

ORIGINAL

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**FILED**  
San Francisco County Superior Court

DEC 30 2004

GORDON PARK-LI, Clerk  
*Indira Caine*  
Deputy Clerk

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6 (Additional Attorneys on Signature Page)

8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF SAN FRANCISCO, UNLIMITED JURISDICTION

10 ENVIRONMENTAL LAW FOUNDATION,  
11 Individually and On Behalf of the General  
12 Public,

13 Plaintiff,

14 v.

15 COST PLUS, INC., SAFEWAY, INC.,  
16 TRADER JOE'S COMPANY, WILLIAMS-  
17 SONOMA, INC., WHOLE FOODS, INC.,  
18 and DOES 1 through 100, inclusive,

19 Defendants.

CASE NO. CGC-03-421108

CONSENT JUDGMENT AS TO  
DEFENDANT COST PLUS, INC.;  
ORDER

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1        1. INTRODUCTION

2            1.1    On June 5, 2003, the Environmental Law Foundation, individually and on  
3 behalf of the general public (“ELF”) filed a Complaint for civil penalties, restitution and  
4 injunctive relief (“Complaint”) in San Francisco County Superior Court (“Action”). Cost  
5 Plus, Inc., one of the defendants in the Action, shall hereinafter be referred to as “Settling  
6 Defendant.”

7            1.2    Settling Defendant is a corporation that employs more than ten persons and  
8 sells Wine Vinegars to persons in the State of California. For purposes of this Consent  
9 Judgment, the term “Wine Vinegar” shall have the meaning set forth in section 6.2.

10           1.3    ELF’s Complaint alleges that the Settling Defendant manufactured, distributed  
11 and/or sold Wine Vinegar containing lead in an amount that resulted in an exposure to  
12 consumers in violation of the provisions of the Safe Drinking Water and Toxic Enforcement  
13 Act of 1986 and Health & Safety Code §§ 25249.5, *et seq.* (Proposition 65), and Business &  
14 Professions Code §§ 17200, *et seq.* (“Unfair Competition Law”), by knowingly and  
15 intentionally exposing persons to a chemical known to the State of California to cause  
16 reproductive toxicity, namely lead, without first providing a clear and reasonable warning to  
17 such individuals.

18           1.4    For purposes of this Consent Judgment only, the parties stipulate that this  
19 Court has jurisdiction over allegations of violations contained in the Complaint and personal  
20 jurisdiction over the Settling Defendant as to the acts alleged in the Complaint, that venue is  
21 proper in the County of San Francisco and that this Court has jurisdiction to enter this  
22 Consent Judgment as a resolution of all claims which could have been raised in the  
23 Complaint based on the facts alleged therein.

24           1.5    On or about November 19, 2003, Settling Defendant filed its Answer  
25 generally and specifically denying the allegations set forth in the Complaint

26           1.6    For the purpose of avoiding prolonged litigation, the parties enter into this  
27 Consent Judgment as a full settlement of all claims that were raised in the Complaint based  
28 on the facts alleged therein, or which could have been raised in the Complaint arising out of

1 the facts alleged therein. By execution of this Consent Judgment, Settling Defendant does  
2 not admit any violations of Proposition 65 or the Unfair Competition Law or any other law  
3 and specifically denies that it has committed any such violations and maintains that all Wine  
4 Vinegar products it has sold and distributed in California have been and are in compliance  
5 with all laws. Nothing in this Consent Judgment shall be construed as an admission by  
6 Settling Defendant of any fact, finding, conclusion, issue of law, or violation of law.

7 However, this paragraph shall not diminish or affect the responsibilities and duties of the  
8 parties under this Consent Judgment.

9 1.7 For the purposes of this Consent Judgment, the term "Effective Date" shall  
10 mean the date upon which this Consent Judgment is approved and entered as a Judgment by  
11 the Court.

12 2. CLEAR AND REASONABLE WARNINGS

13 2.1 Warning Standard. Settling Defendant shall not sell or offer for sale in  
14 California Wine Vinegars that contain lead at levels that exceed 34 parts per billion ("ppb")  
15 unless warnings are given in accordance with one or more of the provisions set forth below.  
16 Which ever warning Settling Defendant elects, that shall be the sole and exclusive method of  
17 warning used in its stores.

18 a. Shelf Warning. Settling Defendant may provide warning by placing a  
19 notice on the top shelf of any rack of shelves in Settling Defendant's stores where Wine  
20 Vinegars are sold. The warning shall state as follows: "CALIFORNIA PROPOSITION 65  
21 WARNING: The Wine Vinegars and Balsamic Vinegars on these shelves contain lead, a  
22 chemical known to the State of California to cause birth defects and other reproductive  
23 harm." Each sign shall be no smaller than 5 inches x 7 inches, and the form and type shall  
24 be substantially similar to that which is attached hereto as Exhibit A.

