illinois Code of Civil Procedure, 735 ILCS 5/2-209(b)(3), by Kraft and Aventis doing business within the state; under Illinois Code of Civil Procedure, 735 ILCS 5/2-209(c), by defendants' knowing sale of products in the stream of commerce which they foresaw and intended for sale in the state of Illinois; and under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 and 10a(a) and (c).

4. Venue is proper in this county under Illinois Code of Civil Procedure, 735 ILCS 5/2-101, and under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/10a(b), because one of the plaintiffs resides in Chicago, Cook County, Illinois, because Kraft's headquarters are located in Glenview, Cook County, Illinois, and because Azteca and Aventis are nonresidents of Illinois, making venue appropriate in any county of the state.

### **The Parties**

5. Plaintiff Merri Place ("Place"), the mother of two children, purchased for personal and household consumption one or more boxes of the subject Taco Bell taco shells over the past year. Place and her family reside in Downers Grove, DuPage County, Illinois.

6. Plaintiff Wallace Wasson ("Wasson") purchased for personal and household consumption one or more boxes of the subject Taco Bell taco shells over the past year. Wasson resides in Chicago, Illinois.

7. Defendant Kraft Foods, Inc. is a Delaware corporation headquartered in Glenview and Northfield, Illinois engaged in the manufacture and distribution of consumer food products for global distribution and sale. Kraft is a subsidiary of Phillip Morris Company, Inc.

8. Defendant Azteca Milling, L.P. is a Texas limited partnership headquartered in Edinburg, Texas. Azteca produced the corn flour with Starlink corn that was used to manufacture the Taco Bell taco shells. Azteca sold corn flour with Starlink corn in its Maseca and Masa-Mixta

brand corn flours for wholesale and retail sale. Azteca's corn flour with Starlink corn is also sold to additional third party entities, including Gruma Corporation for incorporation in other foodstuffs and sold to consumers, and suppliers to the Taco Bell chain of fast food restaurants operated by Tricon Global Restaurants Inc.. Azteca's general partner, Gruma-ADM, Inc., is an affiliation comprised of Gruma Corporation and Archer Daniels Midland Company. Gruma Corporation manufactures and distributes corn flour under the MASECA brand name, and tortillas under the MISSION and GUERRERO brand names. Gruma Corporation has a United States market share of approximately 82% and 25% in corn flour and tortillas respectively. Gruma Corporation is wholly owned by GRUMA, headquartered in Mexico. GRUMA is the world's largest corn flour and tortilla producer with annual sales in excess of \$1.5 billion.

9. Defendant Aventis CropScience USA Holding, Inc. is a Delaware corporation headquartered in Research Triangle Park, North Carolina. Aventis, either alone or in conjunction with its corporate family relations, developed Starlink corn and holds the intellectual property rights for Starlink corn. Aventis is a subsidiary of Aventis SA of France. Aventis SA and its Aventis CropScience organization is the largest crop science company in the world with pro forma sales exceeding \$4 billion.

#### **Factual Allegations**

10. Upon the petition of Aventis, on April 10, 1998, the Environmental Protection Agency ("EPA") established a temporary tolerance exemption from the requirement of a tolerance for residues of the plant pesticide *Bacillus thuringiensis* subspecies *tolworthi* Cry9C protein and the genetic material necessary for its production in corn feed use only; as well as in meat, poultry, milk or eggs resulting from animals fed such feed. 63 Fed.Reg. 17687. This temporary tolerance was made permanent on May 22, 1998. 63 Fed.Reg. 28258.

11. On August 17, 1998, the EPA followed this tolerance exemption action by approving the pesticide product registration of Starlink corn utilizing the Cry9C protein. 63 Fed.Reg. 43936. This registration was recently extended through September 30, 2001. 65 Fed.Reg. 48701. Under

these actions, Starlink corn is legally allowed to be marketed, planted and introduced into interstate commerce for use in non-human animal feed only.

