

**SUPREME COURT OF THE STATE NEW YORK  
COUNTY OF NEW YORK**

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STATE OF NEW YORK, by Eliot Spitzer, :

Plaintiff,

v.

DAICEL CHEMICAL INDUSTRIES, LTD.,  
EASTMAN CHEMICAL COMPANY,  
HOECHST AKTIENGESELLSCHAFT,  
NUTRINOVA NUTRITION SPECIALTIES  
& FOOD INGREDIENTS, GMBH,  
HOECHST CELANESE CORPORATION, a/k/a  
CNA HOLDINGS, INC., NUTRINOVA, INC.,  
CELANESE AG, AVENTIS, S.A.,  
NIPPON GOHSEI, a/k/a NIPPON SYNTHETIC  
CHEMICAL INDUSTRY CO., LTD., and  
UENO FINE CHEMICALS INDUSTRY, LTD.,

**COMPLAINT**

Defendants. :  
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Plaintiff State of New York, by its Attorney General, Eliot Spitzer, for its complaint alleges as follows:

**INTRODUCTION**

1 This action arises from Defendants' unlawful conspiracy to fix the price of sorbates sold in the United States and elsewhere. Sorbates are non-toxic chemical preservatives, used as mold inhibitors in high-moisture and high-sugar food products, such as cheese and other dairy products, baked goods and other processed foods. Sorbates also are used in various beverages, and other products. Worldwide sales of sorbates are roughly \$200 million annually.

2 Beginning in or about January 1979 and continuing until in or about June 1997, Defendants and their named and unnamed coconspirators participated in a conspiracy affecting

approximately \$1 billion in U.S. commerce. As more fully alleged below, beginning on or about September 30, 1998, and on various dates thereafter, certain of the Defendants pleaded guilty to federal criminal antitrust charges brought by the United States Department of Justice. Defendants have agreed to pay at least \$132 million, collectively, in criminal fines to the federal government for participating in the sorbates price-fixing conspiracy

3. In addition, private parties have filed actions arising from the Defendants' conspiracy in courts in California, Kansas, Tennessee, and Wisconsin, which have settled in whole or in part. By way of summary

(a) In or about November 2000, certain of the Defendants settled a private class action filed in the United States District Court for the Northern District of California on behalf of direct purchasers nationwide for approximately \$82 million (the "California Federal Action"). Two other settlements in the case, totaling approximately \$14.5 million, have since been approved either preliminarily or finally by the court.

(b) In or about November 2000, certain of the Defendants settled a private class action filed in Tennessee state court on behalf of indirect purchasers in Tennessee for approximately \$1.45 million.

(c) In or about January 2001, certain of the Defendants settled a private class action filed in California state court on behalf of indirect purchasers in California for approximately \$7.7 million.

(d) In or about July 2001, certain of the Defendants settled a private class action filed in Kansas state court on behalf of indirect purchasers in Kansas for approximately \$1.025 million.

(e) In or about November 2001, certain of the Defendants settled a private class action filed in Wisconsin state court on behalf of indirect purchasers in 11 States (other than New York) and the

District of Columbia for approximately \$7.86 million.

4. Plaintiff State of New York has an interest in the economic health and well-being of those who reside or transact business within its boundaries. The State of New York also has an interest in insuring the presence of an honest marketplace in which economic activity is conducted in a competitive manner for the benefit of consumers and other marketplace participants – without collusion, fraud or deception. Defendants’ illegal price-fixing conspiracy injured both the interests of the State of New York and of those New York consumers and businesses participating in the sorbates market

5 By this action, the State of New York, seeks: (a) monetary relief from the Defendants, in the form of treble damages, restitution, disgorgement and civil penalties, to compensate New York victims of the conspiracy, and to insure that Defendants realize no monetary benefit from – and are sanctioned for – their illegal activity; and (b) such injunctive and other equitable relief as may be appropriate to assure free and open competition involving sorbates.

#### **THE PARTIES**

6. Plaintiff State of New York brings this action as a sovereign state, as *parens patriae* and as otherwise authorized by law on behalf of persons in New York (including governmental entities) who purchased in New York either sorbates or products containing sorbates, and who were injured by Defendants’ illegal conduct, and as *parens patriae* on behalf of the State’s citizens economy and general welfare. The State of New York does not, however, sue on behalf of any person covered by settlements in the California Federal Action, referred to above.

