

State of California - Department of Justice - Attorney General's Office - Proposition 65 Enforcement Reporting

Attention: Prop 65 Coordinator, 1515 Clay Street, Suite 2000, Oakland, CA 94612

FORM JUS 1501
(03/01)

PRIVATE ENFORCEMENT FILING - Health and Safety Code section 25249.7(e) and (f)

REPORT OF SETTLEMENT

Please print or type required information

☒ Original Filing ☐ Supplemental Filing ☐ Corrected Filing

PARTIES TO THE ACTION	PLAINTIFF(S) ENVIRONMENTAL LAW FOUNDATION, INDIVIDUALLY AND ON BEHALF OF THE GENERAL PUBLIC,			
	DEFENDANT(S) INVOLVED IN SETTLEMENT TRADER JOE'S COMPANY; WHOLE FOODS MARKET CALIFORNIA, INC.; MRS. GOOCH'S NATURAL FOODS, INC.; and STATER BROS. MARKETS			
CASE INFO	COURT DOCKET NUMBER CGC-03-421108		COURT NAME SAN FRANCISCO SUPERIOR COURT	
	SHORT CASE NAME IN RE VINEGAR LITIGATION			
REPORT INFO	INJUNCTIVE RELIEF Proposition 65 Warnings, Shelf Warning and/or Product labeling			
	PAYMENT: CIVIL PENALTY -0-		PAYMENT: ATTORNEYS FEES \$111,988.25	PAYMENT: OTHER \$38,011.75 (Plaintiff's cost)
	WILL SETTLEMENT BE SUBMITTED TO COURT? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	IF YES, AFTER ENTRY OF JUDGMENT BY COURT, REPORT OF ENTRY OF JUDGMENT MUST BE SUBMITTED TO ATTORNEY GENERAL		DATE SETTLEMENT SIGNED 11/08/2005
	COPY OF SETTLEMENT MUST BE ATTACHED			
	<small>For Internal Use Only</small>			
FILER INFO	NAME OF CONTACT ALAN M. CAPLAN, ESQ.			
	ORGANIZATION BUSHNELL, CAPLAN & FIELDING, LLP		TELEPHONE NUMBER ((415)) 217-3800	
	ADDRESS 221 PINE STREET, SUITE 600		FAX NUMBER ((415)) 217-3820	
	CITY SAN FRANCISCO	STATE CA	ZIP 94104-2715	E-MAIL ADDRESS ACAPBCF@AOL.COM

FILING INSTRUCTIONS: This form can be completed online and printed. If electronic filing is not available, mail the completed form with a copy of the settlement to the attention of the Prop 65 Coordinator at the address shown above. If you need additional space to complete this form please use an attachment.

1 ALAN M. CAPLAN (SBN 49315)
2 APRIL M. STRAUSS, Of Counsel (SBN 163327)
3 BUSHNELL, CAPLAN & FIELDING, LLP
4 221 Pine Street, Suite 600
5 San Francisco, CA 94104
6 Telephone: (415) 217-3800
7 Facsimile: (415) 217-3820

8 Attorneys for Plaintiff ENVIRONMENTAL LAW FOUNDATION
9 *(Additional Attorneys on Signature Page)*

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO, UNLIMITED JURISDICTION

IN RE VINEGAR LITIGATION

CASE NO. CGC-03-421108
(consolidated with Nos. CGC-04-428945
and CGC-04-435440)

CONSENT JUDGMENT AS TO
DEFENDANTS TRADER JOE'S
COMPANY, WHOLE FOODS MARKET
CALIFORNIA, INC., MRS. GOOCH'S
NATURAL FOODS, INC. AND STATER
BROS. MARKETS;
ORDER

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”). Trader
5 Joe’s Company and Whole Foods Market, Inc. (erroneously named as "Whole Foods, Inc.")
6 are two of the defendants in the Action. Whole Foods Market, Inc. does not engage in the
7 grocery business in the State of California. Two of its subsidiaries, Whole Foods Market
8 California, Inc. and Mrs. Gooch's Natural Foods, Inc. (hereinafter collectively referred to as
9 "Whole Foods"), are the proper defendants and are hereby deemed substituted for Whole
10 Foods Market, Inc., which is dismissed with prejudice and shall bear its own costs.

