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CENTER FOR ENVIRONMENTAL HEALTH

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12
13 CENTER FOR ENVIRONMENTAL HEALTH,)
14 a non-profit corporation,)
15) Plaintiff,)
16 v.)
17)
18 FOOD MARKET MANAGEMENT, INC.;)
19 TARGET CORPORATION; WHOLE FOODS)
MARKET, INC.; WHOLE FOODS MARKET)
20 CALIFORNIA, INC.; and DOES 1 through 200,)
inclusive,)
21) Defendants.)

ENDORSED
FILED
Superior Court of California
County of San Francisco
NOV 27 2012
CLERK OF THE COURT
BY: MEREDITH GRIER
Deputy Clerk

CGC-12-526395

Case No. _____

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code § 25249.6, *et seq.*

(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants' continuing failure to warn
6 individuals in California that they are being exposed to lead and lead compounds (collectively,
7 "Lead"), chemicals known to the State of California to cause cancer and birth defects and other
8 reproductive harm. Such exposures have occurred, and continue to occur, through the
9 manufacture, distribution, sale and consumption of Defendants' ginger and plum baking
10 ingredients (the "Products"). Consumers, including pregnant women and children, are exposed
11 to Lead when they consume the Products.

12 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*
13 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
14 to chemicals known to the State to cause cancer, birth defects or other reproductive harm without
15 providing clear and reasonable warnings to individuals prior to their exposure. Defendants
16 introduce Products contaminated with significant quantities of Lead into the California
17 marketplace, exposing consumers of their Products, many of whom are pregnant women and
18 children, to Lead.

19 3. Despite the fact that Defendants expose pregnant women, children and
20 other consumers to Lead, Defendants provide no warnings whatsoever about the carcinogenic or
21 reproductive hazards associated with Lead exposure. Defendants' conduct thus violates the
22 warning provision of Proposition 65. Health & Safety Code § 25249.6.

23 **PARTIES**

24 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
25 non-profit corporation dedicated to protecting the public from environmental health hazards and
26 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the
27 State of California. CEH is a "person" within the meaning of Health & Safety Code
28 § 25249.11(a) and brings this enforcement action in the public interest pursuant to Health &

1 Safety Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy
2 group that has prosecuted a large number of Proposition 65 cases in the public interest. These
3 cases have resulted in significant public benefit, including the reformulation of thousands of
4 products to remove toxic chemicals and to make them safer. CEH also provides information to
5 Californians about the health risks associated with exposure to hazardous substances, where
6 manufacturers and other responsible parties fail to do so.

7 5. Defendant FOOD MARKET MANAGEMENT, INC. is a person in the
8 course of doing business within the meaning of Health & Safety Code § 25249.11. Food Market
9 Management, Inc. manufactures, distributes and/or sells the Products for sale and use in
10 California.

11 6. Defendant TARGET CORPORATION is a person in the course of doing
12 business within the meaning of Health & Safety Code § 25249.11. Target Corporation
13 manufactures, distributes and/or sells the Products for sale and use in California.

14 7. Defendant WHOLE FOODS MARKET, INC. is a person in the course of
15 doing business within the meaning of Health & Safety Code § 25249.11. Whole Foods Market,
16 Inc. manufactures, distributes and/or sells the Products for sale and use in California.

17 8. Defendant WHOLE FOODS MARKET CALIFORNIA, INC. is a person
18 in the course of doing business within the meaning of Health & Safety Code § 25249.11. Whole
19 Foods Market California, Inc. manufactures, distributes and/or sells the Products for sale and use
20 in California.

21 9. DOES 1 through 200 are each a person in the course of doing business
22 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 200 manufacture,
23 distribute and/or sell the Products for sale or use in California.

24 10. The true names of DOES 1 through 200 are unknown to CEH at this time.
25 When their identities are ascertained, the Complaint shall be amended to reflect their true names.

26 11. The defendants identified in paragraphs 5 through 8 and DOES 1 through
27 200 are collectively referred to herein as "Defendants."
28

1 **JURISDICTION AND VENUE**

2 12. The Court has jurisdiction over this action pursuant to Health & Safety
3 Code § 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant
4 to California Constitution Article VI, Section 10, because this case is a cause not given by statute
5 to other trial courts.