12. On April 7, 1999, Aventis re-submitted a petition to the EPA seeking an exemption from the requirement of a tolerance residues of Cry9C on all raw agricultural commodities. To date, the EPA has not approved this petition. Based upon concerns with Cry9C protein from Starlink, the EPA has embarked a regulatory process to assess the potential allergenicity issues related to use of Cry9C in food directed for human consumption. 64 Fed.Reg. 71452 (announcing assessment of Cry9C's allergenicity and the use of a Scientific Advisory Panel to further analyze the matter). An EPA assessment has found that the Cry9C protein is unique among *b.t.* proteins because it is heat stable and resistant to degradation in gastric juice (not readily digestible) and that these are the best available criteria known as to characteristics of proteins that are food allergens. Thus, consumption of foods containing Cry9C can harm certain individuals resulting in, *inter alia*, gastrointestinal upset.

13. Because of the concerns raised by both the EPA and its Scientific Advisory Panel, the EPA has yet to approve Cry9C for use in other than non-human animal feed. These limitations in Cry9C use were recognized by Aventis during its February 29, 2000 presentation to the EPA Scientific Advisory Panel when the company admitted that the product should not be presently reaching consumers.

14. Despite the fact that the EPA has not approved Starlink corn and Cry9C for incorporation or use in food intended for human consumption, on September 18, 2000, Friends of the Earth and Genetically Engineered Food Alert (an association of public interest organizations which support the removal of genetically engineered food ingredients from consumer foods unless they are adequately safety tested and labeled) announced that a 7-box sample of Taco Bell taco shells sold in a suburban grocery store showed the presence of Starlink corn. Friends of the Earth gave the taco shell samples to an independent laboratory, which concluded that the samples contained at least 1 percent of Starlink corn.

15. On September 22, 2000, Kraft announced that it was voluntarily recalling all Taco

Bell Home Originals taco shell products sold nationwide in retail grocery outlets. Kraft made the decision to recall the Taco Bell taco shells after its own tests confirmed the presence of Starlink and Cry9C in the taco shells.

16. On October 2, 2000, the federal Food and Drug Administration officially recalled the Taco Bell taco shells. The Agency declared a class II recall, defined as "a situation in which the use of, or exposure to, a violative product may cause temporary or medically reversible adverse health effects."

17. On October 12, 2000, Friends of the Earth and Genetically Engineered Food Alert announced that samples of Safeway, Inc. brand taco shells were also found, by an independent testing entity, to contain Starlink corn. This finding was confirmed by Safeway, Inc., the nation's largest supermarket chain, which thereafter recalled its house brand taco shells made by Mission Foods, a sister company of Azteca. Mission Foods also makes the house brand taco shells for Food Lion, Inc. and Shaw's Supermarkets, Inc. Both Food Lion, Inc. and Shaw's Supermarkets, Inc. have pulled their house brand taco shells off the shelf.

18. On or about October 25, 2000, Friends of the Earth and Genetically Engineered Food Alert announced that samples of Western Family brand taco shells purchased from a grocery store in Eugene, Oregon were also found, by an independent testing entity, to contain Starlink corn. Western family sells its grocery products to stores in 23 states and Russia and Japan. Western Family has recalled its Western Family brand taco shells and Shur Fine brand tortilla chips.

19. On or about October 25, 2000, in Japan, which ranks as one of the biggest buyers of United States corn, a consumer group announced that it found Starlink in a food product called "Homemade Baking." The product is now being voluntarily recalled.

20. By mandate of the EPA, Aventis was obligated to require farmers who bought or licenced Starlink corn seeds to segregate Starlink corn from other types of corn that are approved for human consumption. However, despite this contractual requirement, "[w]hat was found, according to industry officials, is that not all farmers had signed required contracts obligating them to follow

certain procedures intended to keep Starlink out of the food supply.” *Chicago Tribune*, October 15, 2000.

