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CENTER FOR ENVIRONMENTAL HEALTH  
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9

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 FOOD MARKET MANAGEMENT, INC.; )  
18 CHARM HAN ENTERPRISE, INC.; JFC )  
INTERNATIONAL INC.; SAVE MART )  
19 SUPERMARKETS; TARGET )  
CORPORATION; WHOLE FOODS MARKET, )  
20 INC.; WHOLE FOODS MARKET )  
CALIFORNIA, INC., and DOES 1 through 200, )  
21 inclusive, )

22 Defendants. )  
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ENDORSED  
FILED  
Superior Court of California  
County of San Francisco

DEC 20 2012

CLERK OF THE COURT  
BY: WESLEY RAMIREZ  
Deputy Clerk

Case No. CGC-12-526395

**FIRST AMENDED 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 CHARM HAN ENTERPRISE, INC. is a person in the course  
12 of doing business within the meaning of Health & Safety Code § 25249.11. Charm Han  
13 Enterprise, Inc. manufactures, distributes and/or sells the Products for sale and use in California.

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

17           8. Defendant SAVE MART SUPERMARKETS is a person  
18 in the course of doing business within the meaning of Health & Safety Code § 25249.11. Save  
19 Mart Supermarkets manufactures, distributes and/or sells the Products for sale and use in  
20 California.

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

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

27           11. Defendant WHOLE FOODS MARKET CALIFORNIA, INC. is a person  
28 in the course of doing business within the meaning of Health & Safety Code § 25249.11. Whole

1 Foods Market California, Inc. manufactures, distributes and/or sells the Products for sale and use  
2 in California.

3 12. Defendant ZION MARKET IRVINE, INC. is a person in the course of  
4 doing business within the meaning of Health & Safety Code § 25249.11. Zion Market Irvine,  
5 Inc. manufactures, distributes and/or sells the Products for sale and use in California.

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

9 14. The defendants identified in paragraphs 5 through 12 and DOES 1 through  
10 200 are collectively referred to herein as "Defendants."

#### 11 JURISDICTION AND VENUE

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

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

22 17. Venue is proper in San Francisco County Superior Court because one or  
23 more of the violations arise in the County of San Francisco.

#### 24 BACKGROUND FACTS

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

28 19. To effectuate this goal, Proposition 65 prohibits exposing people to

1 chemicals listed by the State of California as known to cause cancer, birth defects or other  
2 reproductive harm above certain levels without a “clear and reasonable warning” unless the  
3 business responsible for the exposure can prove that it fits within a statutory exemption. Health  
4 & Safety Code § 25249.6 states, in pertinent part:

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

9           20.     On February 27, 1987, the State of California officially listed lead as a  
10           chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive  
11           toxicant under three subcategories: “developmental reproductive toxicity,” which means harm to  
12           the developing fetus, “female reproductive toxicity,” which means harm to the female  
13           reproductive system, and “male reproductive toxicity,” which means harm to the male  
14           reproductive system. 27 California Code of Regulations (“C.C.R.”) § 27001(c). On February 27,  
15           1988, one year after it was listed as a chemical known to cause reproductive toxicity, lead  
16           became subject to the clear and reasonable warning requirement regarding reproductive toxicants  
17           under Proposition 65. *Ibid.*; Health & Safety Code § 25249.10(b).

18           21.     On October 1, 1992, the State of California officially listed lead and lead  
19           compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were  
20           listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear  
21           and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R.  
22           § 27001(c); Health & Safety Code § 25249.10(b).

23           22.     There is no safe level of exposure to Lead and even minute amounts of  
24           Lead have been proven harmful to children and adults. *See* Report of the Advisory Committee  
25           on Childhood Lead Poisoning Prevention of the Centers For Disease Control and Prevention,  
26           “Low Level Lead Exposure Harms Children: A Renewed Call For Primary Prevention,” January  
27           4, 2012. A study performed by the California Office of Environmental Health Hazard  
28           Assessment determined that exposures to Lead even at levels previously considered safe have  
            now been shown to cause adverse health effects including reduced cognitive ability and

1 significant diminution of intellectual potential. Carlisle, *et al.*, "A Blood Lead Benchmark for  
2 Assessing Risks from Childhood Lead Exposure," *Journal of Environmental Science and Health*,  
3 44, 2009. This conclusion is based on a meta study of 1,333 children who participated in seven  
4 international studies. Lanphear, *et al.*, "Low-Level Environmental Lead Exposure and Children's  
5 Intellectual Function: An International Pooled Analysis," *Environmental Health Perspectives*,  
6 113:7, 2005.

7           23. Young children are especially susceptible to the toxic effects of Lead.  
8 Children show a greater sensitivity to Lead's effects than do adults. Adverse health impacts from  
9 Lead exposure generally occur in children at lower blood Lead levels than in adults. Children  
10 absorb and retain more Lead in proportion to their weight than do adults. Young children also  
11 show a greater prevalence of iron deficiency, a condition that can increase gastrointestinal  
12 absorption of Lead. The body accumulates Lead over a lifetime and releases it slowly, so even  
13 small doses received in childhood, over time, can cause adverse health impacts, including but not  
14 limited to reproductive toxicity, later in life. For example, in times of physiological stress, such  
15 as pregnancy, the body can mobilize accumulated stores of Lead in tissue and bone, thereby  
16 increasing the level of Lead in the blood and increasing the risk of harm to the fetus.

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

1           25.     The level of exposure to a chemical causing reproductive toxicity under  
2 Proposition 65 is determined by multiplying the level in question times the reasonably  
3 anticipated rate of exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For  
4 exposures to consumer products, the level of exposure is calculated using the reasonably  
5 anticipated rate of intake or exposure for average users of the consumer product. 27 C.C.R. §  
6 25821(c)(2). The rate of intake or exposure is based on data for use of a general category or  
7 categories of consumer products, such as the United States Department of Agriculture's  
8 ("USDA") Home Economic Research Report, "Foods Commonly Eaten by Individuals: Amount  
9 Per Day and Per Eating Occasion." *Ibid.* The USDA has issued two such reports of data  
10 compiled from the years 1977-1978 and 1989-1991.

11           26.     The United States Food and Drug Administration ("FDA") has  
12 promulgated regulations that estimate serving sizes for a wide variety of food products based on  
13 national food consumption surveys such as the USDA's "Foods Commonly Eaten by Individuals:  
14 Amount Per Day and Per Eating Occasion." 21 C.F.R. § 101.12. These regulations are designed  
15 to determine "the amount of food customarily consumed per eating occasion." 21 C.F.R. §  
16 101.12(a). The Products at issue are used as an ingredient in baked goods. FDA has determined  
17 that the standard single serving size for baking candies such as the Products is 15 grams per  
18 serving. 21 C.F.R. § 101.12(b). Based on this serving size, the Products will expose an average  
19 consumer to a significant amount of Lead.

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

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

27           29.     Any person acting in the public interest has standing to enforce violations  
28 of Proposition 65 provided that such person has supplied the requisite public enforcers with a

1 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the  
2 action within such time. Health & Safety Code § 25249.7(d).

3           30. More than sixty days prior to naming each Defendant in this lawsuit, CEH  
4 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General,  
5 the District Attorneys of every county in California, the City Attorneys of every California city  
6 with a population greater than 750,000 and to each of the named Defendants. In compliance with  
7 Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the  
8 following information: (1) the name and address of each violator; (2) the statute violated; (3) the  
9 time period during which violations occurred; (4) specific descriptions of the violations,  
10 including (a) the routes of exposure to Lead from the Products, and (b) the specific type of  
11 Products sold and used in violation of Proposition 65; and (5) the name of the specific  
12 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

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

26           32. None of the public prosecutors with the authority to prosecute violations  
27 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against  
28 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each



1 of CEH's Notices.

2 33. Defendants both know and intend that individuals, including pregnant  
3 women and children, will consume the Products, thus exposing them to Lead.

4 34. Under Proposition 65, an exposure is "knowing" where the party  
5 responsible for such exposure has:

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

9 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final  
10 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,  
11 § 12201).

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

14 36. Defendants also have constructive knowledge that their Products contain  
15 Lead due to the widespread media coverage concerning the problem of Lead in consumer  
16 products in general.

17 37. As companies that manufacture, import, distribute and/or sell the Products  
18 for use in the California marketplace, Defendants know or should know that the Products contain  
19 Lead and that individuals who consume the Products will be exposed to Lead. The Lead  
20 exposures to consumers who consume the Products are a natural and foreseeable consequence of  
21 Defendants' placing the Products into the stream of commerce.

22 38. Nevertheless, Defendants continue to expose consumers, including  
23 pregnant women and children, to Lead without prior clear and reasonable warnings regarding the  
24 carcinogenic or reproductive hazards of Lead.

25 39. CEH has engaged in good-faith efforts to resolve the claims alleged herein  
26 prior to filing this Complaint.

27 40. Any person "violating or threatening to violate" Proposition 65 may be  
28 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to

1 violate” is defined to mean “to create a condition in which there is a substantial probability that a  
2 violation will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil  
3 penalties not to exceed \$2,500 per day for each violation of Proposition 65.

4 **FIRST CAUSE OF ACTION**

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

6 41. CEH realleges and incorporates by reference as if specifically set forth  
7 herein Paragraphs 1 through 40, inclusive.

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

10 43. Lead is a chemical listed by the State of California as known to cause  
11 cancer, birth defects and other reproductive harm.

12 44. Defendants know that average use of the Products will expose users of the  
13 Products to Lead. Defendants intend that the Products be used in a manner that results in  
14 exposures to Lead from the Products.

15 45. Defendants have failed, and continue to fail, to provide clear and  
16 reasonable warnings regarding the carcinogenicity and reproductive toxicity of Lead to users of  
17 the Products.

18 46. By committing the acts alleged above, Defendants have at all times  
19 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing  
20 individuals to Lead without first giving clear and reasonable warnings to such individuals  
21 regarding the carcinogenicity and reproductive toxicity of Lead.

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

23 **PRAYER FOR RELIEF**

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

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

28 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),

1 preliminarily and permanently enjoin Defendants from offering the Products for sale in  
2 California without either reformulating the Products such that no Proposition 65 warnings are  
3 required or providing prior clear and reasonable warnings, as CEH shall specify in further  
4 application to the Court;

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

8           4.       That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other  
9 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

10           5.       That the Court grant such other and further relief as may be just and  
11 proper.

12  
13 Dated: December 20, 2012

Respectfully submitted,

14 LEXINGTON LAW GROUP

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Eric Somers

18 Attorneys for Plaintiff  
19 CENTER FOR ENVIRONMENTAL HEALTH  
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