7. Defendant Daicel Chemical Industries, Ltd. (“Daicel”) is a corporation organized under the laws of Japan with its principal place of business in Tokyo, Japan. During the relevant

time period, Daicel engaged in the business of producing sorbates, and – through Daicel (U.S.A.) Inc. and/or Mitsui & Co. (U.S.A.), Inc. – of marketing and distributing sorbates in the United States.

8. Defendant Eastman Chemical Company (“Eastman”) is a corporation organized under the laws of Delaware with its principal place of business in Kingsport, Tennessee. During the relevant time period, Eastman (or its predecessors-in-interest, Eastman Chemical Division, Eastman Chemical Company, or Monsanto Company (“Monsanto”)) engaged in the business of producing, marketing and distributing sorbates in the United States.

9. Defendant Hoechst Aktiengesellschaft (“Hoechst AG”) is a corporation organized under the laws of Germany with its principal place of business in Frankfurt, Germany.

10. Defendant Nutrinova Nutrition Specialties & Food Ingredients, GmbH (“Nutrinova GmbH”) is a corporation organized under the laws of Germany with its principal place of business in Frankfurt, Germany. During the relevant time period, Nutrinova GmbH was a direct or indirect subsidiary of Hoechst AG.

11. Defendant Hoechst Celanese Corporation (“HCC”), later renamed CNA Holdings, Inc., is a corporation organized under the laws of Delaware with its principal place of business in New Jersey. During the relevant time period, HCC was an indirect subsidiary of Hoechst AG.

12. Defendant Nutrinova, Inc. is a corporation organized under the laws of Delaware with its principal place of business in New Jersey. During the relevant time period, Nutrinova, Inc. was a direct or indirect subsidiary of Hoechst AG.

13. Defendant Celanese AG is a corporation organized under the laws of Germany with its principal place of business in Kronberg im Taunus, Germany.

14. During the relevant time period, Hoechst AG and/or Nutrinova GmbH engaged in the

business of producing sorbates and, through HCC and/or Nutrinova, Inc., of marketing and distributing sorbates in the United States.

15. In or about October 1999, Nutrinova GmbH, Nutrinova, Inc. and HCC ceased to be owned by Hoechst, and thereafter were owned by Celanese AG. Celanese AG is named as a defendant insofar as it is a successor-in-interest to Nutrinova GmbH, Nutrinova, Inc. and HCC, and thus legally responsible for their obligations.

16. Defendant Aventis, S.A. ("Aventis") is a French corporation with its principal place of business in Strasbourg, France. Aventis was formed in December 1999, following the merger (or other form of business combination) involving Hoechst AG and Rhone-Poulenc, a French corporation. Aventis owns approximately 97% of the shares of Hoechst AG. Aventis is named as a defendant insofar as it is a successor-in-interest to Hoechst AG and thus legally responsible for its obligations.

17. Defendant Nippon Gohsei, also known as Nippon Synthetic Chemical Industry Co., Ltd. ("Nippon"), is a corporation organized under the laws of Japan with its principal place of business in Osaka, Japan. During the relevant time period, Nippon engaged in the business of producing sorbates, and – through Mitsui & Co. (USA), Inc. – of marketing and distributing sorbates in the United States.

18. Defendant Ueno Fine Chemicals Industry, Ltd. ("Ueno") is a corporation organized under the laws of Japan with its principal place of business in Osaka, Japan. During the relevant time period, Ueno engaged in the business of producing sorbates, and – through Kanematsu USA, Inc. – of marketing and distributing sorbates in the United States.

19. Various other persons, firms or corporations, not named in this pleading, participated

as co-conspirators with the named Defendants in the unlawful activity alleged in this complaint, and performed acts and made statements in furtherance thereof.