21. According to the Des Moines Register, “[g]overnment officials have said Aventis was supposed to ensure that farmers kept Starlink corn separate from other varieties but failed to do so.” *Des Moines Register*, October 18, 2000. “A spokesman said Iowa Attorney General Tom Miller’s office had received about a dozen calls from Starlink growers. ‘Most tell us they were not told about the restriction,’ said Miller aide Bob Brammer.” *Des Moines Register*, October 25, 2000.

22. The presence of Cry9C protein in a food intended for human consumption in interstate commerce is a violation of the federal Food, Drug and Cosmetic Act. Under 21 U.S.C. Sec. 346a(a)(1), when a pesticide residue tolerance or an exemption from such a tolerance has not been granted for a residue, any food intended for human consumption with such a pesticide residue is unsafe, and therefore adulterated under 21 U.S.C. Sec. 342(a)(2)(B). The existing tolerance exemption for Cry9C found in Starlink corn applies only to products used or intended for non-human animal feed. Thus, under 21 U.S.C. Sec. 346(a)(1) and 21 U.S.C. 342(a)(2)(B), the presence of Cry9C in Taco Bell taco shells, Azteca’s corn flour products and other foodstuffs render such products adulterated under the federal Food, Drug and Cosmetic Act. Pursuant to 21 U.S.C. Sec. 331(a), the introduction of an adulterated food into interstate commerce is an illegal act.

23. Kraft and Azteca knew or recklessly failed to ascertain whether their foodstuffs, including the Taco Bell taco shells, contained Starlink corn, and thus recklessly or negligently failed to discover that their foodstuffs were being distributed for human consumption with trace elements of Cry9C.

24. Aventis intentionally, knowingly, recklessly or negligently failed to ensure, as required by the EPA, that farmers to whom it supplied Starlink corn seeds contractually obligated themselves to follow certain procedures intended to keep Starlink corn out of the human food supply. Aventis knew or should have known that without such contractual obligations by farmers of Starlink corn, it was likely and foreseeable that Starlink corn would or could be commingled with corn

approved or fit for human consumption, and that Starlink corn would and could find its way into foodstuffs intended for human consumption.

25. The subject Taco Bell taco shells and other foodstuffs were sold with content descriptions that mislabeled their contents, i.e., failed to disclose that the products contained Starlink corn and the protein Cry9C which is specifically not approved for human consumption by federal regulatory authorities.

26. Despite the belated Taco Bell taco shell recall, plaintiff Wasson suffered an allergic reaction from consuming the Taco Bell taco shells. In the evening of September 20, 2000, Wasson and a friend ate several Taco Bell taco shells from a package of Taco Bell Home Originals 12 Taco Shells. At approximately 3:00 a.m. the next day, on September 21, 2000, Wasson woke up from sleeping with a severe stomach ache, diarrhea, and a head ache. He was able to fall back asleep and awoke again at 9:00 a.m. to discover that, in addition to his previous symptoms, he also had hives on his right arm and back. By that night his symptoms had gotten worse and the hives had spread to his inner thighs, mouth, and throat.

27. By Friday September 22, Wasson learned from news reports of the tainted Taco Bell taco shells and, thinking that he likely consumed taco shells with the Starlink corn, he called Kraft at the 800 number on the Taco Bell taco shell package to find out more information and report his reaction. Kraft put Wasson in touch with one of its physicians named Dr. Jeffrey Butane. On Friday and Saturday, September 22-23, 2000, Wasson spoke on the phone with Dr. Butane. On both occasions, despite the fact that Dr. Butane never physically examined Wasson, Dr. Butane told Wasson that his condition could not have been caused by consuming the Taco Bell taco shells and that in fact Starlink corn was safe for human consumption and would soon be approved for human consumption by federal regulatory agencies.

28. With Wasson's symptoms persisting, on Sunday September 24, 2000, he went to the University of Chicago Hospital where he was diagnosed with symptoms of a food allergy. He was prescribed an antihistamine and an antibiotic (the antibiotic was prescribed for both a pre-existing

ear infection and to prevent infection from the severe scratching Wasson had done to his hives). Currently, as of October 3, 2000, Wasson's symptoms have subsided except for some scaring from the hives.

