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13
14

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **COUNTY OF ALAMEDA**

17 **COORDINATED PROCEEDINGS**
18 **SPECIAL TITLE (RULE 3.550)**

Judicial Council Coordination Proceeding
No. 4779/Alameda County Case No.
RG12636763

19 **PROPOSITION 65 CANNED FOOD**
20 **CASES AND COORDINATED ACTIONS**

[PROPOSED] STIPULATED CONSENT
JUDGMENT; [PROPOSED] ORDER RE:
JFE SHOJI TRADE AMERICA

21 **DAVID STEINMAN and THE CHEMICAL**
22 **TOXIN WORKING GROUP, INC., a**
23 **California non-profit corporation,**

Health & Safety Code Section 25249.5 *et seq.*

24 **Plaintiffs,**

Action Filed: June 28, 2012
Trial Date: November 16, 2015

25 **v.**

26 **THE KROGER CO. and DOES 1-100,**

27 **Defendants.**
28

STIPULATED CONSENT JUDGMENT

1
2 **1. INTRODUCTION**

3 **1.1** On June 28, 2012, Plaintiff David Steinman (“Steinman”), as a private enforcer,
4 and in the public interest, initiated this Action by filing a Complaint for Injunctive and
5 Declaratory Relief and Civil Penalties (the “Complaint”) pursuant to the provisions of
6 California Health and Safety Code section 25249.5 et seq. (“Proposition 65”), The Kroger Co.
7 (“Kroger”). On October 29, 2013, David Steinman filed a First Amended Complaint
8 (“Amended Complaint”), adding Plaintiff The Chemical Toxin Working Group (“CTWG”) to
9 this Action. David Steinman and CTWG shall be collectively referred to as Plaintiffs.
10 Plaintiffs and Defendant shall collectively be referred to as the “Parties,” each a “Party.”

11 **1.2** In this Action, Plaintiffs allege that certain products distributed by Kroger to the
12 general public contain lead, a chemical listed pursuant to Proposition 65 as a carcinogen and
13 reproductive toxicant, and that these products expose consumers at levels requiring a Proposition
14 65 warning. The following products are subject to the terms of this Consent Judgment and
15 hereinafter shall be referred to as “the Covered Products”: Ralphs Premium Quality Whole
16 Oysters in Water, Ralphs Mandarin Oranges, Peeled Segments in Light Syrup, Ralphs Premium
17 Quality Smoked Oysters in Cottonseed Oil, and Ralphs Lite Mandarin Oranges, Peeled Segments
18 in Mandarin Orange Juice.

19 **1.3** Plaintiff David Steinman is an individual and founder of plaintiff CTWG, a California
20 non-profit corporation. Plaintiffs are private enforcers of Proposition 65, acting in the public
21 interest, that have diligently prosecuted this matter and are settling the case in the public
22 interest.

23 **1.4** Defendant The Kroger Co. is a business entity that at all times relevant for
24 purposes of this Consent Judgment employs ten or more persons.

25 **1.5** The Complaint was based on allegations of lead exposure to consumers as set
26 forth in David Steinman’s Notices of Violation dated January 5, 2012 and February 24, 2012
27 served on the Attorney General of the State of California, other public enforcers and Kroger in
28 regard to the Covered Products Ralphs Premium Quality Whole Oysters in Water, Ralphs

1 Mandarin Oranges, Peeled Segments in Light Syrup and Ralphs Premium Quality Smoked
2 Oysters. The First Amended Complaint added allegations of lead exposure to consumers as set
3 forth in CTWG's Notice of Violation dated February 20, 2013 in regard to the Covered Product
4 Ralphs Lite Mandarin Oranges, Peeled Segments in Mandarin Orange Juice. A true and correct
5 copy of the Notices of Violation is attached as Exhibit A. More than sixty (60) days have
6 passed since the Notices of Violation were mailed, and no designated governmental entity has
7 filed a complaint against Kroger with regard to the Covered Products or the alleged violations.