25 b. Product Labeling. A warning may be placed on the packing, labeling  
26 or directly onto all Wine Vinegar products that includes the language as follows:  
27 "WARNING: This product contains lead, a chemical known to the State of California to  
28 cause birth defects and other reproductive harm." Product label warnings shall be placed

1 with such conspicuousness as compared with other words, statements, designs and/or  
2 devices as to render it likely to be read and understood by an ordinary individual under  
3 customary conditions of use or purchase.

4 2.2 In the event that some, but not all, Wine Vinegars sold by World Market  
5 contain lead in excess of 34 pbb, World Market may utilize the shelf warnings with the  
6 language as described in paragraph 2.1(a) of this Consent Judgment.

7 2.3 Any changes to the language or format of the Warning required by this section  
8 shall be made only after obtaining ELF's approval.

9 2.4 Settling Defendant, prior to offering for sale any Wine Vinegar without a  
10 warning, shall require the producer and/or distributor of that product to provide test results,  
11 and the raw data from the testing, to Settling Defendant. Settling Defendant may rely on  
12 those test results so long as the facility that performed the tests utilized the testing protocol  
13 of Professor A. Russell Flegal, attached hereto as Exhibit B.

14 ELF shall have the right to be provided with the test results and raw data if a Wine  
15 Vinegar product is offered for sale without a warning regarding lead, and Settling Defendant  
16 shall have thirty (30) days to provide the test results and raw data to ELF. ELF shall keep all  
17 such information confidential except as is necessary to contest the exemption from warning  
18 of the product.

19 2.5 Provisions of the Warning in paragraphs 2.1 or 2.2 of this Consent Judgment  
20 shall fully and completely satisfy World Market's obligations to provide a warning for all  
21 Wine Vinegars with respect to the presence of lead under Proposition 65, the California  
22 Business and Professions Code, and all federal, state or local laws, regulations, or  
23 ordinances.

24 2.6 If ELF settles this, or any lawsuit regarding the same allegations as in the  
25 instant Complaint, wherein any retailer is permitted to provide a warning regarding lead in  
26 Wine Vinegar that is different in content, method or appearance, Settling Defendant shall, at  
27 its discretion, have the option to warn in the manner alleged in section 2.1, or in the manner  
28 by the subsequent settlement. Settling Defendant shall have the warnings placed no later

1 than sixty (60) days after entry of this Consent Judgment.

2 3. MONETARY RELIEF

3 3.1 Settling Defendant shall pay to ELF the sum of \$60,000 as settlement  
4 proceeds ("Settlement Proceeds") to be applied toward its costs. The settlement draft shall  
5 be delivered to one of ELF's counsel, Alan M. Caplan, Bushnell, Caplan & Fielding, LLP,  
6 221 Pine Street, Suite 600, San Francisco, California 94104, within five (5) business days  
7 after the entry of this Consent Judgment. These Settlement Proceeds shall be delivered to  
8 ELF's counsel, and ELF shall have the sole and exclusive responsibility of apportioning and  
9 paying to the State of California any portion of the Settlement Proceeds as required by  
10 California Health & Safety Code § 25249.12(d), and World Market shall have no liability if  
11 payments to the State of California are not made by ELF.

12 3.2 This payment shall be the only monetary obligation of the Settling Defendant  
13 with respect to this Consent Judgment; each party shall bear its own attorneys' fees and  
14 costs.

15 3.3 ELF agrees to comply with the reporting requirements referenced in California  
16 Health & Safety Code § 25249.7(f). Pursuant to the regulations promulgated under that  
17 section, ELF shall present this Consent Judgment to the California Attorney General's  
18 Office within two (2) days after receipt of all necessary signatures. ELF also agrees to serve  
19 a copy of the Noticed motion to approve and enter the Consent Judgment on the Attorney  
20 General's Office at least forty-five (45) days prior to the date set for hearing of the motion in  
21 the Superior Court of the City and County of San Francisco.

22 3.4 The Settling Parties acknowledge that, pursuant to Health & Safety Code  
23 § 25249.7, a noticed motion must be filed to obtain judicial approval of the Consent  
24 Judgment. Accordingly, the Settling Parties agree to file a joint motion for approval of the  
25 settlement, which shall be prepared by ELF within a reasonable period of time after the date  
26 this agreement is signed by all parties.