### **JURISDICTION AND VENUE**

This action arises under N.Y. Gen. Bus. Law § 340 et seq. (the “Donnelly Act”), N.Y. Exec. Law § 63(12), N.Y. Gen. Bus. Law § 349, and the common law

Jurisdiction is proper in New York pursuant to CPLR §302 and, as to at least certain Defendants, pursuant to CPLR §301

(a) Each Defendant transacted business in the State of New York. The causes of action alleged in this complaint arise from such acts. Accordingly, jurisdiction exists under CPLR § 302(a)(1).

(b) Each Defendant committed tortious acts without the State of New York, causing injury to persons or property within the State, and each Defendant expects or should reasonably expect the tortious acts to have consequences in the State, and derives substantial revenue from interstate or international commerce. The causes of action alleged in this complaint arise from such acts. Accordingly, jurisdiction exists under CPLR §302(a)(3)(ii).

(c) Each Defendant committed tortious acts without the State of New York, causing injury to persons or property within the State, and each Defendant regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the State. The causes of action alleged in this complaint arise from such acts. Accordingly, jurisdiction exists under CPLR §302(a)(3)(i).

22 As to Defendants Eastman and HCC, during the relevant time period each Defendant registered as a foreign corporation doing business in New York. Accordingly, jurisdiction as to each

of these Defendants exists under CPLR §301.

23. Venue is proper in the County of New York pursuant to CPLR § 503 and/or § 509.

## **FACTUAL BACKGROUND**

### **The Uses of Sorbates**

24. Sorbic acid, in the form of an unsaturated fatty acid, is a naturally occurring preservative that inhibits the growth of microbes. It is particularly effective in slowing the growth of fungi (yeasts and molds), and also limits the growth of certain bacteria.

25. Sorbic acid was first isolated in the mid-nineteenth century. Its anti-microbial activity was discovered in or about 1939. Sorbic acid is recognized as generally safe in foods by the food-protection agencies of industrialized nations.

26. Sorbic acid may be extracted from vegetable matter. For more than 50 years, however, nearly all sorbates have been manufactured by synthetic chemical processes. There are several feasible chemical pathways available to produce synthetic sorbates. Sorbic acid can be transformed into at least three salts – potassium sorbate, sodium sorbate, and calcium sorbate – and all four chemical forms are generally called “sorbates.

27. Nearly all sorbates are used to inhibit the growth of yeasts, molds, and microbial rancidity in foods, beverages, and feedstuffs. Examples of products thus preserved are margarine, butter, mayonnaise, salad dressings, cheese, yogurt, pickles, low acid syrups, preserved meats and fish, dried fruit, jams, cakes, confectionary fillings, fruit juices, soft drinks, wine, and high-moisture pet foods. Sorbates can be applied to foods by mixing, dipping, spraying, dusting, or incorporation into wrapping materials. A relatively small amount of sorbates is used for some pharmaceuticals and high-moisture, low-pH, cosmetics and toiletries, as well as for other non-food products.

28. Sorbic acid and potassium sorbates are more commonly used commercially than are sodium sorbates or calcium sorbates. Generally speaking, sorbic acid is more potent than potassium sorbates in inhibiting microbial growth. However, the preservative effect of all sorbates depends on several factors, such as the level of sorbates applied, the pH level of the substrate, temperature, gases in the atmosphere, and the presence of other preservatives.

### **The Sorbates Industry**

29. Although U.S. consumption of sorbates was negligible in the 1950's, by 1978 annual U.S. consumption was almost 12 million pounds. By the late 1990's, annual U.S. consumption was roughly double that of 1978. Factors driving the increasing demand for sorbates included changes in the quantity of sweetened high-moisture food, increased shelf-life of preserved food, and heightened concerns about food spoilage and food safety.

30. From 1970 to 1996, six companies produced nearly all sorbates sold worldwide: (a) Hoechst AG (and its subsidiary Nutrinova, GmbH); (b) Daicel; (c) Nippon; (d) Ueno; (e) Monsanto, whose sorbates operations Eastman purchased in 1990; and (f) Chisso Corporation.

31. Hoechst AG began commercial production of sorbates in the late 1940's or early 1950's. From 1979 until it sold its food ingredients operations in the late 1990's, Hoechst AG was one of the largest single manufacturers of sorbates in the world. Hoechst left the industry in the late 1990's

32. By the early 1970's, four Japanese-domiciled companies produced sorbates from plants in Japan. The four companies, in approximate order of size, beginning with the largest, were: (a) Daicel; (b) Nippon; (c) Ueno; and (d) Chisso. By 1996, the four produced about 30 million pounds of sorbates, which were sold in the U.S. and elsewhere.