8 **1.6** Plaintiffs' Notices of Violation and the First Amended Complaint allege that use
9 of the Covered Products expose persons in California to Proposition 65 listed chemicals
10 without first providing clear and reasonable warnings in violation of California Health and
11 Safety Code section 25249.6. Kroger denies all material allegations contained in the Notices of
12 Violation and First Amended Complaint and specifically denies that it violated Proposition 65
13 or that the Covered Products require or required a Proposition 65 warning or otherwise caused
14 harm to any person. Nothing in the Consent Judgment shall be construed as an admission by
15 Kroger of any fact, issue of law or violation of law, nor shall compliance with the Consent
16 Judgment constitute or be construed as an admission by Kroger of any fact, issue of law or
17 violation of law, at any time, for any purpose. Nothing in the Consent Judgment shall
18 prejudice, waive or impair any right, remedy, argument or defense that Kroger may have in
19 other or further legal proceedings.
20

21 **1.7** The Parties have entered into this Consent Judgment in order to settle,
22 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.
23 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of
24 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,
25 parent companies, subsidiaries, divisions, affiliates, franchises, licensees, customers, suppliers,
26 distributors, wholesalers, or retailers of any fact, conclusion of law, issue of law, violation of
27 law, fault, wrongdoing, or liability, including without limitation, any admission concerning any
28 alleged violation of Proposition 65 or any other law or legal duty.

1 **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall
2 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
3 other or future legal proceeding unrelated to these proceedings.

4 **1.9** The Effective Date of this Consent Judgment is the date on which it is entered as a
5 Judgment by this Court.

6 **2. JURISDICTION AND VENUE**

7 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
8 jurisdiction over the allegations of violations contained in the First Amended Complaint and
9 personal jurisdiction over Kroger as to the acts alleged in the First Amended Complaint, that
10 venue is proper in Alameda, and that this Court has jurisdiction to enter this Consent Judgment
11 as a full and final resolution of all claims which were or could have been asserted in this action
12 based on the facts alleged in the Notices of Violation and the First Amended Complaint.

13 **3. INJUNCTIVE RELIEF, WARNINGS AND TESTING**

14 **3.1** Subject to the provisions set forth in Section 3.4 below, Kroger shall not
15 manufacture for sale in the State of California, distribute into the State of California, or directly
16 sell in the State of California, any Covered Products unless each such unit of the Covered
17 Product (1) meets the warning requirements under Section 3.2, or (2) qualifies as a
18 “Reformulated Covered Product” under Section 3.3.

19 **3.1.5** As used in this Consent Judgment, the term “distribute into the State of
20 California” shall mean Kroger directly ships a Covered Product into California for sale in
21 California or sells a Covered Product to a distributor or retailer that Kroger knows will sell the
22 Covered Product in California.

23 **3.2 Clear and Reasonable Warnings**

24 If Kroger provides a warning for Covered Products pursuant to Section 3.1 (1) then Kroger
25 shall provide the following warnings:

26 [California Proposition 65] **WARNING: THIS PRODUCT CONTAINS LEAD, A
27 CHEMICAL KNOWN TO THE STATE OF CALIFORNIA TO CAUSE [CANCER**
28

1 **AND] BIRTH DEFECTS OR OTHER REPRODUCTIVE HARM.**

2 [California Propuesta 65] **ATENCION. LAS LATAS DE ESTE PRODUCTO**
3 **CONTIENEN PLOMO, UN QUIMICO QUE HA SIDO RECONOCIDO POR EL**
4 **ESTADO DE CALIFORNIA DE CAUSA [EL CANCER], DEFECTOS DE**
5 **NACIMIENTO, DEFECTOS CONGENITOS Y OTROS DAÑOS**
6 **REPRODUCTIVOS.**

7 The word "cancer" shall be used in the warnings above only if the average daily exposure
8 level exceeds 15 micrograms of lead as determined pursuant to the provisions set forth in Section
9 3.3 and 3.4. The words "California Proposition 65" may be included at Kroger's option. No
10 additional language about Proposition 65 or lead may accompany the Proposition 65 warning.

11 Kroger shall provide the applicable warning by either or both of the following methods:

12 1) On the label of the can or container (other than on the underside or bottom of the
13 can or; and/or container) of each individual unit of a Covered Product sold or distributed to
14 retail stores in California and on those Covered Products shipped to California consumers.
15 If the warning is provided pursuant to this method, it shall be provided in English. Kroger,
16 may, but is not required to include the Spanish warning on this method of warning.