6 13. This Court has jurisdiction over Defendants because each is a business
7 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
8 intentionally avails itself of the California market through the sale, marketing or use of the
9 Products in California and/or by having such other contacts with California so as to render the
10 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
11 play and substantial justice.

12 14. Venue is proper in San Francisco County Superior Court because one or
13 more of the violations arise in the County of San Francisco.

14 **BACKGROUND FACTS**

15 15. The People of the State of California have declared by initiative under
16 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
17 defects, or other reproductive harm.” Proposition 65, § 1(b).

18 16. To effectuate this goal, Proposition 65 prohibits exposing people to
19 chemicals listed by the State of California as known to cause cancer, birth defects or other
20 reproductive harm above certain levels without a “clear and reasonable warning” unless the
21 business responsible for the exposure can prove that it fits within a statutory exemption. Health
22 & Safety Code § 25249.6 states, in pertinent part:

23 No person in the course of doing business shall knowingly and
24 intentionally expose any individual to a chemical known to the
25 state to cause cancer or reproductive toxicity without first giving
clear and reasonable warning to such individual. . .

26 17. On February 27, 1987, the State of California officially listed lead as a
27 chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive
28 toxicant under three subcategories: “developmental reproductive toxicity,” which means harm to

1 the developing fetus, "female reproductive toxicity," which means harm to the female
2 reproductive system, and "male reproductive toxicity," which means harm to the male
3 reproductive system. 27 California Code of Regulations ("C.C.R.") § 27001(c). On February 27,
4 1988, one year after it was listed as a chemical known to cause reproductive toxicity, lead
5 became subject to the clear and reasonable warning requirement regarding reproductive toxicants
6 under Proposition 65. *Ibid.*; Health & Safety Code § 25249.10(b).

7 18. On October 1, 1992, the State of California officially listed lead and lead
8 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
9 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
10 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.
11 § 27001(c); Health & Safety Code § 25249.10(b).

12 19. There is no safe level of exposure to Lead and even minute amounts of
13 Lead have been proven harmful to children and adults. *See* Report of the Advisory Committee
14 on Childhood Lead Poisoning Prevention of the Centers For Disease Control and Prevention,
15 "Low Level Lead Exposure Harms Children: A Renewed Call For Primary Prevention," January
16 4, 2012. A study performed by the California Office of Environmental Health Hazard
17 Assessment determined that exposures to Lead even at levels previously considered safe have
18 now been shown to cause adverse health effects including reduced cognitive ability and
19 significant diminution of intellectual potential. Carlisle, *et al.*, "A Blood Lead Benchmark for
20 Assessing Risks from Childhood Lead Exposure," *Journal of Environmental Science and Health*,
21 44, 2009. This conclusion is based on a meta study of 1,333 children who participated in seven
22 international studies. Lanphear, *et al.*, "Low-Level Environmental Lead Exposure and Children's
23 Intellectual Function: An International Pooled Analysis," *Environmental Health Perspectives*,
24 113:7, 2005.

25 20. Young children are especially susceptible to the toxic effects of Lead.
26 Children show a greater sensitivity to Lead's effects than do adults. Adverse health impacts from
27 Lead exposure generally occur in children at lower blood Lead levels than in adults. Children
28 absorb and retain more Lead in proportion to their weight than do adults. Young children also

1 show a greater prevalence of iron deficiency, a condition that can increase gastrointestinal
2 absorption of Lead. The body accumulates Lead over a lifetime and releases it slowly, so even
3 small doses received in childhood, over time, can cause adverse health impacts, including but not
4 limited to reproductive toxicity, later in life. For example, in times of physiological stress, such
5 as pregnancy, the body can mobilize accumulated stores of Lead in tissue and bone, thereby
6 increasing the level of Lead in the blood and increasing the risk of harm to the fetus.

