

LAW OFFICES OF  
**BUSHNELL, CAPLAN & FIELDING, LLP**

221 PINE STREET, SUITE 600

AT BATTERY

SAN FRANCISCO, CALIFORNIA 94104-2715

TELEPHONE (415) 217-3800

FAX (415) 217-3820

RODERICK P. BUSHNELL\*

ALAN M. CAPLAN†

DAVID H. FIELDING

OF COUNSEL

PHILIP NEUMARK

APRIL M. STRAUSS

TERENCE F. YOUNG

\* BOARD CERTIFIED CIVIL TRIAL ADVOCATE

† ALSO MEMBER OF  
DISTRICT OF COLUMBIA BAR

November 26, 2003

Mr. Perry D. Odak, President  
WILD OATS MARKETS, INC.  
3375 Mitchell Lane  
Boulder, CO 80301

Re: Notice of Violation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), Section 25249.6 of the California Health and Safety Code, for Exposing Consumers to Lead in Vinegar Without Warning

Dear Mr. Odak:

This office represents the Environmental Law Foundation (“ELF”), a California non-profit organization dedicated to the preservation and enhancement of human health and the environment. ELF has a long-standing interest in reducing health hazards to the public posed by toxic chemicals.

This letter constitutes notice that the entity listed below has violated and continues to violate provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code §§ 25249.5, *et seq.* Specifically, this entity has violated and continues to violate the warning requirement at § 25249.6 of the California Health and Safety Code, which provides, “No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual . . .”

Alleged Violator: WILD OATS MARKETS, INC.

Wine vinegar, including, but not limited to Modenaceti Balsamic Vinegar of Modena, Gaeta Balsamic Vinegar of Modena (4 years), Colavita Aged Balsamic Vinegar, Sweet Vinegar of Modena, Antiqua Balsamic Vinegar of Modena, organic, Lorenzo de’ Medici Aceto Balsamico di Modena, and Antiqua Balsamic Vinegar of Modena Riserva ‘90, produced, distributed and/or sold by this entity contains lead, a chemical known to

Mr. Perry D. Odak, President  
WILD OATS MARKETS, INC.  
November 26, 2003  
Page 2

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the state to cause cancer and reproductive toxicity. Since on or after February 1, 1999 and continuing to the present time, this entity has exposed and continues to expose consumers within the State of California to high levels of lead, a toxic chemical contained in vinegar. The amount of lead contained in one serving of the vinegar at issue herein is more than .5 micrograms/liter per day or .5 ppb. Exposure has occurred by ingestion of the vinegar.

Because lead is a chemical listed in Proposition 65 as a reproductive toxin, pursuant to Health & Safety Code § 25249.6 this entity was, and is, required to provide clear and reasonable warnings to purchasers of its vinegar before exposing the purchasers to lead contained in the vinegar. The warnings must state that the vinegar contains a chemical known by the State of California to cause reproductive toxicity. Pursuant to Health & Safety Code § 25249.7(d), ELF intends to bring suit in the public interest against each of the above-named entity sixty days hereafter to correct the violation occasioned by the failure to warn consumers of exposure to lead, unless the entity fully and completely remedies and ceases and desists from violating Proposition 65 within the sixty-day period.

Pursuant to 22 California Code of Regulations § 12903(b)(1), attached is a copy of "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65)," a summary of Proposition 65 prepared by the Office of Environmental Health Hazard Assessment of the California Environmental Protection Agency. Pursuant to Health & Safety Code § 25249.7(d)(1), attached is a Certificate of Merit pertaining to the allegations set forth in this Notice.

LAW OFFICES OF  
**BUSHNELL, CAPLAN & FIELDING, LLP**

Mr. Perry D. Odak, President

WILD OATS MARKETS, INC.