29. Wasson's friend, who also ate Taco Bell taco shells on the evening of September 20, 2000, similarly suffered from a headache and stomach upset the next morning.

### Class Allegations

30. Plaintiffs bring this litigation as a class action under Illinois Code of Civil Procedure §2-801, on behalf of the following classes of persons and other entities nationwide: all persons who purchased defendants' foodstuff products for human consumption that contain corn and corn flour supplied by Azteca Milling, L.P. (including, but not limited to, Kraft's Taco Bell Home Originals 12 Taco Shells, Taco Bell Home Originals 18 Taco Shells, and Taco Bell Home Originals Taco Dinner), and all persons who purchased foodstuff products for human consumption that contain Aventis' Starlink corn.

31. Excluded from the class are defendants and their officers and directors.

32. Numerosity: The class is numerous and joinder impracticable. Millions of containers of the Taco Bell taco shells and Azteca's corn flour and corn flour products are sold nationwide each year to consumers who may rely upon the purity of their contents and truthfulness of their descriptions. In additions, millions of pounds of Starlink corn have been grown in the United States and a currently unknown but likely vast amount of such corn has found its way into the human food supply.

33. Existence and Predominance of Common Questions of Law or Fact: Questions of law or fact exist arising from defendants' conduct. Such questions are common to all class members and predominate over any questions affecting only individual members of the class. The myriad of questions of law or fact common to the class includes, *inter alia*:

- (a) whether defendants omitted, misrepresented or otherwise falsely stated material facts,
- (b) whether the omissions, misrepresentations or false statements were made intentionally, willfully, wantonly, or recklessly,

- (c) whether defendants owed a duty to the class members, what is the scope of any duty, and was the duty breached,
- (d) whether the class members have been damaged and, if so, what is the proper measure of damages,
- (e) whether the class members are entitled to punitive damages,
- (f) whether the class members are entitled to injunctive and/or declaratory relief, and the scope of such relief, and
- (g) whether defendants have violated state laws barring consumer fraud, deceptive practices, negligence, warranty breach or contract breach.

34. Adequacy of Representation. Plaintiffs will fairly and adequately protect and pursue the interests of the members of the class. Plaintiffs' counsel has vast experience in consumer class cases. Plaintiffs understand the nature of the claims herein, their role in these proceedings, and will vigorously represent the interests of the class.

35. Appropriateness. This class litigation is an appropriate method for the fair and efficient adjudication of the claims involved. The Taco Bell taco shells and other corn and corn flour based foodstuffs generally sell for a few dollars each. Thus, the size of the expected recovery for an individual class member is not expected to be substantial enough for any one class member to incur the costs and expenses of this litigation.

#### Jury Demand

36. Plaintiffs and the class demand a trial by jury.

#### Count I (Consumer Fraud Act - Against Kraft and Azteca)

37. Plaintiffs reallege paragraphs 1 through 36.

38. At all relevant times there was in full force and effect the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* (the "Consumer Fraud Act") and similar deceptive practice acts in other states

39. Section 2 of the Consumer Fraud Act, 815 ILCS 505/2, provides, in pertinent part:  
Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or

the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act. (footnotes omitted)

40. The Uniform Deceptive Trade Practices Act, 815 ILCS 510/1, *et seq.* provides at 815 ILCS 510/2, in pertinent part:

A person engages in a deceptive trade practice when, in the course of his business, vocation or occupation, he:

\* \* \*

- (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

\* \* \*

- (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

\* \* \*

- (7) represents that goods or services are a particular standard, quality or grade or that goods are a particular style or model, if they are of another;

\* \* \*

- (12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding.

41. Similar statutes, identical in their material respects, are in effect in most other jurisdictions within the united States.

42. Plaintiffs and members of the class are consumers of defendants' foodstuff products.

43. Defendants intended that plaintiffs and the class members would rely on their representations and omissions as to the contents described on the boxes of Taco Bell taco shells and other foodstuff containers sold, manufactured or distributed by defendants.