11 On October 13, 2004, Environmental Law Foundation filed the same Complaint
12 against other defendants. One of those defendants is Stater Bros. Markets. (The two actions
13 shall be collectively referred to as “Actions.”)

14 Defendants Trader Joe’s Company, Whole Foods, and Stater Bros. Markets shall
15 hereinafter be referred to as “Settling Defendants.”

16 1.2 Settling Defendants are corporations that employ more than ten persons and sell
17 Wine Vinegars to persons in the State of California. For purposes of this Consent Judgment,
18 the term “Wine Vinegar” shall have the meaning set forth in section 6.2.

19 1.3 ELF’s Complaint alleges that the Settling Defendants manufactured, distributed
20 and/or sold Wine Vinegar containing lead in an amount that resulted in exposures to
21 consumers in violation of the provisions of the Safe Drinking Water and Toxic Enforcement
22 Act of 1986 and Health & Safety Code §§ 25249.5, *et seq.* (Proposition 65), and Business &
23 Professions Code §§ 17200, *et seq.* (“Unfair Competition Law”), by knowingly and
24 intentionally exposing persons to a chemical known to the State of California to cause
25 reproductive toxicity, namely lead, without first providing a clear and reasonable warning to
26 such individuals.

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1 1.4 For purposes of this Consent Judgment only, the parties stipulate that this Court
2 has jurisdiction over allegations of violations contained in the Complaints and personal
3 jurisdiction over the Settling Defendants as to the acts alleged in the Complaints, that venue is
4 proper in the County of San Francisco and that this Court has jurisdiction to enter this
5 Consent Judgment as a resolution of all claims which could have been raised in the
6 Complaints based on the facts alleged therein.

7 1.5 On or about August 20, 2003, Trader Joe's Company filed its Answer generally
8 and specifically denying the allegations as set forth in the Complaint.

9 1.6 On or about November 13, 2003, Whole Foods Market, Inc. filed its Answer
10 generally and specifically denying the allegations as set forth in the Complaint.

11 1.7 For the purpose of avoiding prolonged litigation, the parties enter into this
12 Consent Judgment as a full settlement of all claims that were raised in the Complaints based
13 on the facts alleged therein, or which could have been raised in the Complaints arising out of
14 the facts alleged therein. By execution of this Consent Judgment, Settling Defendants do not
15 admit any violations of Proposition 65 or the Unfair Competition Law or any other law and
16 specifically deny that they have committed any such violations and maintain that all Wine
17 Vinegar products they have sold and distributed in California have been and are in
18 compliance with all laws. Nothing in this Consent Judgment shall be construed as an
19 admission by any Settling Defendant of any fact, finding, conclusion, issue of law, or
20 violation of law. Settling Defendants do not admit that 34 parts per billion ("ppb") limit set
21 forth in paragraph 2.1 of this Consent Judgment is the appropriate limit for requiring a
22 warning based on consumption of wine vinegar, and adopt this limit for purposes of this
23 settlement only. This paragraph shall not diminish or affect the responsibilities and duties of
24 the parties under this Consent Judgment.

25 1.8 For the purposes of this Consent Judgment, the term "Effective Date" shall
26 mean the date upon which this Consent Judgment is approved and entered as a Judgment by
27 the Court.

1 2. CLEAR AND REASONABLE WARNINGS

2 2.1 Warning Standard. Settling Defendants shall not sell or offer for sale in
3 California Wine Vinegars that contain lead at levels that exceed 34 ppb unless warnings are
4 given in accordance with one or more of the provisions set forth below. Settling Defendants
5 shall have the warnings placed no later than sixty (60) days after entry of this Consent
6 Judgment.