1 4. MODIFICATION OF CONSENT JUDGMENT

2 4.1 This Consent Judgment may be modified by written agreement between ELF  
3 and the Settling Defendant, after noticed motion, and upon entry of a modified Consent  
4 Judgment by the Court thereon, or upon motion of ELF or the Settling Defendant as  
5 provided by law or upon entry of a modified Consent Judgment by the Court.

6 5. APPLICATION OF CONSENT JUDGMENT

7 5.1 This Consent Judgment shall apply to and be binding upon ELF and the  
8 Settling Defendant, their divisions, subdivisions, parent entities or subsidiaries, and  
9 successors or assigns of either of them. officers, directors, and shareholders.

10 5.2 Each signatory to this Consent Judgment certifies that he or she is fully  
11 authorized by the party that he or she represents to enter into and execute the Consent  
12 Judgment on behalf of the party represented and legally bind that party.

13 6. CLAIMS COVERED

14 6.1 This Consent Judgment is a final and binding resolution between ELF and the  
15 Settling Defendant, of any violation of Proposition 65 and Business and Professions Code  
16 section 17200, *et seq.*, or any other statutory or common law claim that could have been  
17 asserted against the Settling Defendant for failure to provide clear, reasonable and lawful  
18 warnings of exposures to lead that result from the ingestion of Wine Vinegar.

19 6.2 For purposes of this Consent Judgment, the term "Wine Vinegar" shall mean  
20 any vinegar, including but not limited to balsamic vinegar, that contains wine as a  
21 constituent. Nothing in this section shall be construed to affect the liability of any defendant  
22 in this Action other than the Settling Defendant.

23 6.3. Release of Settling Defendant. In further consideration of the promises and  
24 agreements herein contained, and for the payments to be made pursuant to Paragraph 3.1,  
25 ELF, on behalf of itself, its past and current agents, representatives, attorneys, successors  
26 and/or assignees, and in the interest of the general public, hereby waives all rights to  
27 institute or participate in, directly or indirectly, any form of legal action and releases all  
28 claims, including, without limitation, all actions, causes of action, in law or in equity, suits,

1 liabilities, demands, obligations, damages, costs, fines penalties, losses or expenses,  
2 including, but not limited to, investigation fees, expert fees and attorneys' fees of any nature  
3 whatsoever, whether known or unknown, fixed or contingent against the Settling Defendant  
4 and each of its customers, owners, parent companies, corporate affiliates, subsidiaries and its  
5 respective officers, directors, attorneys, representatives, shareholders, agents, and employees  
6 arising under Proposition 65, Business and & Professions Code § 17200, *et seq* and Business  
7 & Professions Code § 17500, *et seq.*, related to the Settling Defendant's alleged failure to  
8 warn about exposures to or identification of lead contained in Wine Vinegars.

9 ELF and the Settling Defendant further agree and acknowledge that this Consent  
10 Judgment is a full, final, and binding, resolution of any violations of Proposition 65,  
11 Business & Professions Code § 17200, *et seq.* and Business & Professions Code § 17500, *et*  
12 *seq.*, that have been or could have been asserted in the Complaint against the Settling  
13 Defendant for its alleged failure to provide clear and reasonable warnings of exposure to or  
14 identification of lead contained in Wine Vinegars.

15 In addition, ELF, on behalf of its, itself, attorneys and its agents, waives all rights to  
16 institute or participate in, directly or indirectly, any form of legal action and releases all  
17 claims against the Settling Defendant arising under Proposition 65, Business & Professions  
18 Code § 17200, *et seq* and Business & Professions Code § 17500, *et seq.*, related to the  
19 Settling Defendant's alleged failures to warn about exposures to or identification of lead  
20 contained in the Wine Vinegars and for all actions or statements regarding the alleged  
21 failures to warn about exposures to or identification of lead contained in the Wine Vinegars  
22 made by Settling Defendants or its attorneys or representatives, in the course of responding  
23 to those alleged violations of Proposition 65, Business & Professions Code § 17200, or  
24 Business & Professions Code § 17500, as alleged in the Complaint.

25 It is specifically understood and agreed that ELF and the Settling Defendant intend  
26 that Settling Defendant's compliance with the terms of this Consent Judgment will resolve  
27 all issues and liability, now and in the future, concerning the Settling Defendant's alleged  
28 violation of the requirements of Proposition 65, Business & Professions Code § 17200, *et*

1 *seq.* and Business & Professions Code § 17500, *et seq.*, as to lead in Wine Vinegars.

2       6.4   Release of ELF. Settling Defendant waives all rights to institute any form of  
3 legal action against ELF or its attorneys or representatives, for all actions taken or  
4 statements made by ELF and its attorneys or representatives, in the course of seeking  
5 enforcement of Proposition 65, Business & Professions Code § 17200, *et seq.* or Business &  
6 Professions Code § 17500, *et seq.*, in these Actions.