44. Defendants' knowing or reckless actions constitute violations of these deceptive practice acts and implicates consumer protection concerns.

45. Section 10a of the Consumer Fraud Act, 815 ILCS 505/10a, and similar provisions in the deceptive practice acts in other jurisdictions within the United States, provide, in pertinent part:

- (a) Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper...

\* \* \*

- (b) Except as provided in subsections (f), (g), and (h) of this Section, in any action brought by a person under this Section, the Court may grant injunctive relief where appropriate and may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party.

46. Plaintiffs and the class members have been damaged as a proximate result of defendants' misrepresentations, omissions and other violations in that either:

- (a) they paid for products that were different than they received;
- (b) they paid for products that they would not have purchased; or
- (c) they would not have paid the price they paid.

**Count II**  
**(Common Law Fraud - Against Kraft and Azteca)**

47. Plaintiffs reallege paragraphs 1 through 46.

48. Defendants intentionally, knowingly, recklessly or negligently concealed or omitted material facts as to the true contents of the Taco Bell taco shells and other foodstuffs (in that they illegally contained Starlink corn) and defendants intended that plaintiffs and members of the class rely upon the product content descriptions on the subject taco shells and other

foodstuffs.

49. Plaintiffs and the class members reasonably relied on defendants' representations and omissions and as a proximate result thereof were deceived and damaged.

**Count III**  
**(Negligence - Against Kraft, Azteca and Aventis)**

50. Plaintiffs reallege paragraphs 1 through 49.

51. At all relevant times defendants owed a duty to plaintiffs and the class members to use reasonable care in the manufacture, distribution, advertising, marketing and sale of the subject taco shells and other foodstuffs to be certain that the containers' content descriptions accurately identified the contents of each product and contained only corn products approved for human consumption.

52. Defendants breached their duty by failing to verify that the contents of the subject taco shells and other foodstuffs were accurately described and labeled and contained only corn approved for human consumption, and/or by failing to disclose and/or discover that the subject taco shells and other foodstuffs were not accurately described and labeled and contained corn not approved for human consumption.

53. At all relevant times Azteca owed a duty to plaintiffs and members of the class to take reasonable and adequate steps to segregate Starlink corn (and other corns intended for non-human consumption) from corns intended for human consumption in the production of its corn flour.

54. Azteca breached its duty to plaintiffs and members of the class by failing to take reasonable and adequate steps to segregate Starlink corn from corns intended for human consumption in the production of its corn flower.

55. At all relevant times Aventis owed a duty to plaintiffs and members of the class to take reasonable and adequate steps to ensure that farmers to whom it sold or licenced Starlink corn seeds followed certain procedures intended to keep Starlink corn out of the human food supply and to ensure that Starlink corn was not commingled with other corn intended for human

consumption.

56. Aventis breached its duty to plaintiffs and the members of the class by failing to take reasonable and adequate steps to ensure that farmers to whom it sold or licenced Starlink corn seeds followed certain procedures intended to keep Starlink corn out of the human food supply and to ensure that Starlink corn was not commingled with other corn intended for human consumption.

57. Defendants' breach proximately caused damage to plaintiffs and the class.

**Count IV**  
**(Uniform Commercial Code Breach of Warranty - Against Kraft and Azteca )**

58. Plaintiffs reallege paragraphs 1 through 57.

59. The subject Taco Bell taco shells' and other foodstuffs' affirmative statements of product contents constituted a warranty.

60. The sale of the subject Taco Bell taco shells and other foodstuffs implied that they were as represented, were fit for their ordinary purposes (i.e., that they were fit for human consumption and contained food material approved for sale to consumers) and that they conformed to the promises or affirmations thereon.

61. At all relevant times there was in full force and effect the Illinois Uniform Commercial Code, 810 ILCS 5/1-101, *et seq.* (the "UCC").

62. Section 2-313 of the UCC (815 ILCS 5/2-313) provides, in pertinent part:

§2-313. Express Warranties by Affirmation, Promise, Description, Sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of

the bargain creates an express warranty that the whole of the goods shall conform to the sample of model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty.

