

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

* BOARD CERTIFIED CIVIL TRIAL ADVOCATE

OF COUNSEL

PHILIP NEUMARK
APRIL M. STRAUSS
TERENCE F. YOUNG
DIANA L. MAIER

May 7, 2004

Joseph A. Pichler
President
THE KROGER CO.
1014 Vine Street
Cincinnati, OH 45202-1100

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. Pichler:

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: THE KROGER CO. (DBA CALA FOODS/BELL MARKETS)

Wine vinegar, including, but not limited to Colavita Aged Balsamic Vinegar of Modena Sweet Vinegar of Modena, Private Selection Balsamic Vinegar (6 years), and Private Selection Balsamic Vinegar (aged up to 8 years), produced, distributed and/or

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sold by this entity contains lead, a chemical known to 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.

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BUSHNELL, CAPLAN & FIELDING, LLP

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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,

AMC:ams
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 The Kroger Co. (dba Cala Foods/Bell Markets)
Health & Safety Code § 25249.7(d)

I, Alan M. Caplan, 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: _____

5/7/04

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 Robert Brown
Mariposa County District Attorney
P.O. Box 730
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 Jordan Funk
Modoc District Attorney
204 South Court Street
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 Office of the District Attorney
San Benito County District Attorney
P.O. Box 2461
Hollister, CA 95024-2461

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

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

The Honorable Kamala Harris
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

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

1
2 I am employed in the City and County of San Francisco, State of California. I am
3 over the age of 18 and not a party to the within action. My business address is 221 Pine
4 Street, Suite 600, San Francisco, California 94104.

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

6 **NOTICE OF VIOLATION OF THE KROGER CO. OF THE SAFE DRINKING**
7 **WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65),**
8 **SECTION 25249.6 OF THE CALIFORNIA HEALTH AND SAFETY CODE, FOR**
9 **EXPOSING CONSUMERS TO LEAD IN VINEGAR WITHOUT WARNING**

10 on the other parties in this action by placing the true copies thereof enclosed in sealed
11 envelopes addressed as stated below:

12 **Joseph A. Pichler**
13 **President**
14 **THE KROGER CO.**
15 **1014 Vine Street**
16 **Cincinnati, OH 45202-1100**

17 **and**

18 **SERVICE LIST ATTACHED**

19 **BY FIRST-CLASS MAIL:** I am readily familiar with the firm's practice of
20 collection and processing of correspondence for mailing. Under that practice, it is
21 deposited with the U.S. Postal Service on that same day with postage thereon fully
22 prepaid at San Francisco, California, in the ordinary course of business. I am aware
23 that on motion of the party served, service is presumed invalid if the postal
24 cancellation date or the postage meter date is more than one day after date of deposit
25 for mailing in affidavit.

26 **BY OVERNIGHT COURIER SERVICE:** I caused each envelope with postage fully
27 prepaid to be sent by Federal Express.

28 **BY FACSIMILE:** I caused each document to be delivered by facsimile transmission
to the offices of the addressee, Fax Number _____.

Executed on May 7, 2004 at San Francisco, California. I declare under penalty of
perjury under the laws of the State of California, that the above is true and correct.