November 26, 2003

Page 3

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ELF is located at: 1736 Franklin Street, Ninth Floor, Oakland, California 94612, telephone: (510) 208-4555. ELF is represented in this matter by the law firms of Bushnell, Caplan & Fielding, LLP and Altshuler, Berzon, Nussbaum, Rubin & Demain. All communications concerning this matter should be direct to:

Alan M. Caplan, Esq.  
Bushnell, Caplan & Fielding, LLP  
221 Pine Street, Suite 600  
San Francisco, California 94104-2715  
Telephone: (415) 217-3800  
Facsimile: (415) 217-3820

Very truly yours,

AMS:self  
Enclosures

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA  
ENVIRONMENTAL PROTECTION AGENCY

**THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986  
(PROPOSITION 65): A SUMMARY**

The following summary has been prepared by the Office of Environmental Health Hazard Assessment, the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and its implementing regulations (see citations below) for further information.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 22 of the California Code of Regulations, Sections 12000 through 14000.

*WHAT DOES PROPOSITION 65 REQUIRE?*

***The "Governor's List."*** Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer, or birth defects or other reproductive harm. This list must be updated at least once a year. Over 735 chemical listings have been included as of November 16, 2001. Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release or otherwise engage in activities involving those chemicals must comply with the following:

***Clear and reasonable warnings.*** A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed. Exposures are exempt from the warning requirement if they occur less than twelve months after the date of listing of the chemical.

***Prohibition from discharges into drinking water.*** A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Discharges are exempt from this requirement if they occur less than twenty months after the date of listing of the chemical.

*DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?* Yes. The law exempts:

***Governmental agencies and public water utilities.*** All agencies of the federal, State or

local government, as well as entities operating public water systems, are exempt.

***Businesses with nine or fewer employees.*** Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees.

***Exposures that pose no significant risk of cancer.*** For chemicals that are listed as known to the State to cause cancer ("carcinogens"), a warning is not required if the business can demonstrate that the exposure occurs at a level that poses "no significant risk." This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific "no significant risk" levels for more than 250 listed carcinogens.

***Exposures that will produce no observable reproductive effect at 1,000 times the level in question.*** For chemicals known to the State to cause birth defects or other reproductive harm ("reproductive toxicants"), a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the "no observable effect level (NOEL)," divided by a 1,000-fold safety or uncertainty factor. The "no observable effect level" is the highest dose level which has not been associated with an observable adverse reproductive or developmental effect.

***Discharges that do not result in a "significant amount" of the listed chemical entering into any source of drinking water.*** The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a "significant amount" of the listed chemical has not, does not, or will not enter any drinking water source, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A "significant amount" means any detectable amount, except an amount that would meet the "no significant risk" or "no observable effect" test if an individual were exposed to such an amount in drinking water.

#### ***HOW IS PROPOSITION 65 ENFORCED?***

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys (those in cities with a population exceeding 750,000). Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. A notice must comply with the information and procedural requirements specified in regulations (Title 22, California Code of Regulations, Section 12903). A private party may not pursue an enforcement action directly under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of the notice. A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court of law to stop committing the violation.

*FOR FURTHER INFORMATION . . .*

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900.

**CERTIFICATE OF MERIT**  
for Environmental Law Foundation's Notice of  
Proposition 65 Violation on Wild Oats Markets, Inc.  
Health & Safety Code § 25249.7(d)

I, April M. Strauss, hereby declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice have violated Health and Safety Code section 25249.6 by failing to provide clear and reasonable warnings.
2. I am an attorney for the Noticing party Environmental Law Foundation.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action.
4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiffs' case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.
5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code section 25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Date: 11/28/03 \_\_\_\_\_

PROOF OF SERVICE  
[Code of Civil Procedure §§ 1013(a), 2015]

I, APRIL M. STRAUSS, DECLARE AS FOLLOWS:

I am a citizen of the United States, over the age of eighteen (18) years, and not a party to the within action. My place of business is 221 Pine Street, Suite 600, San Francisco, California 94104-2715.

On the below-stated date, I served the attached document entitled:

**NOTICE OF VIOLATION OF WILD OATS MARKETS, INC. OF THE  
SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986  
(PROPOSITION 65), SECTION 25249.6 OF THE CALIFORNIA HEALTH  
AND SAFETY CODE, FOR EXPOSING CONSUMERS TO LEAD IN  
VINEGAR WITHOUT WARNING**

by placing a true and correct copy thereof in an envelope addressed to each of the persons named below at the address shown, and by sealing and depositing said envelope in the United States mail at Sunnyvale, California, with postage fully prepaid:

Mr. Perry D. Odak  
President  
Wild Oats Markets, Inc.  
3375 Mitchell Lane  
Boulder, CA 80301

AND

**SEE ATTACHED LIST**

Executed on November 29, 2003, at Sunnyvale, California. I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct.