7 21. Lead exposures for pregnant women are also of particular concern in light
8 of evidence that even short term lead exposures *in utero* may have long-term harmful effects.
9 Hu, H., *et al.*, "Fetal Lead Exposure at Each State of Pregnancy as a Predictor of Infant Mental
10 Development," *Environmental Health Perspectives* 114:11, 2006; Schnaas, Lourdes, *et al.*,
11 "Reduced Intellectual Development in Children with Prenatal Lead Exposure," *Environmental*
12 *Health Perspectives* 114:5, 2006. Increased lead exposure during pregnancy has also been shown
13 to cause increased risk of premature birth and increased blood pressure in both the mother during
14 pregnancy and the child after birth. Vigeh, *et al.*, "Blood Lead at Currently Acceptable Levels
15 May Cause Preterm Labour," *Occupational Environmental Medicine*, 68:231-234, 2010; Zhang,
16 *et al.*, "Association Between Prenatal Lead Exposure and Blood Pressure in Children,"
17 *Environmental Health Perspectives*, 120:3, 2012; Wells, *et al.*, "Low-Level Lead Exposure and
18 Elevations in Blood Pressure During Pregnancy," 119:5, 2011.

19 22. The level of exposure to a chemical causing reproductive toxicity under
20 Proposition 65 is determined by multiplying the level in question times the reasonably
21 anticipated rate of exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For
22 exposures to consumer products, the level of exposure is calculated using the reasonably
23 anticipated rate of intake or exposure for average users of the consumer product. 27 C.C.R. §
24 25821(c)(2). The rate of intake or exposure is based on data for use of a general category or
25 categories of consumer products, such as the United States Department of Agriculture's
26 ("USDA") Home Economic Research Report, "Foods Commonly Eaten by Individuals: Amount
27 Per Day and Per Eating Occasion." *Ibid.* The USDA has issued two such reports of data
28 compiled from the years 1977-1978 and 1989-1991.

1 23. The United States Food and Drug Administration (“FDA”) has
2 promulgated regulations that estimate serving sizes for a wide variety of food products based on
3 national food consumption surveys such as the USDA’s “Foods Commonly Eaten by Individuals:
4 Amount Per Day and Per Eating Occasion.” 21 C.F.R. § 101.12. These regulations are designed
5 to determine “the amount of food customarily consumed per eating occasion.” 21 C.F.R. §
6 101.12(a). The Products at issue are used as an ingredient in baked goods. FDA has determined
7 that the standard single serving size for baking candies such as the Products is 15 grams per
8 serving. 21 C.F.R. § 101.12(b). Based on this serving size, the Products will expose an average
9 consumer to a significant amount of Lead.

10 24. Defendants’ Products contain sufficient quantities of Lead such that
11 consumers, including pregnant women and children, who consume the Products are exposed to
12 Lead. The primary route of exposure for the violations is direct ingestion when consumers eat
13 the Products. These exposures occur in homes, workplaces and everywhere else throughout
14 California where the products are consumed.

15 25. No clear and reasonable warning is provided with the Products regarding
16 the carcinogenic or reproductive hazards of Lead.

17 26. Any person acting in the public interest has standing to enforce violations
18 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
19 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
20 action within such time. Health & Safety Code § 25249.7(d).

21 27. More than sixty days prior to naming each Defendant in this lawsuit, CEH
22 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General,
23 the District Attorneys of every county in California, the City Attorneys of every California city
24 with a population greater than 750,000 and to each of the named Defendants. In compliance with
25 Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
26 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
27 time period during which violations occurred; (4) specific descriptions of the violations,
28 including (a) the routes of exposure to Lead from the Products, and (b) the specific type of

1 Products sold and used in violation of Proposition 65; and (5) the name of the specific
2 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

3 28. CEH also sent a Certificate of Merit for each Notice to the California
4 Attorney General, the District Attorneys of every county in California, the City Attorneys of
5 every California city with a population greater than 750,000 and to each of the named
6 Defendants. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each
7 Certificate certified that CEH's counsel: (1) has consulted with one or more persons with
8 relevant and appropriate experience or expertise who reviewed facts, studies or other data
9 regarding the exposures to Lead alleged in each Notice; and (2) based on the information
10 obtained through such consultations, believes that there is a reasonable and meritorious case for a
11 citizen enforcement action based on the facts alleged in each Notice. In compliance with Health
12 & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each Certificate served on the Attorney
13 General included factual information – provided on a confidential basis – sufficient to establish
14 the basis for the Certificate, including the identity of the person(s) consulted by CEH's counsel
15 and the facts, studies or other data reviewed by such persons.

