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Attorneys for Plaintiff
MATEEL ENVIRONMENTAL JUSTICE FOUNDATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION,

Plaintiff,

v.

WHOLE FOODS MARKET CALIFORNIA,
INC., a corporation, and DOES 1 to 20,

Defendants.

CASE NO. CGC-12-520998
~~PROPOSED~~ CONSENT JUDGEMENT

1. INTRODUCTION

1.1. On or about January 4, 2012, plaintiff MATEEL ENVIRONMENTAL JUSTICE FOUNDATION ("Mateel"), provided a 60-Day Notice of Violation to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and defendant Whole Foods Market California, Inc., alleging that these entities, through sales in California of liquid foods dispensed

ENDORSED
FILED
San Francisco County Superior Court
MAR 07 2014
CLERK OF THE COURT
BY: CYNTHIA S. HERBER
Deputy Clerk

1 from certain bulk food dispensing equipment ("Bulk Food Dispensing Equipment"), including bulk
2 kombucha, tamari (soy sauce), vinegar, honey, and maple syrup were violating Health & Safety
3 Code section 25249.6. Mateel issued a subsequent 60-Day Notice on May 30, 2013 to Whole
4 Foods Market California, Inc. and Mrs. Gooch's Natural Food Markets, Inc. alleging that these
5 entities violated Health & Safety Code section 25249.6 through the sale of Kombucha. The January
6 4, 2012 60-Day Notice and the May 30, 2013 60-Day Notice shall collectively be referred to herein
7 as "Notice." Whole Foods Market California, Inc. and Mrs. Gooch's Natural Food Markets, Inc.
8 shall collectively be referred to herein as "Whole Foods" or "Defendants."

9
10 1.2. On May 22, 2012, plaintiff Mateel, acting in the public interest pursuant to
11 Health and Safety Code section 25249.7(d), filed a Complaint for Civil Penalties and Injunctive
12 Relief in San Francisco County Superior Court, Case No. CGC-12-520998 ("Complaint") against
13 Defendants based on the allegations contained in the Notice.

14 1.3. This case involves alleged lead exposures that Mateel claims are caused by
15 Bulk Food Dispensing Equipment used to dispense bulk kombucha, tamari (soy sauce), honey and
16 maple syrup sold at Whole Foods stores in California, including at least two stores in San Francisco.
17 For purposes of this Consent Judgment, Bulk Food Dispensing Equipment is defined to include all
18 equipment used to dispense bulk kombucha, soy sauce, honey and maple syrup. The Parties hereto
19 agree that sales of vinegar is the subject of another consent judgment into which Whole Foods
20 previously entered and Mateel agrees to dismiss its claims in this action regarding vinegar.

21
22 1.4. Whole Foods is a business that employs more than ten people. Whole Foods
23 sells in the State of California foods, including bulk kombucha, tamari (soy sauce), maple syrup and
24 honey that is dispensed through Bulk Food Dispensing Equipment. During a time period pertinent
25 to this enforcement action, Plaintiff alleges that Bulk Food Dispensing Equipment contained
26 component parts that contained lead which leached into the food when it was dispensed through the
27 Bulk Food Dispensing Equipment.

1 1.5 Pursuant to Health & Safety Code § 25249.9, lead and lead compounds
2 (hereinafter "lead") are chemicals known to the State of California to cause cancer and reproductive
3 toxicity. Under certain circumstances, products containing lead that are sold or distributed in
4 California are subject to Proposition 65's warning requirement. Mateel alleges that the bulk
5 kombucha, tamari (soy sauce), maple syrup and honey that Whole Foods sells, when served via
6 Bulk-food Dispensing Equipment that utilize parts that have food contact surfaces that contain Pb,
7 requires a Proposition 65 warning.

8 1.6 For purposes of this Consent Judgment only, and without waiving any
9 arguments to the contrary that it might assert in any other matter, Whole Foods agrees not to contest
10 the court's jurisdiction over the allegations of violations contained in the Notice and the complaint,
11 and over Whole Foods, and to enter and enforce the provisions of this Consent Judgment as a full
12 and final settlement and resolution of the allegations made against Whole Foods contained in the
13 Notice or arising therefrom, to the extent those allegations pertain to lead exposures caused by Bulk
14 Food Dispensing Equipment. For purposes of this Consent Judgment only, Whole Foods agrees
15 that venue is proper in the City and County of San Francisco. Both parties to this Consent
16 Judgment stipulate to the court's jurisdiction to enter and enforce the provisions of this Consent
17 Judgment as a full and final settlement and resolution of the allegations made against Whole Foods
18 regarding lead exposures caused by Bulk Food Dispensing Equipment.