—



The Honorable Thomas J. Orloff  
Alameda County District Attorney  
1225 Fallon Street, Room 900  
Oakland, CA 94612

The Honorable Alan Turner  
Alpine County District Attorney  
P.O. Box 248  
Markleeville, CA 96120

The Honorable Todd D. Riebe  
Amador County District Attorney  
708 Court Street, Ste. 202  
Jackson, CA 94542

The Honorable Michael Ramsey  
Butte County District Attorney  
25 County Center Drive  
Oroville, CA 95965

The Honorable Jeffrey Tuttle  
Calaveras County District Attorney  
891 Mtn Ranch Road  
San Andreas, CA 95249

The Honorable John Poyner  
Colusa County District Attorney  
547 Market Street  
Colusa, CA 95932

The Honorable Gary T. Yancy  
Contra Costa County District Atty.  
P.O. Box 670  
Martinez, CA 94553

The Honorable Robert J. Drossel  
Del Norte County District Attorney  
450 H Street  
Crescent City, CA 95531

The Honorable Gary L. Lacy  
El Dorado County District Attorney  
515 Main Street  
Placerville, CA 95667

The Honorable Edward W. Hunt  
Fresno County District Attorney  
2220 Tulare Street, Ste. 1000  
Fresno, CA 93721

The Honorable Robert Holzapfel  
Glenn County District Attorney  
P.O. Box 430  
Willows, CA 95988

The Honorable Terry R. Farmer  
Humboldt County District Attorney  
825 Fifth Street  
Eureka, CA 95501

The Honorable Gilbert Otero  
Imperial County District Attorney  
939 W. Main Street  
El Centro, CA 92243

The Honorable Philip McDowell  
Inyo County District Attorney  
P.O. Drawer D  
Independence, CA 93526

The Honorable Edward R. Jagels  
Kern County District Attorney  
1215 Truxtun Ave.  
Bakersfield, CA 93301

The Honorable Ron Calhoun  
Kings County District Attorney  
1400 W. Lacey Blvd.  
Hanford, CA 93230

The Honorable Gary Luck  
Lake County District Attorney  
255 N. Forbes Street  
Lakeport, CA 95453

The Honorable Robert Burns  
Lassen County District Attorney  
220 S. Lassen Street, Ste. 8  
Susanville, CA 96130

The Honorable Steve Cooley  
Los Angeles County District Atty.  
210 W. Temple Street, Ste. 18000  
Los Angeles, CA 90012-3210

The Honorable Ernest Licalsi  
Madera County District Attorney  
209 W. Yosemite Ave.  
Madera, CA 93637

The Honorable Paula Freschi Kamena  
Marin County District Attorney  
3501 Civic Center Drive, Rm 130  
San Rafael, CA 94903

The Honorable Christine A. Johnson  
Mariposa County District Attorney  
P.O. Box 748  
Mariposa, CA 95388

The Honorable Norman Vroman  
Mendocino County District Attorney  
P.O. Box 1000  
Ukiah, CA 95482

The Honorable Gordon Spencer  
Merced County District Attorney  
2222 M Street  
Merced, CA 95340

The Honorable Tom Buckwalter  
Modoc County District Attorney  
P.O. Box 1171  
Alturas, CA 96101

The Honorable George Booth  
Mono County District Attorney  
P.O. Box 617  
Bridgeport, CA 93517

The Honorable Dean Flippo  
Monterey County District Attorney  
240 Church Street, Ste. 101  
Salinas, CA 93920

The Honorable Gary Lieberstein  
Napa County District Attorney  
931 Parkway Mall  
Napa, CA 94559

The Honorable Michael Ferguson  
Nevada County District Attorney  
201 Church Street, Ste. 8  
Nevada City, CA 95959

The Honorable Tony Rackauckas  
Orange County District Attorney  
401 Civic Center Drive  
Santa Ana, CA 92701