33. In 1977, Monsanto began to operate what was then the world's largest sorbates plant, located at Chocolate Bayou near Alvin, Texas. This plant had the capacity to supply the entire, or virtually entire, U.S. demand for sorbates at the time. In late 1990, Monsanto sold its sorbates business to Eastman. Eastman thereafter expanded the Texas plant's capacity. After pleading guilty to price-fixing in 1998, Eastman closed the Texas plant and left the sorbates industry.

34. No significant entry at the manufacturing level took place in the sorbates industry from 1977 to the late 1990's.

### **The Conspiracy Charged**

35. Beginning in or about January 1979, Defendants entered into a continuing conspiracy to fix and maintain the price of sorbates sold in the United States and elsewhere, and to coordinate price increases for the sale of sorbates. In furtherance of this conspiracy, which continued until in or about June 1997, Defendants engaged in the following overt acts, among others:

- (a) Participated in meetings to discuss the prices and sales of sorbates to be sold in the United States and elsewhere. The meetings were held in various locations throughout the world including: Salzburg, Austria; Vienna, Austria; Prague, Czechoslovakia; Helsinki, Finland; Athens, Greece; Budapest, Hungary; Tokyo, Japan; Warsaw, Poland; Lisbon, Portugal; Stockholm, Sweden; Interlaken, Sweden; and Zurich, Switzerland.
- (b) Participated in telephone conversations and other discussions regarding the prices and volumes of sorbates to be sold in the United States and elsewhere;
- (c) Agreed, during those meetings and conversations, to charge prices at certain levels and otherwise to increase and maintain prices of sorbates to be sold in the United States and elsewhere;
- (d) Agreed, during those meetings and conversations, to allocate market shares among major producers of sorbates in the United States and elsewhere;
- (e) Issued price announcements and price quotations relating to sorbates in accordance with the agreement reached; and

- (f) Participated in meetings and conversations to discuss prices and sales of sorbates to be sold in the United States and elsewhere, and exchanged information on the sales of sorbates in the United States and elsewhere, for the purpose of monitoring and enforcing adherence to the agreed-upon prices and market shares.

36. Defendants, and their unnamed co-conspirators, participated in one or more overt acts in furtherance of the conspiracy and participated in conspiratorial activities. Each Defendant is jointly and severally liable for all damages caused by the conspiracy.

37. Defendants, and their unnamed co-conspirators, engaged in the acts described in the foregoing paragraphs for the purpose of effectuating the unlawful agreements described in this complaint.

#### **Defendants' Guilty Pleas in the United States and the Canadian Fines**

38. On or about September 30, 1998, the Antitrust Division of the U.S. Department of Justice charged Eastman with conspiracy to fix prices in the sorbates industry. Eastman pled guilty to the criminal charges and agreed to pay a fine of \$11 million.

On or about May 5, 1999, the Antitrust Division of the U.S. Department of Justice charged Hoechst AG with conspiracy to fix prices in the sorbates industry. Hoechst AG pled guilty to the criminal charges and agreed to pay a fine of \$36 million. A former Hoechst employee was also charged, pled guilty, and agreed to pay a \$250,000 fine.

On or about July 14, 1999, the Antitrust Division of the U.S. Department of Justice charged Nippon with conspiracy to fix prices in the sorbates industry. Nippon pled guilty to the criminal charges and agreed to pay a fine of \$21 million. A Nippon employee was also charged, pled guilty, and agreed to pay a \$350,000 fine.

41. On or about July 25, 2000, the Antitrust Division of the U.S. Department of Justice

charged Daicel with conspiracy to fix prices in the sorbates industry. Daicel pled guilty to the criminal charges and agreed to pay a fine of \$53 million. Three Daicel employees were also indicted for their roles in the conspiracy. These individuals have remained outside the United States, and the cases against them are still pending.