17 2) On a warning sign at least 2" x 4" or substantially the equivalent size and displayed
18 in the area(s) where the Covered Products are located for sale with such conspicuousness
19 and compared so as to render it likely to be read and understood by an ordinary individual
20 under customary conditions of purchase of such Covered Products. If the warning is
21 provided pursuant to this method, it shall be provided in both English and Spanish.

22 Kroger must display the above warnings with such conspicuousness, as compared with
23 other words, statements, or design of the label, can, container, and shelf
24 warning to render the warning likely to be read and understood by an ordinary individual under
25 customary conditions of purchase or use of the Covered Product. Each letter in the word
26 "WARNING" must be in all capital letters and bold print.
27
28

1 **3.3 Calculation of Lead Levels, Reformulated Covered Products**

2 A Reformulated Covered Product is one for which the average daily exposure does not
3 exceed 0.5 micrograms of lead per day (for Covered Products) as determined by the formula,
4 testing and quality control methodology described in Section 3.4. As used in this Consent
5 Judgment, “no more than 0.5 micrograms of lead per day” mean that the samples of the testing
6 under Section 3.4 yield an average daily exposure of no more than 0.5 micrograms of lead for
7 Covered Products (with average daily exposure calculated pursuant to Section 3.4 of this
8 Consent Judgment). For Covered Products that cause exposures in excess of 0.5 micrograms of
9 lead per day, Kroger shall provide the warning set forth in Section 3.2. For purposes of
10 determining which warning, if any, is required pursuant to Section 3.2, the average concentration
11 utilizing the geometric mean of lead detection results of five (5) samples of the Covered
12 Products, randomly selected by Kroger, will be controlling.

13 **3.4 Formula, Testing and Quality Control Methodology**

14 **3.4.1** For purposes of this Consent Judgment, average daily exposure levels shall be
15 measured in micrograms per day, and shall be calculated using the following formula: the
16 average concentration of lead in the product in micrograms per gram, multiplied by grams of
17 product per serving of the product (using the serving size appearing on the product label),
18 multiplied by frequency of consumption of once every fourteen (14) days.

19 **3.4.2** Kroger shall not be required to engage in testing pursuant to this Consent
20 Judgment unless Kroger determines that it will manufacture for sale in the State of California,
21 distribute into the State of California, or directly sell in the State of California any Reformulated
22 Covered Products without a warning. All testing pursuant to this Consent Judgment shall be
23 performed using a laboratory method that complies with the performance and quality control
24 factors appropriate for the method used, including limit of detection, limit of quantification,
25 accuracy, and precision and meets the following criteria: Inductively Coupled Plasma-Mass
26 Spectrometry (ICP-MS) achieving a limit of quantification of less than or equal to 0.010 mg/kg
27 or any other testing method subsequently agreed upon in writing by the Parties.
28

1 **3.4.3** All testing pursuant to this Consent Judgment shall be performed
2 by an independent third-party laboratory certified by the California Environmental Laboratory
3 Accreditation Program for the analysis of heavy metals or a laboratory that is approved by,
4 accredited by, or registered with the United States Food & Drug Administration. If Kroger
5 determines that it will manufacture for sale in the State of California, distribute into the State of
6 California, or directly sell in the State of California any of the Reformulated Covered Products
7 without a warning in the future, Kroger shall provide written notice to Plaintiffs of its intent to
8 conduct such sales at least one hundred twenty (120) days prior to recommencement of such
9 sales. Testing shall continue for at least four (4) consecutive years from date of
10 recommencement of such sales and at least once per year, for the lead testing of five (5)
11 randomly-selected samples of each Reformulated Covered Product in the form intended for sale
12 to the end-user to be distributed or sold in California. If tests conducted pursuant to this
13 Section demonstrate that no warning is required for a Reformulated Covered Product during
14 each of four (4) consecutive years, then the testing requirements of this Section will no longer
15 be required as to that Reformulated Covered Product. However, if after the four-year period,
16 Kroger changes suppliers for any of the Reformulated Covered Products and/or reformulates
17 any of the Reformulated Covered Products, then Kroger shall test that Reformulated Covered
18 Product at least once after such change is made, and send those test results to Plaintiffs within
19 ten (10) court days of receiving the test results. If Kroger ceases the manufacture for sale in the
20 State of California, the distribution into the State of California, or the direct sale in the State of
21 California of any Reformulated Covered Products under this Section 3.4.3, Kroger shall not be
22 required to engage in further testing pursuant to this Consent Judgment.
23