19 1.7 This consent judgment resolves all claims in the Notice and complaint to the
20 extent those claims pertain to lead exposures caused by Bulk Food Dispensing Equipment. Whole
21 Foods denies and disputes all allegations made in the Notice and in the complaint. This Consent
22 Judgment shall not constitute an admission with respect to any allegation made in the Notice, nor
23 may this Consent Judgment or compliance with it be used as an admission or evidence of any fact,
24 wrongdoing, misconduct, culpability, violation of law or liability on the part of Whole Foods or any
25 person or entity released herein.
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1 2. INJUNCTIVE RELIEF

2
3 2.1 No later than 90 days after the Effective Date, and as to all Whole Foods
4 stores in California, any in-store Bulk-Food Dispensing Equipment shall have no food contact
5 surfaces that contain lead. Whole Foods will further provide a declaration by an individual
6 knowledgeable and authorized to speak on behalf of Whole Foods to Mateel acknowledging
7 compliance with this section.

8 3. ENTRY OF CONSENT JUDGMENT

9
10 The parties hereby request that the court promptly enter this Consent Judgment.
11 Upon entry of this Consent Judgment, the Parties waive their respective rights to a hearing or trial
12 on the allegation made in the Complaint.

13 4. MATTERS COVERED BY THIS CONSENT JUDGMENT

14
15 4.1 Mateel's Release on Behalf of the Public Interest.

16 As to all exposures to lead alleged in the Notice to be caused by Bulk Food
17 Dispensing Equipment, this Consent Judgment provides a full release of liability on behalf of the
18 Public Interest for all claims that were or could have been brought up through the Effective Date
19 (which shall be the date the court enters this Consent Judgment). As to all exposures to lead alleged
20 in the Notice to be caused by Bulk Food Dispensing Equipment that is in the stream of commerce as
21 of the Effective Date, this Consent Judgment also provides a full release of liability on behalf of the
22 Public Interest to Whole Foods, including but not limited to Whole Foods' past, present and future
23 parents, holding companies, controlling entities, joint ventures or other investment vehicles, related
24 or affiliated companies, subsidiaries, predecessors, successors, and assigns to any of them for all
25 claims that were or could have been brought up through the Effective Date. Notwithstanding any
26 other provision of this Consent Judgment, no claim or matter is released on behalf of the public
27 interest unless that claim or matter was raised in the Notice. This Consent Judgment does not

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1 release any entity that supplies Whole Foods with bulk kombucha, tamari (soy sauce), maple syrup
2 or honey.

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4 4.2 Mateel's Release on Behalf of Itself.

5 As to Bulk Food Dispensing Equipment, Mateel, acting in its individual capacity
6 only and not in its representative capacity, waives all rights to institute any form of legal action and
7 releases all claims which were or could have been brought up through the Effective Date. As to
8 Bulk Food Dispensing Equipment that is in the stream of commerce as of the Effective Date, on
9 behalf of Mateel, in its individual capacity, this Consent Judgment also provides a full release of
10 liability to Whole Foods, including, but not limited to its past, present and future parents, holding
11 companies, controlling entities, joint ventures or other investment vehicles, related or affiliated
12 companies, subsidiaries, predecessors, successors, and assigns to any of them for all claims that
13 were or could have been brought up through the Effective Date. In furtherance of the foregoing,
14 Mateel, acting on behalf of itself, hereby waives any and all rights and benefits which it now has, or
15 in the future may have, conferred upon it with respect to lead exposures alleged to be caused by
16 Bulk Food Dispensing Equipment by virtue of the provisions of Section 1542 of the California Civil
17 Code, which provides as follows:

18
19 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
20 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME**
21 **OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE**
22 **MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR**

23 Mateel understands and acknowledges that the significance and consequence of this
24 waiver of California Civil Code Section 1542 is that even if Mateel has future claims arising out of
25 or resulting from, or related directly or indirectly to, in whole or in part, Bulk Food Dispensing
26 Equipment it will not be able to pursue that claim against Whole Foods, nor may it pursue such a
27 claim against any and all entities related to Whole Foods including, but not limited to, their past,
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1 present and future parents, holding companies, controlling entities, related or affiliated companies,
2 subsidiaries, predecessors, successors and assigns to any of them. Furthermore, Mateel
3 acknowledges that it intends these consequences for any such claims which may exist as of the date
4 of this release but which Mateel does not know exist, and which, if known, would materially affect
5 its decision to enter into this Consent Judgment, regardless of whether its lack of knowledge is the
6 result of ignorance, oversight, error, negligence or any other cause. Mateel does not release any
7 entity that supplies Whole Foods with bulk kombucha, tamari, maple syrup or honey.