63. Section 2-314 of the UCC (810 ILCS 5/2-314) provides, in pertinent part:

§2-314. Implied Warranty: Merchantability; Usage of Trade. (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this Section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

64. Similar statutes, identical in their material respects, are in effect in most other jurisdictions within the United States.

65. Plaintiffs and the class members have been damaged by defendants' breach of their express and implied warranty obligations.

Count V

**(Uniform Commercial Code Nonconformity of Goods - Against Kraft and Azteca)**

66. Plaintiffs reallege paragraphs 1 through 65.

67. Section 2-301 of the UCC provides that the seller is obligated to transfer and deliver the contracted goods in accordance with the contract. According to the UCC's Official Comments under §2-301, in order 'to determine what is in 'accordance with the contract' under this Article usage of trade, course of dealing and performance, and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words used to define the scope of the conditions and duties." 810 ILCS 5/2-301, *Official Comments*.

68. "Contract" is defined under UCC § 1-201(11) as the total legal obligation which results from the parties' agreement as affected by the UCC and other applicable rules of law. 810 ILCS 5/1-301.

69. "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing and usage of trade or course of performance as provided in the UCC. 810 ILCS 5/1-201(3).

70. Under the conditions that plaintiffs and the members of the class purchased their Taco Bell taco shells and other foodstuffs as set forth herein, the general background and implication from the circumstances was (and continues to be) that the Taco Bell taco shells and other foodstuffs only contained corn flour that was fit for human consumption and legally approved for sale to humans for their consumption.

71. Defendants failed to sell plaintiffs and members of the class Taco Bell taco shells and other foodstuffs containing corn flour fit for human consumption and legally approved for sale to humans for their consumption and thus defendants failed to transfer or deliver conforming goods as required by the UCC.

**Count VI**  
**(Breach of Contract to Third Party Beneficiary - Against Aventis)**

72. Plaintiffs reallege paragraphs 1 through 71.

73. Upon information and belief, Aventis, as a necessary condition for the EPA granting its temporary tolerance exemption for Starlink corn and Cry9C, entered into a contractual agreement with the EPA (for adequate consideration) that required Aventis to contractually require farmers who bought or licensed Starlink corn to employ certain specified procedural safeguards to ensure that Starlink corn was segregated from other types of corn that are approved for human consumption.

74. It was the intent of both Aventis and the EPA upon entering into that contract that it was for the primary and direct benefit, protection, health and welfare of plaintiffs, and all others similarly situated, who comprise the population of United States consumers of foodstuffs containing corn and corn flour.

75. Aventis breached its contract with the EPA, and thereby caused damage to plaintiffs, by failing to contractually require all farmers of its Starlink corn to employ certain specified procedural safeguards to ensure that Starlink corn was segregated from other types of corn that are approved for human consumption.

**Prayer for Relief**

WHEREFORE, plaintiffs and the class pray for the following relief:

- A. an order certifying the class as set forth herein, with the named plaintiffs as class representatives and their counsel as class counsel;
- B. a declaration that defendants' conduct violated the law as alleged in each cause of action;
- C. judgment for plaintiffs and the class for compensatory damages sustained as a result of defendants' unlawful conduct;
- D. preliminary and permanent injunctions preventing defendants from supplying, producing, manufacturing, distributing, promoting, marketing, advertising or selling for human consumption mislabeled corn, corn flour and other foodstuffs containing Starlink corn;

E. directing defendants to take such action as to protect plaintiffs, the class and the public from foodstuffs containing corn or corn flour that contain or might contain Starlink corn including, but not limited to, ordering a judicial recall of all such foodstuffs;

F. an order requiring defendants to disgorge all revenues they have made from their illegal conduct; and

G. awarding plaintiffs and the class attorneys' fees and costs against defendants as allowed by law; and

H. granting such other or further relief as the Court may hold appropriate under the circumstances.

DATED: October 26, 2000

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one of plaintiffs' attorneys

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