24 **3.4.4** If Kroger determines that it will manufacture for sale in the State of
25 California, distribute into the State of California, or directly sell in the State of California any
26 of the Reformulated Covered Products without a warning, Kroger shall provide to Plaintiffs
27 copies of all laboratory reports with results of testing for lead (for the Covered Products)
28 performed under this Section no later than ninety (90) days prior to sales of the Reformulated

1 Covered Product. For a period of four (4) years thereafter, Kroger shall arrange annually for
2 copies of all laboratory reports with results of testing for lead content under and for the purpose
3 of Section 3 of this Consent Judgment to be sent to Plaintiffs upon request within fifteen (15)
4 court days of such request. Kroger shall retain all test results and documentation for a period of
5 four (4) years from the date of each test. These reports shall be treated by Plaintiffs as
6 confidential information under the terms of the confidentiality agreement entered into by the
7 Parties.

8 **4. SETTLEMENT PAYMENT**

9 **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil
10 penalties, attorney's fees and costs in connection with claims regarding the Covered Products,
11 Kroger shall make a total payment of \$157,750.00 within ten (10) business days of receiving
12 the Notice of Entry of Judgment. Said payment shall be made by checks apportioned as
13 follows:
14

15 **4.2** \$21,144.00 shall be payable as civil penalties pursuant to California Health and
16 Safety Code section 25249.7(b)(1). Of this amount, \$15,858.00 shall be payable to the Office
17 of Environmental Health Hazard Assessment ("OEHHA") and \$5,286.00 shall be payable to
18 The Chemical Toxin Working Group, Inc., pursuant to California Health and Safety Code
19 section 25249.12(c)(1) & (d). Kroger shall send both civil penalty payments to Plaintiffs'
20 counsel who will be responsible for forwarding the civil penalty to OEHHA along with a copy
21 of the transmittal letter to Kroger's counsel.

22 **4.3** \$6,178.00 shall be payable to The Chemical Toxin Working Group, Inc. as
23 reimbursement to CTWG for (A) reasonable costs and expenses associated with the
24 enforcement of Proposition 65 and other costs incurred as a result of Plaintiffs' work in
25 bringing this action; and (B) \$84,577.00 shall be payable to The Chemical Toxin Working
26 Group, Inc. in lieu of further civil penalties, for day-to-day business activities such as continued
27 enforcement of Proposition 65, which includes work analyzing, researching and testing food
28 and other consumer products that may contain Proposition 65 chemicals.

1 **4.4** \$36,602.00 shall be payable to Michael Freund and \$9,249.00 shall be payable to
2 Ryan Hoffman as reimbursement of Plaintiffs' attorneys' fees and costs.

3 **4.5** Kroger shall mail or deliver the payments in this Section in the form of checks
4 to the address of Michael Freund & Associates as stated in Section 11 (Provision of Notice)
5 below. Within two (2) court days of the Effective Date, Plaintiffs and their counsel will
6 provide their taxpayer identification information and W-9 forms to enable Kroger to process
7 the payments.

8 **5. MODIFICATION OF CONSENT JUDGMENT**

9 **5.1** This Consent Judgment may be modified only by: (i) written agreement and
10 stipulation of the Parties and (ii) upon entry of a modified Consent Judgment by the Court.

