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

ALBECO INC. (dba MOLLIE STONE'S MARKETS; and DEHOFF ENTERPRISES, INC. (dba KEY MARKETS).

CASE INFO

COURT DOCKET NUMBER	COURT NAME
CGC-03-421108	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	PAYMENT: ATTORNEYS FEES	PAYMENT: OTHER
-0-	-0-	-0-

WILL SETTLEMENT BE SUBMITTED TO COURT?	IF YES, AFTER ENTRY OF JUDGMENT BY COURT, REPORT OF ENTRY OF JUDGMENT MUST BE SUBMITTED TO ATTORNEY GENERAL	DATE SETTLEMENT SIGNED
☒ Yes ☐ No		11/08/2005

COPY OF SETTLEMENT MUST BE ATTACHED

For Internal Use Only

FILER INFO

NAME OF CONTACT

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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.

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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 ALBECO, INC. (dba MOLLIE STONE'S MARKETS); and DEHOFF ENTERPRISES, INC. (dba KEY MARKETS); ORDER

1 INTRODUCTION

1.1 On October 13, 2004, the Environmental Law Foundation, individually and on behalf of the general public ("ELF") filed a Complaint for civil penalties, restitution and injunctive relief ("Complaint") in San Francisco County Superior Court ("Action"). Albeco, Inc., dba Mollie Stone's Markets and Dehoff Enterprises, Inc., dba Key Markets, two of the defendants in the Action, shall hereinafter be referred to as "Settling Defendants."

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

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

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

1.5 For the purpose of avoiding prolonged litigation, the parties enter into this Consent Judgment as a full settlement of all claims that were raised in the Complaints based on the facts alleged therein, or which could have been raised in the Complaints arising out of the facts alleged therein. By execution of this Consent Judgment, Settling Defendants do not

admit any violations of Proposition 65 or the Unfair Competition Law or any other law and specifically deny that they have committed any such violations and maintain that all Wine Vinegar products they have sold and distributed in California have been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by any Settling Defendant of any fact, finding, conclusion, issue of law, or violation of law. Settling Defendants do not admit that 34 parts per billion ("ppb") limit set forth in paragraph 2.1 of this Consent Judgment is the appropriate limit for requiring a warning based on consumption of wine vinegar, and adopt this limit for purposes of this settlement only. This paragraph shall not diminish or affect the responsibilities and duties of the parties under this Consent Judgment.

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

2. CLEAR AND REASONABLE WARNINGS

2.1 Warning Standard. Settling Defendants shall not sell or offer for sale in California Wine Vinegars that contain lead at levels that exceed 34 ppb unless warnings are given in accordance with one or more of the provisions set forth below. Whichever warning Settling Defendants elects, that shall be the sole and exclusive method of warning used in stores. Settling Defendants shall have the warnings placed no later than sixty (60) days after entry of this Consent Judgment.

a. Shelf Warning. Settling Defendants may provide warning by placing a notice on the top shelf of or at eye level on any rack of shelves in Settling Defendants' stores where Wine Vinegars are sold. The notice may be either parallel or perpendicular to shelf line. The warning shall state as follows: "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." Each

sign shall be no smaller than 2.25 inches x 5.5 inches, and the form and type shall be substantially similar to that which is attached hereto as Exhibit A.

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

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

2.3 Any changes to the language or format of the Warning required by this section shall be made only after obtaining ELF's approval, unless such changes are allowed under paragraphs 2.6, 4.1, 10.1, or 10.2 of this Consent Judgment.

2.4 A Settling Defendant, prior to offering for sale any Wine Vinegar without a warning, shall have any such Wine Vinegar tested to determine the level of lead, if any, in such Wine Vinegar. Testing shall be conducted by West Coast Analytical Service, Inc. ("WCAS"), or if WCAS is not available for any reason, another testing laboratory with Environmental Laboratory Certification from the State of California, Department of Health Services, Environmental Laboratory Accreditation Program. Any such test must be conducted using inductively coupled plasma mass spectrometry or graphite furnace atomic absorption spectrometry and employ sample preparation and evaluation techniques generally accepted in the scientific community. At least 60 days before any proposed discontinuance of any warning pursuant to this paragraph, Settling Defendant proposing such discontinuance shall provide to ELF the results, the underlying raw data, and a description of the test methodology used. Should ELF dispute for any reason the discontinuance of any warning,

the dispute may be submitted by either party to the Court for resolution on motion. Unless and until such motion is resolved favorably to Settling Defendant, the warning in question may not be discontinued.

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

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

3. MONETARY RELIEF

3.1 There will be no monetary payment as a result of this settlement. Plaintiff, and each Settling Defendant, agrees to bear its own costs and attorneys fees, and any other costs associated with this litigation.

4. MODIFICATION OF CONSENT JUDGMENT

4.1 This Consent Judgment may be modified by written agreement between ELF and any Settling Defendant, after noticed motion, and upon entry of a modified Consent 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 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, demands, obligations, damages, costs, fines penalties, losses or expenses, including, but not limited to, investigation fees, expert fees and attorneys' fees of any nature whatsoever, whether known or unknown, fixed or contingent against the Settling Defendant and each of its customers, owners, parent companies, corporate affiliates, subsidiaries and its respective officers, directors, attorneys, representatives, shareholders, agents, and employees arising under Proposition 65, Business and & Professions Code § 17200, *et seq.* and Business & Professions Code § 17500, *et seq.,* related to the Settling Defendants' alleged failure to warn about exposures to or identification of lead contained in Wine Vinegars.

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

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

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

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

7. RETENTION OF JURISDICTION

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

8. COURT APPROVAL

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

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

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

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

9.3 In the event that ELF identifies a specific retail outlet, other than the specific one identified in subsection 9.2 of this Consent Judgment, not giving warnings for Wine Vinegars as required under paragraph 2, ELF shall serve the Settling Defendant with another Notice of

Breach in the manner described in subsection 9.2 and provide the same information as required in subsection 9.2.

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

10. GOVERNING LAW

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

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

11. EXCHANGE IN COUNTERPARTS

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

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

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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: 7/18/05

ALBECO, INC. dba MOLLIE STONE'S MARKETS

By: David M. Bennett V.P./Sec
DAVID M. BENNETT

DATED:_____

DEHOFF ENTERPRISES, INC. dba KEY MARKETS

By: _____

_____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED:_____

_____
JUDGE OF THE SUPERIOR COURT

10879277_1.DOC

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: _____

ALBECO, INC. dba MOLLIE STONE'S MARKETS

By: _____

_____

DATED: 7/28/05

DEHOFF ENTERPRISES, INC. dba KEY MARKETS

By: _____, G.M.
CHRIS DEHOFF, Gen Mgr

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
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San Francisco, CA 94104

ALBECO, INC. (dba MOLLIE STONE'S MARKETS) and DEHOFF ENTERPRISES, INC. (dba KEY MARKETS)

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