42. On or about January 23, 2001, the Antitrust Division of the U.S. Department of Justice charged Ueno with conspiracy to fix prices in the sorbates industry. Ueno pled guilty and agreed to pay a fine of \$11 million. Three Ueno employees, and a fourth Daicel employee, were also indicted for their roles in the conspiracy. These individuals have remained outside the United States, and the cases against them are still pending.

43 In addition to the U.S. Department of Justice charges, in the period October 1999 through July 2001, Eastman, Hoechst AG, Daicel and Ueno each pled to criminal antitrust charges brought by the Canadian Competition Bureau for violation of the Canadian Competition Act. These Defendants agreed to the following fines: (a) Eastman – C\$ 780,000; (b) Hoechst AG – C\$ 2.5 million; (c) Daicel – C\$ 2.46 million; and (d) Ueno – \$1.25 million

#### **The Effect of the Defendants' Illegal Conduct**

44. The effect of Defendants' conspiracy to fix the prices of sorbates was artificially to increase the prices paid to purchase sorbates used in the production of many foods, beverages, and other products offered for sale to ultimate users. Persons who purchased sorbates at the artificially high prices arising from Defendants' unlawful activity, in turn, passed on all or part of the artificially high cost of sorbates to their own customers, who similarly passed on all or part of the artificially high cost. End-users of foods, beverages, and other products containing sorbates paid all or part of the artificially high cost of sorbates arising from Defendants' conspiracy, and were, thereby, injured.

Non-end-users of foods, beverages, and other products, to the extent that they did not pass on all of the artificially high cost of sorbates arising from Defendants' conspiracy, similarly were injured. End-users and non-end-users who were thus injured include persons in the State of New York (including governmental entities).

45. Defendants' unlawful conspiracy had the purpose or effect, or the tendency or capacity, unreasonably to restrain and to injure competition within New York (and throughout the United States) by:

- (a) artificially increasing the price of sorbates and of products containing sorbates above their competitive levels;
- (b) providing Defendants with an unfair advantage over other sorbates producers who might have entered the market if the Defendants were not acting in collusion; and
- (c) denying persons in New York access to a free and open competitive market for foods, beverages and other products containing sorbates.

#### **Fraudulent Concealment and Tolling**

46. The State of New York did not discover, and could not have discovered through the exercise of reasonable diligence, until after the first of Defendants' guilty pleas to federal antitrust charges, the existence of the claims alleged because Defendants and their co-conspirators actively, intentionally, and fraudulently concealed the existence of their conspiracy to fix, raise, maintain or stabilize the prices of sorbates sold and to manipulate and allocate the market for sorbates. By way of example, Defendants discussed steps to be taken to avoid detection of the conspiracy, and agreed to stagger the timing of their pricing announcements. As a result of Defendants' active, intentional and fraudulent concealment, the statute of limitations governing this action has been tolled. The statute of limitations has also been tolled by the federal criminal antitrust actions by the U.S.

Department of Justice, and as to Daicel, Nippon, Hoechst AG, Nutrinova, and Eastman by agreement of the parties.

**FIRST CLAIM:  
AGREEMENT IN RESTRAINT OF TRADE  
IN PER SE VIOLATION OF THE DONNELLY ACT**

47. Plaintiff State of New York realleges paragraphs 1 - 46.

48. From in or about January 1979 through in or about June 1997, Defendants engaged in a contract, agreement, arrangement and combination in unreasonable restraint of interstate trade and commerce in violation of the Donnelly Act, N.Y. Gen. Bus. Law §340 et seq.

49. The contract, combination, agreement and arrangement consisted of, among other things, an agreement by Defendants and their co-conspirators unlawfully and secretly artificially to fix the price for sorbates above competitive levels, and to allocate the market for sorbates among themselves.

50. As a result of this conspiracy, Defendants sold sorbates for higher prices than would have prevailed in a competitive market, and they deprived purchasers of access to a marketplace in which sorbates and products containing sorbates were priced competitively.

51. The activities of Defendants are a *per se* violation of the Donnelly Act, N.Y. Gen. Bus. Law §340 et seq.

52. The State of New York – on behalf of itself and other governmental entities and as *parens patriae* on behalf of persons who purchased in New York either sorbates or products containing sorbates – seeks damages sustained as a result of Defendants' anti-competitive conduct, together with civil penalties and equitable relief. (As noted earlier, the State of New York does not, in this or any subsequent claim, sue on behalf of any person covered by settlements in the California

Federal Action.