11 **5.2** If Kroger seeks to modify this Consent Judgment under Section 5.1, then
12 Kroger must provide written notice to Plaintiffs of its intent ("Notice of Intent"). If Plaintiffs
13 seek to meet and confer with Kroger regarding the proposed modification in the Notice of
14 Intent, then Plaintiffs must provide written notice to Kroger within ten (10) days of receiving
15 the Notice of Intent. If Plaintiffs notify Kroger in a timely manner of their intent to meet and
16 confer, then the Parties shall meet and confer in good faith as required in this Section. The
17 Parties shall meet in person or by phone within ten (10) days of Plaintiffs' notification of their
18 intent to meet and confer. Within ten (10) days of such meeting, if any Plaintiff disputes the
19 proposed modification, that Plaintiff must provide to Kroger a written basis for its position.
20 The Parties shall continue to meet and confer for an additional ten (10) days in an effort to
21 resolve any remaining disputes. The Parties may agree in writing to different deadlines for the
22 meet-and-confer period.

23 **5.3** In the event that Kroger initiates or otherwise requests a modification under
24 Section 5.1, Kroger shall reimburse Plaintiffs their documented reasonable costs and reasonable
25 attorney's fees for the time spent in the meet-and-confer process and filing and arguing a joint
26 motion or application in support of a modification of the Consent Judgment; provided,
27
28

1 however, that these fees and costs shall not exceed \$8,000 total without the prior written
2 consent of Kroger.

3 **5.4** Where the meet-and-confer process does not lead to a joint motion or
4 application in support of a modification of the Consent Judgment, then either Party may seek
5 judicial relief on its own. In such a situation, the prevailing party may seek to recover costs and
6 reasonable attorney's fees. As used in the preceding sentence, the term "prevailing party"
7 means a party who is successful in obtaining relief more favorable to it than the relief that the
8 other party was amenable to providing during the Parties' good faith attempt to resolve the
9 dispute that is the subject of the modification.
10

11 **5.5** If any court in a case alleging that a defendant sold canned smoked oysters,
12 canned whole oysters or canned mandarin oranges without providing clear and reasonable
13 warnings regarding the presence of lead in violation of Proposition 65 renders a final judgment
14 that such products do not require a warning under Proposition 65 because the average daily
15 exposure is at or below the average daily exposure for the Covered Products, based on the
16 exposure calculation accepted by that court, then Kroger shall be entitled to modify this Consent
17 Judgment to eliminate or modify the injunctive relief set forth in Section 3, consistent with the
18 court judgment as described herein, and considering any differences between the Covered
19 Products and the canned smoked and/or whole oyster products and canned mandarin orange
20 products addressed in another settlement or court judgment. In addition, Kroger shall be entitled
21 to modify this Consent Judgment to eliminate or modify the injunctive relief set forth in Section
22 3 if (a) lead is removed from the Proposition 65 list of chemicals; or (b) if any court in a case
23 alleging that a defendant sold canned smoked oysters, canned whole oysters or canned mandarin
24 oranges without providing clear and reasonable warnings regarding the presence of lead violation
25 of Proposition 65 renders a final judgment that such products do not require a warning under
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27
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1 Proposition 65 because such warnings are preempted by federal law, so long as such
2 modification is consistent with the court judgment as described herein. Plaintiffs shall not be
3 entitled to object to any modifications sought under this Section 5.5, except based upon an error
4 in calculation of the average daily exposure. The reimbursement provisions of Sections 5.3 and
5 5.4 above are not applicable to modifications sought under this Section 5.5. If Plaintiffs object to
6 the calculation of the average daily exposure and a court sustains the objections, Kroger shall
7 reimburse Plaintiffs their documented reasonable costs and reasonable attorney's fees incurred to
8 raise the objection. Any fees and costs related to a sustained objection shall not exceed \$8,000
9 total without the prior written consent of Kroger.
10

11 **6. RETENTION OF JURISDICTION; ENFORCEMENT OF CONSENT**
12 **JUDGMENT**

13 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate
14 this Consent Judgment.

15 **6.2** Only after it complies with Section 15 below may any Party, by motion or
16 application for an order to show cause filed with this Court, enforce the terms and conditions
17 contained in this Consent Judgment.
18

19 **6.3** If Kroger determines that it will manufacture for sale in the State of California,
20 distribute into the State of California, or directly sell in the State of California any of the
21 Covered Products without a Proposition 65 warning, and subsequently any plaintiff alleges that
22 any such Covered Product fails to qualify as a Reformulated Covered Product (for which a
23 plaintiff alleges that no warning has been provided), then the plaintiff shall inform Kroger in a
24 reasonably prompt manner of the plaintiff's test results, including information sufficient to
25 permit Kroger to identify the Covered Products at issue. Kroger shall, within thirty (30) days
26 following such notice, provide the plaintiff with testing information, from an independent third-
27 party laboratory meeting the requirements of Sections 3.4.2 and 3.4.3, demonstrating Kroger's
28

1 compliance with the Consent Judgment. The Parties shall first attempt to resolve the matter
2 prior to any plaintiff taking any further legal action with the Court.