7 a. Shelf Warning. Settling Defendants may provide warning by placing a
8 notice on the top shelf of or at eye level on any rack of shelves in Settling Defendants' stores
9 where Wine Vinegars are sold. The notice may be either parallel or perpendicular to shelf
10 line. The warning shall state as follows: "CALIFORNIA PROPOSITION 65 WARNING:
11 The Red Wine Vinegars and Balsamic Vinegars on these shelves contain lead, a chemical
12 known to the State of California to cause birth defects and other reproductive harm." Each
13 sign shall be no smaller than 2.25 inches x 5.5 inches, and the form and type shall be
14 substantially similar to that which is attached hereto as Exhibit A.

15 b. Product Labeling. Settling Defendants may provide warning by placing
16 the following language on the packing, labeling or directly onto each bottle of a Red or
17 Balsamic Wine Vinegar product: "WARNING: This product contains lead, a chemical known
18 to the State of California to cause birth defects and other reproductive harm." Product label
19 warnings shall be placed with such conspicuousness as compared with other words,
20 statements, designs and/or devices as to render it likely to be read and understood by an
21 ordinary individual under customary conditions of use or purchase.

22 2.2 In the event that some, but not all, Wine Vinegars sold by Settling Defendants
23 contain lead in excess of 34 ppb, Settling Defendants may utilize the shelf warnings with the
24 language as described in paragraph 2.1 (a) of this Consent Judgment.

25 2.3 Any changes to the language or format of the Warning required by this section
26 shall be made only after obtaining ELF's approval, unless such changes are allowed under
27 paragraphs 2.6, 4.1 or 10.1 of this Consent Judgment.

1 2.4 A Settling Defendant, prior to offering for sale any Wine Vinegar without a
2 warning, shall have any such Wine Vinegar tested to determine the level of lead, if any, in
3 such Wine Vinegar. Testing shall be conducted by West Coast Analytical Service, Inc.
4 (“WCAS”), or if WCAS is not available for any reason, another testing laboratory with
5 Environmental Laboratory Certification from the State of California, Department of Health
6 Services, Environmental Laboratory Accreditation Program. Any such test must be
7 conducted using inductively coupled plasma mass spectrometry or graphite furnace atomic
8 absorption spectrometry and employ sample preparation and evaluation techniques generally
9 accepted in the scientific community. At least 60 days before any proposed discontinuance of
10 any warning pursuant to this paragraph, Settling Defendant proposing such discontinuance
11 shall provide to ELF the results, the underlying raw data, and a description of the test
12 methodology used. Should ELF dispute for any reason the discontinuance of any warning,
13 the dispute may be submitted by either party to the Court for resolution on motion. Unless
14 and until such motion is resolved favorably to Settling Defendant, the warning in question
15 may not be discontinued.

16 2.5 Provisions of the Warning in paragraphs 2.1 or 2.2 of this Consent Judgment
17 shall fully and completely satisfy Settling Defendants’ obligations to provide a warning for
18 all Wine Vinegars with respect to the presence of lead under Proposition 65, the California
19 Business and Professions Code, and all federal, state or local laws, regulations, or ordinances.

20 2.6 If ELF settles this, or any lawsuit regarding the same allegations as in the
21 Complaints, wherein any retailer is permitted to provide a warning regarding lead in Wine
22 Vinegar that is different in content, method or appearance, any Settling Defendant shall, at its
23 sole discretion, have the option to warn in the manner described in section 2.1, or in the
24 manner set forth in the subsequent settlement.
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1 3. MONETARY RELIEF

2 3.1 Settling Defendants shall pay to ELF the sum of \$150,000 as settlement
3 proceeds ("Settlement Proceeds") to be applied toward its attorneys' fees and costs. The
4 settlement draft shall be delivered to one of ELF's counsel, Alan M. Caplan, Bushnell,
5 Caplan & Fielding, LLP, 221 Pine Street, Suite 600, San Francisco, California 94104, within
6 five (5) business days after the entry of this Consent Judgment. These Settlement Proceeds
7 shall be delivered to ELF's counsel, and ELF shall have the sole and exclusive responsibility
8 of apportioning and paying to the State of California any portion of the Settlement Proceeds
9 as required by California Health & Safety Code § 25249.12(d), and Settling Defendants shall
10 have no liability if payments to the State of California are not made by ELF.