8
9 **5. NOTICE AND CURE/MEET AND CONFER**

10 **5.1 At any time more than 30 days after the Effective Date of this Consent**
11 **Judgment, Mateel may provide Whole Foods with a Notice of Violation, alleging that Bulk Food**
12 **Dispensing Equipment does not comply with section 2.1 of this Consent Judgment. Mateel shall**
13 **provide with the Notice of Violation sent to Whole Foods copies of documents and laboratory**
14 **analysis that support the allegations of non-compliance.**

15 **5.2 Within 30 days of receiving such a Notice of Violation, Whole Foods shall**
16 **provide to Mateel its Notice of Election to contest or not to contest the Notice of Violation. If**
17 **Whole Foods elects not to contest the Notice of Violation, it shall, within 10 business days after**
18 **providing its Notice of Election, stop use of the identified Bulk Food Dispensing Equipment, and**
19 **provide Mateel with written notice of such discontinuation of use the alleged non-compliant**
20 **product. If Whole Foods elects not to contest and otherwise complies with this paragraph, it shall**
21 **be deemed to be in compliance with this Consent Judgment and Mateel may take no further action**
22 **related to the alleged non-compliant products and the Notice of Violation and Mateel may not hold**
23 **Whole Foods liable for any other remedies, including injunctive relief, penalties, sanctions,**
24 **monetary award, attorney's fees, or costs associated with the investigation and prosecution of the**
25 **alleged non-compliant products the Notice of Violation for which Whole Foods elected – pursuant**
26 **to this paragraph – to settle and not to contest.**

1 5.3 In the event Whole Foods elects to contest the allegations contained in any
2 Notice of Violation Mateel sends pursuant to this Section, Whole Foods may provide Mateel along
3 with its Notice of Election any evidence that, in Whole Foods' judgment, supports its position. In
4 the event Mateel agrees with Whole Foods' position, it shall within 15 days of receiving such
5 Notice of Election and evidence notify Whole Foods of its agreement and Mateel shall take no
6 further action regarding the Alleged Non-Compliant Products subject to the Notice and the evidence
7 that Whole Foods provided. If Mateel disagrees with Whole Foods' position, Mateel shall, within
8 30 days, notify Whole Foods of such and shall in writing provide Whole Foods with the reasons for
9 Mateel's disagreement. Thereafter, the Parties shall meet and confer to attempt to resolve their
10 dispute or mutually acceptable terms.

11 5.4 If within 60 days of receipt of a Notice of Violation either a.) there is no
12 resolution of the meet and confer process required under paragraph 5.3; b.) Whole Foods fails to
13 provide written Notice of Election not to contest the Notice of Violation; or c.) Whole Foods fails
14 to correct any uncontested violations identified in the Notice of Violation within 30 days, then
15 Mateel may – at its election – seek to enforce the terms and conditions contained in this Consent
16 Judgment in the Superior Court of the State of California, or may initiate an enforcement action for
17 new violations pursuant to Health & Safety Code § 25249.7(d). In any such proceeding, Mateel
18 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation
19 of Proposition 65 or this Consent Judgment.

21 6. SETTLEMENT PAYMENT

22 6.1 In settlement of all the claims pertaining to lead exposures alleged to have
23 been caused by Bulk Food Dispensing Equipment Whole Foods shall pay a total amount of
24 \$220,000, which shall be allocated as follows: \$20,000 shall be paid as a civil penalty; \$160,000
25 shall be paid to the Klamath Environmental Law Center ("KELC") to cover a portion of Mateel's
26 attorneys fees and litigation costs, \$25,000 shall be paid to Californians for Alternatives to Toxics
27