3 **7. APPLICATION OF CONSENT JUDGMENT**

4 This Consent Judgment shall have no application to Covered Products which are
5 distributed or sold exclusively outside the State of California.

6 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

7 **8.1** This Consent Judgment is a full, final, and binding resolution between Plaintiffs,
8 on behalf of themselves and in the public interest, and Kroger, of any alleged violation of
9 Proposition 65 or its implementing regulations for failure to provide Proposition 65 warnings of
10 exposure to lead from the handling, use, or consumption of the Covered Products and fully
11 resolves all claims that have been or could have been asserted in this Action up to and
12 including the date of entry of Judgment for failure to provide Proposition 65 warnings for
13 exposure to lead from the Covered Products. Plaintiffs, on behalf of themselves and in the
14 public interest, hereby discharge and release Kroger, its parents, subsidiaries, affiliated entities
15 under common ownership, directors, officers, agents, employees, attorneys, and each entity to
16 or from whom Kroger directly or indirectly acquires, distributes or sells the Covered Products,
17 including but not limited to, distributors, wholesalers, customers, retailers, franchises,
18 cooperative members and licensees, (collectively, "Releasees") from any and all claims,
19 actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs and
20 expenses asserted, or that could have been asserted, as to any alleged violation of Proposition
21 65 arising from the failure to provide Proposition 65 warnings on the Covered Products
22 regarding lead as set forth in the Notices of Violation and the First Amended Complaint.
23

24 **8.2** Each Plaintiff, on behalf of itself only, hereby releases and discharges the
25 Releasees from all claims, causes of action, obligations, costs, expenses, attorney's fees,
26 damages, losses, liabilities and demands of Plaintiffs of any nature, character, or kind, whether
27 known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to lead
28 in the Covered Products as set forth in the Notices of Violation and the First Amended

1 Complaint that have been or could have been asserted in this Action up to and including the date
2 of entry of Judgment for failure to provide Proposition 65 warnings for exposure to lead in the
3 Covered Products. Each Plaintiff, on behalf of itself only, waive any and all rights they may
4 have under any applicable statute, including, but not limited to California Civil Code Section
5 1542 or common law principle which would limit the effect of the release in Section 8.1 and 8.2
6 to those claims actually known or suspected to exist at the time of the date of entry of Judgment.
7 Plaintiffs have full knowledge of the contents of California Civil Code Section 1542, which
8 reads as follows:

9 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
10 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT
11 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
12 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
13 OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
14 HER SETTLEMENT WITH THE DEBTOR.
15

16 Each Plaintiff, on behalf of itself only, acknowledges and understands the significance and
17 consequences of this specific waiver of California Civil Code Section 1542.

18 **8.3** Compliance with the terms of this Consent Judgment shall be deemed to
19 constitute compliance with Proposition 65 by the Releasees regarding alleged exposures to lead
20 the Covered Products as set forth in the Notices of Violation and the First Amended Complaint.

21 **8.4** Plaintiffs and Kroger each release and waive all claims they may have
22 against each other for any statements or actions made or undertaken by them in connection with
23 the Notices of Violation or the First Amended Complaint; provided, however, that nothing in
24 Section 8 shall affect or limit any Party's right to seek to enforce the terms of this Consent
25 Judgment.

26 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

27 In the event that any of the provisions of this Consent Judgment is held by a court to be
28 unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

1 **10. GOVERNING LAW**

2 The terms and conditions of this Consent Judgment shall be governed by and construed in
3 accordance with the laws of the State of California.