The Honorable Brad Fenocchio  
Placer County District Attorney  
11562 B Avenue  
Auburn, CA 95603

The Honorable James Reichle  
Plumas County District Attorney  
520 Main Street, Room 404  
Quincy, CA 95971

The Honorable Grover C. Trask II  
Riverside County District Attorney  
4075 Main Street  
Riverside, CA 92501

The Honorable Jan Scully  
Sacramento County District Attorney  
901 G Street  
Sacramento, CA 95814

The Honorable Harry J. Damkar  
San Benito County District Attorney  
419 Fourth Street  
Hollister, CA 95023-3801

The Honorable Dennis L. Stout  
San Bernardino County District Atty  
316 N. Mountain View Avenue  
San Bernardino, CA 92415-0004

The Honorable Paul Pflingst  
San Diego County District Attorney  
330 W. Broadway, Room 1300  
San Diego, CA 92112

The Honorable Terence Hallinan  
San Francisco County District Attorney  
880 Bryant Street, Ste. 325  
San Francisco, CA 94103

The Honorable John D. Phillips  
San Joaquin County District Attorney  
222 E. Weber Street, Room 202  
Stockton, CA 95202

The Honorable Gerald T. Shea  
San Luis Obispo County District Attorney  
County Government Center, Room 450  
San Luis Obispo, CA 93408

The Honorable James P. Fox  
San Mateo County District Attorney  
400 County Center, Third Floor  
Redwood City, CA 93101

The Honorable Thomas W. Sneddon Jr.  
Santa Barbara County District Attorney  
1105 Santa Barbara Street  
Santa Barbara, CA 93101

The Honorable George Kennedy  
Santa Clara County District Attorney  
70 W Hedding Street  
San Jose, CA 95110

The Honorable Ronald L. Ruiz  
Santa Cruz County District Attorney  
701 Ocean Street, Ste. 200  
Santa Cruz, CA 95060

The Honorable McGregor Scott  
Shasta County District Attorney  
1525 Court Street, Third Floor  
Redding, CA 96001

The Honorable Sharon O Sullivan  
Sierra County District Attorney  
P.O. Box 457  
Downieville, CA 95936

The Honorable Peter F. Knoll  
Siskiyou County District Attorney  
P.O. Box 986  
Yreka CA 96097

The Honorable David W. Paulson  
Solano County District Attorney  
600 Union Ave.  
Fairfield, CA 94533

The Honorable J. Michael Mullins  
Sonoma County District Attorney  
600 Administration Drive, Room 212  
Santa Rosa, CA 95403

The Honorable James C. Brazleton  
Stanislaus County District Attorney  
P.O. Box 442  
Modesto, CA 95353

The Honorable Carl V. Adams  
Sutter County District Attorney  
446 Second Street  
Yuba City, CA 95991

The Honorable Gregg Cohen  
Tehama County District Attorney  
P.O. Box 519  
Red Bluff, CA 96080

The Honorable David L. Cross  
Trinity County District Attorney  
P.O. Box 310  
Weaverville, CA 96093

The Honorable Philip J. Cline  
Tulare County District Attorney  
221 S. Mooney Blvd., Ste. 224  
Visalia, CA 93291

The Honorable Donald I. Segerstrom  
Tuolumne County District Attorney  
Two S. Green Street  
Sonora, CA 95370

The Honorable Michael D. Bradbury  
Ventura County District Attorney  
800 S Victoria Ave  
Ventura, CA 93009

The Honorable David C. Henderson  
Yolo County District Attorney  
301 Second Street  
Woodland, CA 95695

The Honorable Patrick McGrath  
Yuba County District Attorney  
215 Fifth Street  
Marysville, CA 95901

Los Angeles City Attorney's Office  
200 N Main Street, Room 1800  
Los Angeles, CA 90012

San Diego City Attorney's Office  
Civic Center Plaza  
1200 Third Ave., Ste 1200  
San Diego, CA 92101

San Jose City Attorney's Office  
151 W Mission Street  
San Jose, CA 95110

San Francisco City Attorney's Office  
City Hall, Room 234  
San Francisco, CA 94102