1 (“CATs”), and \$15,000 shall be paid to the Ecological Rights Foundation (“ERF). Funds paid to
2 CATs and ERF may only be used for activities that reduce exposures to toxic chemicals, or which
3 promote increased worker and community awareness of health hazards posed by lead and other
4 toxic chemicals. Pursuant to Health & Safety Code § 25249.12(d), the above-referenced \$20,000
5 civil penalty shall be distributed as follows: Mateel’s 25% share of civil penalties is directed to
6 Californians for Alternatives to Toxics. The remaining 75% of the above-referenced civil penalties
7 shall be made payable, pursuant to statute, to California’s Office of Environmental Health Hazard
8 Assessment (“OEHHA”). The above-referenced payments shall be forwarded by Whole Foods to
9 its counsel so that they are received at least five days prior to the hearing date scheduled for
10 approval of this Consent Judgment. Whole Foods’s counsel shall notify Klamath Environmental
11 Law Center via email upon receipt of the funds. If this Consent Judgment is not entered by the
12 court within 120 days, of the date scheduled for approval, the above-referenced payments shall be
13 returned to Whole Foods and the provisions of this Consent Judgment shall be null and void. If the
14 Consent Judgment is entered by the court, within five days of that date, Whole Foods Market’s
15 counsel shall ensure the above described payments are delivered via UPS or FedEx for next
16 business day delivery, to Klamath Environmental Law Center.

17 **7. ENFORCEMENT OF JUDGMENT**

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19 7.1 The terms of this Consent Judgment shall be enforced exclusively by the
20 Parties hereto.

21 **8. MODIFICATION OF JUDGMENT**

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23 8.1 This Consent Judgment may be modified only upon entry of a modified
24 Consent Judgment by the court. Any party may seek such modification by noticed motion, with
25 notice provided to both the other party and to the Attorney General.

26
27 8.2 Mateel agrees not to contest any motion made by Whole Foods to modify this

1 Consent Judgment in the event Whole Foods has sought, and obtained, written consent from the
2 Attorney General to such modification. Mateel also agrees not to contest any motion by Whole
3 Foods to conform this Consent Judgment to any "safe use determination" established by OEEHA,
4 pursuant to 27 Cal. Code Regs. § 25204 or any successor regulation, regarding lead content of Bulk
5 Food Dispensing Equipment.

6
7 **9. NOTICE**

8 9.1 When any party is entitled to receive any notice or report under this Consent
9 Judgment, the notice or report shall be made in writing and sent via U.S. Mail or other manner of
10 overnight delivery to the following:

11 9.1.1 For Mateel: William Verick, Klamath Environmental Law Center,
12 424 First Street, Eureka, CA 95501

13
14 9.1.2 For Whole Foods: John H. Hempfling, Whole Foods Market, 550
15 Bowie Street, Austin, TX 78703. With a copy to: Wells Blaxter, BlaxterLaw, 1 Bush Street,
16 Suite 650, San Francisco, CA 94104.

17
18 **10. AUTHORITY TO STIPULATE**

19 Each signatory to this Consent Judgment certifies that he or she is fully authorized
20 by the Party he or she represents to enter this Consent Judgment and to execute it on behalf of the
21 Party represented and legally to bind that party.

22
23 **11. RETENTION OF JURISDICTION**

24 This court shall retain jurisdiction to implement this Consent Judgment.

25
26 **12. ENTIRE AGREEMENT**

27 This Consent Judgment contains the sole and entire agreement and understanding of

1 the parties with respect to the entire subject matter hereof, and any and all prior discussions,
2 negotiations, commitments and understandings related hereto. No representations, oral or
3 otherwise, express or implied, other than those contained herein have been made by any party
4 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
5 to exist or bind any of the parties.

6
7 13. GOVERNING LAW

8 The validity, construction and performance of this consent judgment shall be
9 governed by the laws of the State of California, without reference to any conflicts or law provisions
10 of California law.

11
12 14. COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(f)

13 Mateel agrees to comply with Health & Safety Code § 25249.7's reporting and
14 approval requirements and as implemented by various regulations.

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16 15. EXECUTION IN COUNTERPART

17 This Consent Judgment may be executed in counterparts and/or by facsimile, which
18 taken together shall be deemed to constitute one original document.

19 IT IS SO STIPULATED:

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22 DATED: December 19, 2013


By:



WHOLE FOODS MARKET CALIFORNIA, INC.
AND MRS. GOOCH'S NATURAL FOOD
MARKETS, INC.

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DATED: Feb. 5, 2014
~~December~~, ~~2013~~

By: 
WILLIAM VERICK - CEO of MATEEL
ENVIRONMENTAL JUSTICE FOUNDATION

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED:

MAR 07 2014

ERNEST H. GOLDSMITH

JUDGE OF THE SUPERIOR COURT