11 3.2 This payment shall be the only monetary obligation of the Settling Defendants
12 with respect to this Consent Judgment; each party shall bear its own attorneys' fees and costs.

13 3.3 ELF agrees to comply with the reporting requirements referenced in California
14 Health & Safety Code § 25249.7(f). Pursuant to the regulations promulgated under that
15 section, ELF shall present this Consent Judgment to the California Attorney General's Office
16 within two (2) days after receipt of all necessary signatures. ELF also agrees to serve a copy
17 of the Noticed motion to approve and enter the Consent Judgment on the Attorney General's
18 Office at least forty-five (45) days prior to the date set for hearing of the motion in the
19 Superior Court of the City and County of San Francisco.

20 3.4 The Settling Parties acknowledge that, pursuant to Health & Safety Code §
21 25249.7, a noticed motion must be filed to obtain judicial approval of the Consent Judgment.
22 Accordingly, the Settling Parties agree to file a joint motion for approval of the settlement,
23 which shall be prepared by ELF within a reasonable period of time after the date this
24 agreement is signed by all parties.

25 4. MODIFICATION OF CONSENT JUDGMENT

26 4.1 This Consent Judgment may be modified by written agreement between ELF
27 and any Settling Defendant, after noticed motion, and upon entry of a modified Consent
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Judgment by the Court thereon, or upon motion of ELF or the Settling Defendant as provided by law or upon entry of a modified Consent Judgment by the Court.

5. APPLICATION OF CONSENT JUDGMENT

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

5.2 The provisions of Paragraph 2 of this Consent Judgment shall apply only to sales of Wine Vinegar within the State of California.

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

6. CLAIMS COVERED

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

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

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

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

9 ELF and the Settling Defendants further agree and acknowledge that this Consent
10 Judgment is a full, final, and binding, resolution of any violations of Proposition 65, Business
11 & Professions Code § 17200, *et seq.* and Business & Professions Code § 17500, *et seq.*, that
12 have been or could have been asserted in the Complaints against the Settling Defendants for
13 their alleged failure to provide clear and reasonable warnings of exposure to or identification
14 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 Defendants arising under Proposition 65, Business & Professions
18 Code § 17200, *et seq.* and Business & Professions Code § 17500, *et seq.*, related to the
19 Settling Defendants' 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 failures
21 to warn about exposures to or identification of lead contained in the Wine Vinegars made by
22 Settling Defendants or their attorneys or representatives, in the course of responding to those
23 alleged violations of Proposition 65, Business & Professions Code § 17200, or Business &
24 Professions Code § 17500, as alleged in the Complaint.

25 It is specifically understood and agreed that ELF and the Settling Defendants intend
26 that Settling Defendants' compliance with the terms of this Consent Judgment will resolve all
27 issues and liability, now and in the future, concerning the Settling Defendants' alleged
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1 violation of the requirements of Proposition 65, Business & Professions Code § 17200, *et seq.*
2 and Business & Professions Code § 17500, *et seq.*, as to lead in Wine Vinegars.

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

8 7. RETENTION OF JURISDICTION

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

11 8. COURT APPROVAL

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

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

16 9.1 Before moving to enforce the terms and conditions of this Consent Judgment
17 against any Settling Defendant with respect to an alleged violation occurring at a retail store
18 located in California, ELF must follow the procedures set forth in subsections 9.2 through
19 9.4.