7       7.    RETENTION OF JURISDICTION

8       7.1   This Court shall retain jurisdiction of this matter to implement this Consent  
9 Judgment.

10      8.    COURT APPROVAL

11      8.1   If this Consent Judgment is not approved by the Court, it shall be of no force  
12 or effect and cannot be used in any proceeding for any purpose.

13      9.    ENFORCEMENT OF CONSENT JUDGMENT WITH REGARD  
14         TO RETAIL STORES IN CALIFORNIA

15      9.1   Before moving to enforce the terms and conditions of this Consent Judgment  
16 against the Settling Defendant with respect to an alleged violation occurring at a retail store  
17 located in California, ELF must follow the procedures set forth in subsections 9.2 through  
18 9.4.

19      9.2   In the event that ELF and/or its attorneys, agents or assigns, identify one or  
20 more retail stores in California owned and operated by World Market at which Wine  
21 Vinegars are sold (hereinafter "retail outlet") for which the warnings required under  
22 paragraph 2 of this Consent Judgment are not being given, ELF shall notify, in writing,  
23 Settling Defendant of such alleged failure to warn (the "Notice of Breach"). The Notice of  
24 Breach shall be sent by first-class mail, with proof of service within sixty (60) days of the  
25 date the alleged violation was observed. The Notice of Breach shall identify the date the  
26 alleged violation was observed and the retail outlet in question, and reasonably describe the  
27 nature of the alleged violation with sufficient detail to allow the Settling Defendant to  
28 determine the basis of the claim being asserted and the identities of the Wine Vinegars to



1 which those assertions apply.

2 9.3 In the event that ELF identifies a specific retail outlet, other than the specific  
3 one identified in subsection 9.2 of this Consent Judgment, not giving warnings for Wine  
4 Vinegars as required under paragraph 2, ELF shall serve the Settling Defendant with another  
5 Notice of Breach in the manner described in subsection 9.2 and provide the same  
6 information as required in subsection 9.2.

7 9.4 ELF shall take no further action against the Settling Defendant unless ELF  
8 discovers, at least thirty (30) days after service of the Notices of Breach served pursuant to  
9 subsections 9.2 and 9.3, another failure to warn for any Wine Vinegars at the same retail  
10 outlet(s) identified in the Notices of Breach served pursuant to subsections 9.2 and 9.3.

11 10. GOVERNING LAW

12 10.1 The terms of this Consent Judgment shall be governed by the laws of the State  
13 of California. In the event that Proposition 65 is repealed or is otherwise rendered  
14 inapplicable by reason of law generally, or as to Wine Vinegars specifically, then the  
15 Settling Defendant shall have no further obligations pursuant to this Consent Judgment with  
16 respect to, and to the extent those Wine Vinegars are so affected.

17 11. EXCHANGE IN COUNTERPARTS

18 11.1 Stipulations to this Consent Judgment may be executed in counterparts by  
19 and/or facsimile which taken together shall be deemed to constitute one document.

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12. NOTICES

12.1 All correspondence and notices required to be provided pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (1) first-class, registered, certified mail, return receipt requested, or (2) overnight courier on ELF or Settling Defendant by the others at the addresses listed in Exhibit B. Either ELF or Settling Defendant may specify a change of address to which all notices and other communications shall be sent.

IT SO STIPULATED:

DATED: \_\_\_\_\_

ENVIRONMENTAL LAW FOUNDATION

By: \_\_\_\_\_  
JAMES WHEATON

DATED: 9/9/04

COST PLUS, INC.

By: [Signature]  
SVP + CFO

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: 12/29/04

[Signature]  
JUDGE OF THE SUPERIOR COURT

1 12. NOTICES

2 12.1 All correspondence and notices required to be provided pursuant to this  
3 Consent Judgment shall be in writing and personally delivered or sent by: (1) first-class,  
4 registered, certified mail, return receipt requested, or (2) overnight courier on ELF or  
5 Settling Defendant by the others at the addresses listed in Exhibit B. Either ELF or Settling  
6 Defendant may specify a change of address to which all notices and other communications  
7 shall be sent.

8 IT SO STIPULATED:

9  
10 DATED: 10/12/04

ENVIRONMENTAL LAW FOUNDATION

11  
12 By:   
13 JAMES WHEATON

14  
15 DATED: \_\_\_\_\_

COST PLUS, INC.

16  
17 By: \_\_\_\_\_  
18 \_\_\_\_\_

19  
20 IT IS SO ORDERED, ADJUDGED AND DECREED:

21  
22 DATED: \_\_\_\_\_

23 \_\_\_\_\_  
24 JUDGE OF THE SUPERIOR COURT