**SECOND CLAIM:  
N.Y. EXEC. LAW § 63(12)**

53. Plaintiff State of New York realleges paragraphs 1 - 52.

54. Defendants engaged in repeated and persistent fraudulent and illegal acts in the conduct of their businesses.

55. Defendants' acts violated the Sherman Act, 15 U.S.C. § 1, the Donnelly Act, the Canadian Competition Act, and (as alleged below) N.Y. Gen. Bus. Law §349, and constituted fraudulent and/or illegal conduct.

56. Under N.Y. Exec. Law § 63(12), the State of New York is entitled to recover damages and/or restitution for the injuries caused to New York businesses, consumers, and others by Defendants' repeated or persistent illegal and/or fraudulent acts, as well as to injunctive relief.

**THIRD CLAIM:  
VIOLATION OF N.Y. GEN. BUS. LAW § 349**

Plaintiff State of New York realleges paragraphs 1 - 56.

Persons who purchased sorbates or products containing sorbates had a reasonable expectation that the price for sorbates was not established by manufacturers acting in collusion with each other. That expectation was thwarted by the Defendants' activities, and by their concealment of those activities. Through these acts, Defendants intentionally conducted their businesses in a deceptive manner.

59. By fixing the prices at which sorbates were sold, and by allocating the sorbates market, Defendants wrongfully deprived purchasers of the lower, competitive prices that sorbates and products containing sorbates would have sold for in a free and open competitive marketplace.

Those practices caused injury to persons who purchased in New York sorbates or products containing sorbates, and harmed the interest of the New York public-at-large in free and open competition.

60. The activities of the Defendants constituted deceptive acts and practices in violation of §349 of New York General Business Law. Under Section 349, the State of New York is entitled to restitution for the injuries caused by Defendants' unlawful conduct, as well as to injunctive relief.

**FOURTH CLAIM:  
UNJUST ENRICHMENT**

61 Plaintiff State of New York realleges paragraphs 1 - 60.

62. By fixing the prices at which sorbates were sold, and by allocating the sorbates market, Defendants wrongfully deprived purchasers of the lower, competitive prices that sorbates and products containing sorbates would have sold for in a free and open competitive marketplace. Defendants thereby wrongfully appropriated for themselves monetary benefits that properly belong to those persons who purchased in New York sorbates or products containing sorbates.

63. Defendants have failed to make restitution of the monetary benefits received by reason of their collusive acts.

64. Defendants have been unjustly enriched by their wrongful acts. The State of New York is entitled to restitution on behalf of those so victimized in New York.

**RELIEF REQUESTED**

Accordingly, Plaintiff State of New York requests judgment as follows:

1. Adjudging and decreeing that Defendants have engaged in conduct in violation of the antitrust laws of New York.
2. Awarding damages against Defendants, jointly and severally, in favor of the State of New

York in an amount equal to three times the damages proven at trial to have been sustained by persons who purchased in New York sorbates or products containing sorbates as a result of Defendants' unlawful conduct, for violations of New York law;


3. Awarding damages, disgorgement and/or restitution against Defendants, jointly and severally, in an amount to be proven at trial, for violations of New York law;
4. Awarding the State of New York civil penalties against each Defendant individually, pursuant to N.Y. Gen. Bus. Law § 342-a;
5. Enjoining and restraining the Defendants, their affiliates, assignees, subsidiaries, successors and transferees, and their officers, directors, partners, agents and employees, and all other persons acting or claiming to act on their behalf or in concert with them, from engaging in any conduct, contract, combination or conspiracy, and from adopting or following any practice, plan, program or device having a purpose or effect similar to the anti-competitive actions set forth above;
6. Directing such other equitable relief as may be necessary to redress Defendants' violations of New York law;
7. Awarding the State of New York the costs of this action, including reasonable attorneys' fees, and expert fees; and
8. Granting such other and further relief as may be just and proper.



Dated: New York, New York  
October 2, 2002

STATE OF NEW YORK  
ELIOT SPITZER  
Attorney General

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