20 9.2 In the event that ELF and/or its attorneys, agents or assigns, identify one or
21 more retail stores in California owned and operated by any Settling Defendant at which Wine
22 Vinegars are sold (hereinafter “retail outlet”) for which the warnings required under
23 paragraph 2 of this Consent Judgment are not being given, ELF shall notify, in writing, any
24 Settling Defendant of such alleged failure to warn (the “Notice of Breach”). The Notice of
25 Breach shall be sent in a manner authorized in paragraph 12.1 of this Consent Judgment ,
26 with proof of service within sixty (60) days of the date the alleged violation was observed.
27 The Notice of Breach shall identify the date the alleged violation was observed and the retail
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1 outlet in question, and reasonably describe the nature of the alleged violation with sufficient
2 detail to allow such Settling Defendant to determine the basis of the claim being asserted and
3 the identities of the Wine Vinegars to which those assertions apply.

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

9 9.4 ELF shall take no further action against the Settling Defendant unless ELF
10 discovers, at least thirty (30) days after service of the Notices of Breach served pursuant to
11 subsections 9.2 and 9.3, that the violation described in the Notice of Breach has not been
12 corrected.

13 10. GOVERNING LAW

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

19 10.2 In the event that either Proposition 65 or the regulations promulgated pursuant
20 to Proposition 65 ("Proposition 65 Regulations") are revised or modified in a way that affects
21 the Settling Defendants' obligations set forth in this Consent Judgment, then the Settling
22 Defendants shall have an option of complying with the revised or modified Proposition 65 or
23 Proposition 65 Regulations in lieu of the terms of this Consent Judgment.

24 11. EXCHANGE IN COUNTERPARTS

25 11.1 Stipulations to this Consent Judgment may be executed in counterparts by
26 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 Defendants may specify a change of address to which all notices and other communications shall be sent.

IT SO STIPULATED:

DATED: 11/8/05

ENVIRONMENTAL LAW FOUNDATION

By: 
JAMES WHEATON

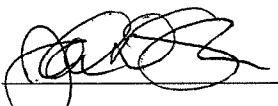
DATED: _____

TRADER JOE'S COMPANY

By: _____

DATED: 8/5/2005

WHOLE FOODS MARKET CALIFORNIA, INC.

By: 
John D. Clougher
Vice President

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 Defendants may specify a change of address to which all notices and other communications shall be sent.

IT SO STIPULATED:

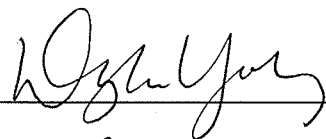
DATED: _____

ENVIRONMENTAL LAW FOUNDATION

By: _____
JAMES WHEATON

DATED: JULY 22, 2005

TRADER JOE'S COMPANY

By: 
VICE PRESIDENT AND GENERAL
COUNSEL

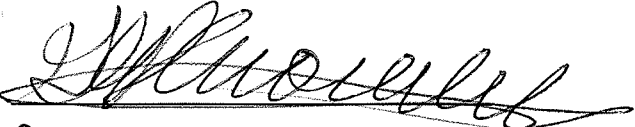
DATED: _____

WHOLE FOODS MARKET CALIFORNIA, INC.

By: _____

1 DATED: 8/16/05

MRS. GOOCH'S NATURAL FOODS, INC.

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3 By: 
4 George Khoury
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7 DATED: _____

STATER BROS. MARKETS

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9 By: _____
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12 IT IS SO ORDERED, ADJUDGED AND DECREED:

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14 DATED: _____

JUDGE OF THE SUPERIOR COURT

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DATED: _____

MRS. GOOCH'S NATURAL FOODS, INC.

By: _____

DATED: 7-25-05

STATER BROS. MARKETS

By: 

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT

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Exhibit A

CALIFORNIA PROPOSITION 65 WARNING:

The Red Wine Vinegars and Balsamic Vinegars on these shelves contain lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

Exhibit B

ENVIRONMENTAL LAW FOUNDATION

Alan M. Caplan
BUSHNELL, CAPLAN & FIELDING, LLP
221 Pine St.
San Francisco, CA 94104

WHOLE FOODS MARKET CALIFORNIA, INC.; MRS. GOOCH'S NATURAL FOODS,
INC.; and STATER BROS. MARKETS

Charles C. Ivie
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

TRADER JOE'S COMPANY

Jennifer Laser
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
Los Angeles, CA 90067