16 29. None of the public prosecutors with the authority to prosecute violations
17 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
18 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each
19 of CEH's Notices.

20 30. Defendants both know and intend that individuals, including pregnant
21 women and children, will consume the Products, thus exposing them to Lead.

22 31. Under Proposition 65, an exposure is "knowing" where the party
23 responsible for such exposure has:

24 knowledge of the fact that a[n] . . . exposure to a chemical listed
25 pursuant to [Health & Safety Code § 25249.8(a)] is occurring. No
26 knowledge that the . . . exposure is unlawful is required.

27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
28 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,

1 § 12201).

2 32. Defendants have been informed of the Lead in their Products by the 60-
3 Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

4 33. Defendants also have constructive knowledge that their Products contain
5 Lead due to the widespread media coverage concerning the problem of Lead in consumer
6 products in general.

7 34. As companies that manufacture, import, distribute and/or sell the Products
8 for use in the California marketplace, Defendants know or should know that the Products contain
9 Lead and that individuals who consume the Products will be exposed to Lead. The Lead
10 exposures to consumers who consume the Products are a natural and foreseeable consequence of
11 Defendants' placing the Products into the stream of commerce.

12 35. Nevertheless, Defendants continue to expose consumers, including
13 pregnant women and children, to Lead without prior clear and reasonable warnings regarding the
14 carcinogenic or reproductive hazards of Lead.

15 36. CEH has engaged in good-faith efforts to resolve the claims alleged herein
16 prior to filing this Complaint.

17 37. Any person "violating or threatening to violate" Proposition 65 may be
18 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to
19 violate" is defined to mean "to create a condition in which there is a substantial probability that a
20 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
21 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

22 **FIRST CAUSE OF ACTION**

23 **(Violations of the Health & Safety Code § 25249.6)**

24 38. CEH realleges and incorporates by reference as if specifically set forth
25 herein Paragraphs 1 through 37, inclusive.

26 39. By placing the Products into the stream of commerce, each Defendant is a
27 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.

28 40. Lead is a chemical listed by the State of California as known to cause

1 cancer, birth defects and other reproductive harm.

2 41. Defendants know that average use of the Products will expose users of the
3 Products to Lead. Defendants intend that the Products be used in a manner that results in
4 exposures to Lead from the Products.

5 42. Defendants have failed, and continue to fail, to provide clear and
6 reasonable warnings regarding the carcinogenicity and reproductive toxicity of Lead to users of
7 the Products.

8 43. By committing the acts alleged above, Defendants have at all times
9 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
10 individuals to Lead without first giving clear and reasonable warnings to such individuals
11 regarding the carcinogenicity and reproductive toxicity of Lead.

12 Wherefore, CEH prays for judgment against Defendants, as set forth hereafter.

13 **PRAYER FOR RELIEF**

14 Wherefore, CEH prays for judgment against Defendants as follows:

15 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess
16 civil penalties against each of the Defendants in the amount of \$2,500 per day for each violation
17 of Proposition 65 according to proof;

18 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
19 preliminarily and permanently enjoin Defendants from offering the Products for sale in
20 California without either reformulating the Products such that no Proposition 65 warnings are
21 required or providing prior clear and reasonable warnings, as CEH shall specify in further
22 application to the Court;

23 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
24 Defendants to take action to stop ongoing unwarned exposures to Lead resulting from use of
25 Products sold by Defendants, as CEH shall specify in further application to the Court;

26 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
27 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and
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5. That the Court grant such other and further relief as may be just and proper.

Dated: November 27, 2012

Respectfully submitted,
LEXINGTON LAW GROUP


Eric Somers
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH