

1 Reuben Yeroushalmi (SBN 193981)
2 Daniel D. Cho (SBN 105409)
3 Ben Yeroushalmi (SBN 232540)
4 **YEROUSHALMI & YEROUSHALMI**
5 An Association of Independent Law Corporations
6 9100 Wilshire Boulevard, Suite 240W
7 Beverly Hills, California 90212
8 Telephone: 310.623.1926
9 Facsimile: 310.623.1930

10 Attorneys for Plaintiff,
11 Consumer Advocacy Group, Inc.

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF ALAMEDA**

14 **CONSUMER ADVOCACY GROUP, INC.,**
15 in the public interest,

16 Plaintiff,

17 v.

18 **THE KROGER CO.,** an Ohio Corporation;
19 **GREEN FARM MARKET,** a business entity
20 form unknown; and DOES 1-20;

21 Defendants.

22 CASE NO. **RG15798482**

23 **COMPLAINT FOR PENALTY AND**
24 **INJUNCTION**

25 Violation of Proposition 65, the Safe
26 Drinking Water and Toxic Enforcement
27 Act of 1986 (*Health & Safety Code, §*
28 *25249.5, et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
Defendants THE KROGER CO., GREEN FARM MARKET and DOES 1-20 as follows:

THE PARTIES

1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an organization qualified to do business in the State of California. CAG is a person within the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private attorney general, brings this action in the public interest as defined under Health and Safety Code section 25249.7, subdivision (d).

1
COMPLAINT FOR VIOLATION OF PROPOSITION 65, THE SAFE DRINKING WATER AND TOXIC
ENFORCEMENT ACT OF 1986 (HEALTH AND SAFETY CODE § 25249.5, ET SEQ.)

**ENDORSED
FILED
ALAMEDA COUNTY**

DEC 31 2015

CLERK OF THE SUPERIOR COURT
By **BOWIE**

BY FAX

- 1 2. Defendant THE KROGER CO. ("KROGER"), is an Ohio Corporation doing business in
2 the State of California at all relevant times herein.
- 3 3. Defendant GREEN FARM MARKET ("GREEN FARM"), is a business entity form
4 unknown, doing business in the State of California at all relative times herein.
- 5 4. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
6 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
7 complaint to allege their true names and capacities when ascertained. Plaintiff is
8 informed, believes, and thereon alleges that each fictitiously named defendant is
9 responsible in some manner for the occurrences herein alleged and the damages caused
10 thereby.
- 11 5. At all times mentioned herein, the term "Defendants" includes KROGER, GREEN
12 FARM and DOES 1-20.
- 13 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
14 times mentioned herein have conducted business within the State of California.
- 15 7. Upon information and belief, at all times relevant to this action, each of the Defendants,
16 including DOES 1-20, was an agent, servant, or employee of each of the other
17 Defendants. In conducting the activities alleged in this Complaint, each of the
18 Defendants was acting within the course and scope of this agency, service, or
19 employment, and was acting with the consent, permission, and authorization of each of
20 the other Defendants. All actions of each of the Defendants alleged in this Complaint
21 were ratified and approved by every other Defendant or their officers or managing agents.
22 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
23 wrongful conduct of each of the other Defendants.
- 24 8. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
25 Defendants was a person doing business within the meaning of Health and Safety Code
26 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
27 employees at all relevant times.

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JURISDICTION

9. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article VI, Section 10, which grants the Superior Court original jurisdiction in all causes except those given by statute to other trial courts. This Court has jurisdiction over this action pursuant to Health and Safety Code section 25249.7, which allows enforcement of violations of Proposition 65 in any Court of competent jurisdiction.
10. This Court has jurisdiction over Defendants named herein because Defendants either reside or are located in this State or are foreign corporations authorized to do business in California, are registered with the California Secretary of State, or who do sufficient business in California, have sufficient minimum contacts with California, or otherwise intentionally avail themselves of the markets within California through their manufacture, distribution, promotion, marketing, or sale of their products within California to render the exercise of jurisdiction by the California courts permissible under traditional notions of fair play and substantial justice.
11. Venue is proper in the County of Alameda because one or more of the instances of wrongful conduct occurred, and continues to occur, in the County of Alameda and/or because Defendants conducted, and continue to conduct, business in the County of Alameda with respect to the consumer product that is the subject of this action.

BACKGROUND AND PRELIMINARY FACTS

12. In 1986, California voters approved an initiative to address growing concerns about exposure to toxic chemicals and declared their right "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp., Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources from contamination, to allow consumers to make informed choices about the products they buy, and to enable persons to protect themselves from toxic chemicals as they see fit.

- 1 13. Proposition 65 requires the Governor of California to publish a list of chemicals known to
2 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
3 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
4 chemicals and chemical families. Proposition 65 imposes warning requirements and
5 other controls that apply to Proposition 65-listed chemicals.
- 6 14. All businesses with ten (10) or more employees that operate or sell products in California
7 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
8 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
9 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
10 reasonable" warnings before exposing a person, knowingly and intentionally, to a
11 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).
- 12 15. Proposition 65 provides that any person "violating or threatening to violate" the statute
13 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
14 "Threaten to violate" means "to create a condition in which there is a substantial
15 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
16 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
17 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).
- 18 16. On February 27, 1987, the Governor of California added lead to the list of chemicals
19 known to the State to cause reproductive toxicity (Cal. Code Regs. tit. 27, § 27001(c)).
20 lead is known to the State to cause developmental, female, and male reproductive
21 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
22 months after addition of lead to the list of chemicals known to the State to cause
23 reproductive toxicity, lead became fully subject to Proposition 65 warning requirements
24 and discharge prohibitions.
- 25 17. On October 1, 1992, the Governor of California added lead and lead compounds to the
26 list of chemicals known to the State to cause cancer (Cal. Code Regs. tit. 27, § 27001(b)).
27 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
28 after addition of lead and lead compounds to the list of chemicals known to the State to

1 cause cancer, lead and lead compounds became fully subject to Proposition 65 warning
2 requirements and discharge prohibitions.

- 3 18. Plaintiff identified certain practices of manufacturers and distributors of lead and lead
4 compounds ("LEAD")-bearing products of exposing, knowingly and intentionally,
5 persons in California to the Proposition 65-listed chemicals of such products without first
6 providing clear and reasonable warnings of such to the exposed persons prior to the time
7 of exposure. Plaintiff later discerned that Defendants engaged in such practice.

8 **SATISFACTION OF PRIOR NOTICE**

- 9 19. On or about September 16, 2014 Plaintiff gave notice of alleged violations of Health and
10 Safety Code section 25249.6, concerning consumer products exposures subject to a
11 private action to GREEN FARM and to the California Attorney General, County District
12 Attorneys, and City Attorneys for each city containing a population of at least 750,000
13 people in whose jurisdictions the violations allegedly occurred, concerning the product
14 seaweed, containing LEAD.

- 15 20. On or about June 22, 2015 Plaintiff gave notice of alleged violations of Health and Safety
16 Code section 25249.6, concerning consumer products exposures subject to a private
17 action to KROGER and to the California Attorney General, County District Attorneys,
18 and City Attorneys for each city containing a population of at least 750,000 people in
19 whose jurisdictions the violations allegedly occurred, concerning the product seaweed,
20 containing LEAD.

- 21 21. Before sending the notice of alleged violations, Plaintiff investigated the consumer
22 products involved, the likelihood that such products would cause users to suffer
23 significant exposures to LEAD and the corporate structure of each of the Defendants.

- 24 22. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the
25 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
26 Plaintiff who executed the certificate had consulted with at least one person with relevant
27 and appropriate expertise who reviewed data regarding the exposures to LEAD, the
28 subject Proposition 65-listed chemicals of this action. Based on that information, the

1 attorney for Plaintiff who executed the Certificate of Merit believed there was a
2 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
3 to the Certificate of Merit served on the Attorney General the confidential factual
4 information sufficient to establish the basis of the Certificate of Merit.

5 23. Plaintiff's notices of alleged violations also included a Certificate of Service and a
6 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
7 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

8 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
9 gave notices of the alleged violation to KROGER, GREEN FARM, and the public
10 prosecutors referenced in Paragraph 19 to 20.

11 25. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
12 any applicable district attorney or city attorney has commenced and is diligently
13 prosecuting an action against the Defendants.

14 FIRST CAUSE OF ACTION

15 (By CONSUMER ADVOCACY GROUP, INC. and against GREEN FARM MARKET and
16 DOES 1-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic
Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, *et seq.*))

17 Seaweed

18 26. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
19 reference paragraphs 1 through 25 of this complaint as though fully set forth herein. Each
20 of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor,
21 promoter, or retailer of seaweed, which includes but is not limited to "JayOne, 100%
22 Natural Premium Seaweed" Seasoned and Roasted Seaweed" No Sugar, No MSG, No
23 Preservatives, 100% DV of Iodine (Net Wt. 0.17oz (5g)) PRODUCT OF KOREA
24 "Imported by Jayone Foods, Inc., Paramount, CA 90723, www.jayone.com" UPC: 6
25 78108 17117 7" ("SEAWEED").

26 27. SEAWEED contains LEAD.
27
28

1 28. Defendants knew or should have known that LEAD has been identified by the State of
2 California as a chemical known to cause cancer and reproductive toxicity and therefore
3 was subject to Proposition 65 warning requirements. Defendants were also informed of
4 the presence of LEAD in SEAWEEED within Plaintiff's notice of alleged violations
5 further discussed above at Paragraph 19.

6 29. Plaintiff's allegations regarding SEAWEEED concern "[c]onsumer products exposure[s],"
7 which "is an exposure that results from a person's acquisition, purchase, storage,
8 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
9 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.
10 SEAWEEED is a consumer product, and, as mentioned herein, exposures to lead took
11 place as a result of such normal and foreseeable consumption and use.

12 30. Plaintiff is informed, believes, and thereon alleges that between September 16, 2011, and
13 the present, each of the Defendants knowingly and intentionally exposed their employees,
14 California consumers of SEAWEEED, which Defendants manufactured, distributed, or
15 sold as mentioned above, to LEAD without first providing any type of clear and
16 reasonable warning of such to the exposed persons before the time of exposure.
17 Defendants have distributed and sold SEAWEEED in California. Defendants know and
18 intend that California consumers will use and consume SEAWEEED, thereby exposing
19 them to LEAD. Defendants thereby violated Proposition 65.

20 31. The principal routes of exposure are through dermal contact, ingestion and inhalation.
21 Persons sustain exposures by eating and consuming SEAWEEED, handling SEAWEEED
22 without wearing gloves or any other personal protective equipment, or by touching bare
23 skin or mucous membranes with gloves after handling SEAWEEED, as well as through
24 direct and indirect hand to mouth contact, hand to mucous membrane, or breathing in
25 particulate matter dispersed from SEAWEEED.

26 32. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
27 Proposition 65 as to SEAWEEED have been ongoing and continuous to the date of the
28 signing of this complaint, as Defendants engaged and continue to engage in conduct

1 which violates Health and Safety Code section 25249.6, including the manufacture,
2 distribution, promotion, and sale of SEAWEED, so that a separate and distinct violation
3 of Proposition 65 occurred each and every time a person was exposed to lead by
4 SEAWEED as mentioned herein.

5 33. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
6 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
7 violations alleged herein will continue to occur into the future.

8 34. Based on the allegations herein, Defendants are liable for civil penalties of up to
9 \$2,500.00 per day per individual exposure to lead from SEAWEED, pursuant to Health
10 and Safety Code section 25249.7(b).

11 35. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
12 filing this Complaint.

13 SECOND CAUSE OF ACTION

14 (By CONSUMER ADVOCACY GROUP, INC. and against THE KROGER CO. and
15 DOES 1-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic
16 Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))

16 **Seaweed**

17 36. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by
18 reference paragraphs 1 through 35 of this complaint as though fully set forth herein. Each
19 of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor,
20 promoter, or retailer of seaweed, which includes but is not limited to "Sea's Gift Sweet
21 Seaweed Snack Net Wt 0.69 Oz (20g) UPC #6 78108 17107 8 ("SEAWEED II").

22 37. SEAWEED II contains LEAD.

23 38. Defendants knew or should have known that LEAD has been identified by the State of
24 California as a chemical known to cause cancer and reproductive toxicity and therefore
25 was subject to Proposition 65 warning requirements. Defendants were also informed of
26 the presence of LEAD in SEAWEED II within Plaintiff's notice of alleged violations
27 further discussed above at Paragraph 20.

1 39. Plaintiff's allegations regarding SEAWEED II concern "[c]onsumer products
2 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
3 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
4 exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, §*
5 *25602(b)*. SEAWEED II is a consumer product, and, as mentioned herein, exposures to
6 lead took place as a result of such normal and foreseeable consumption and use.

7 40. Plaintiff is informed, believes, and thereon alleges that between June 22, 2011, and the
8 present, each of the Defendants knowingly and intentionally exposed their employees,
9 California consumers of SEAWEED II, which Defendants manufactured, distributed, or
10 sold as mentioned above, to LEAD without first providing any type of clear and
11 reasonable warning of such to the exposed persons before the time of exposure.
12 Defendants have distributed and sold SEAWEED II in California. Defendants know and
13 intend that California consumers will use and consume SEAWEED II, thereby exposing
14 them to LEAD. Defendants thereby violated Proposition 65.

15 41. The principal routes of exposure are through dermal contact, ingestion and inhalation.
16 Persons sustain exposures by eating and consuming SEAWEED II, handling SEAWEED
17 II without wearing gloves or any other personal protective equipment, or by touching
18 bare skin or mucous membranes with gloves after handling SEAWEED II, as well as
19 through direct and indirect hand to mouth contact, hand to mucous membrane, or
20 breathing in particulate matter dispersed from SEAWEED II.

21 42. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
22 Proposition 65 as to SEAWEED II have been ongoing and continuous to the date of the
23 signing of this complaint, as Defendants engaged and continue to engage in conduct
24 which violates Health and Safety Code section 25249.6, including the manufacture,
25 distribution, promotion, and sale of SEAWEED II, so that a separate and distinct
26 violation of Proposition 65 occurred each and every time a person was exposed to lead by
27 SEAWEED II as mentioned herein.
28

1 43. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
2 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
3 violations alleged herein will continue to occur into the future.

4 44. Based on the allegations herein, Defendants are liable for civil penalties of up to
5 \$2,500.00 per day per individual exposure to lead from SEAWEED II, pursuant to Health
6 and Safety Code section 25249.7(b).

7 45. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
8 filing this Complaint.

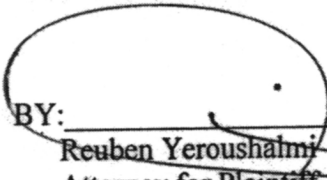
9 **PRAYER FOR RELIEF**

10 Plaintiff demands against each of the Defendants as follows:

- 11 1. A permanent injunction mandating Proposition 65-compliant warnings;
12 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
13 3. Costs of suit;
14 4. Reasonable attorney fees and costs; and
15 5. Any further relief that the court may deem just and equitable.

16
17 Dated: December 30, 2015

YEROUSHALMI & YEROUSHLAMI

18
19 BY: 
20 Reuben Yeroushalmi
21 Attorney for Plaintiff,
22 Consumer Advocacy Group, Inc.
23
24
25
26
27
28