4 **11. PROVISION OF NOTICE**

5 All notices required to be given to either Party to this Consent Judgment by the other shall
6 be in writing and sent to the following agents listed below by: (a) first-class, registered, or certified
7 mail; (b) overnight courier; or (c) personal delivery. Courtesy copies via email may also be sent.

8 **FOR DAVID STEINMAN AND THE CHEMICAL TOXIN WORKING GROUP, INC.:**

9 David Steinman
10 The Chemical Toxin Working Group, Inc.
11 1801 Chart Trail
12 Topanga, CA 90290

13 **With a copy to:**

14 Michael Freund
15 Michael Freund & Associates
16 1919 Addison Street, Suite 105
17 Berkeley, CA 94704
18 Telephone: (510) 540-1992
19 Facsimile: (510) 540-5543

20 **FOR THE KROGER CO.:**

21 Steve Prough
22 The Kroger Co.
23 P.O. Box 54143
24 Los Angeles, CA 90054

25 **With a copy to:**

26 Lisa A. Cole
27 Nixon Peabody LLP
28 Two Palo Alto Square
3000 El Camino Real, Suite 500
Palo Alto, CA 94306-2106
Telephone: (650) 320-7700
Facsimile: (650) 320-7701

12. COURT APPROVAL

12.1 If this Consent Judgment is not approved by the Court, it shall be void and have
no force or effect.

1 **12.2** Plaintiffs shall comply with California Health and Safety Code section
2 25249.7(f) and with Title II of the California Code Regulations, Section 3003.

3 **13. EXECUTION AND COUNTERPARTS**

4 This Consent Judgment may be executed in counterparts, which taken together shall be
5 deemed to constitute one document. A facsimile or .pdf signature shall be construed as valid as
6 the original signature.

7 **14. DRAFTING**

8 The terms of this Consent Judgment have been reviewed by the respective counsel for the
9 each Party to this settlement prior to its signing, and each Party has had an opportunity to fully
10 discuss the terms with counsel. The Parties agree that, in any subsequent interpretation and
11 construction of this Consent Judgment entered thereon, the terms and provisions shall not be
12 construed against any Party.

13 **15. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

14 If a dispute arises with respect to either Party's compliance with the terms of this Consent
15 Judgment entered by the Court, the Parties shall meet in person or by telephone and endeavor to
16 resolve the dispute in an amicable manner. No action or motion may be filed in the absence of
17 such a good faith attempt to resolve the dispute beforehand. In the event an action or motion is
18 filed, however, the prevailing party may seek to recover costs and reasonable attorney's fees. As
19 used in the preceding sentence, the term "prevailing party" means a party who is successful in
20 obtaining relief more favorable to it than the relief that the other party was amenable to providing
21 during the parties' good faith attempt to resolve the dispute that is the subject of such enforcement
22 action.

23 **16. ENTIRE AGREEMENT, AUTHORIZATION**

24 **16.1** This Consent Judgment contains the sole and entire agreement and
25 understanding of the Parties with respect to the entire subject matter herein, and any and all
26 prior discussions, negotiations, commitments and understandings related hereto. No
27 representations, oral or otherwise, express or implied, other than those contained herein have
28

1 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
2 herein, shall be deemed to exist or to bind any Party.

3 16.2 Each signatory to this Consent Judgment certifies that he or she is fully
4 authorized by the Party he or she represents to stipulate to this Consent Judgment.
5 Except as explicitly provided herein, each Party shall bear its own fees and costs.
6

7 **17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
8 **CONSENT JUDGMENT**

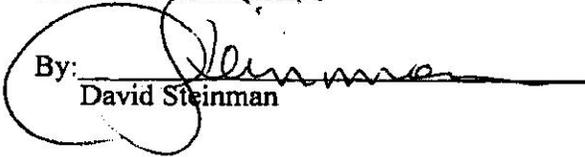
9 This Consent Judgment has come before the Court upon the request of the Parties. The
10 Parties request the Court to fully review this Consent Judgment and, being fully informed
11 regarding the matters which are the subject of this action, to:

- 12 (1) Find that the terms and provisions of this Consent Judgment represent a fair and equitable
13 settlement of all matters raised by the allegations of the First Amended Complaint, that the matter
14 has been diligently prosecuted, and that the public interest is served by such settlement; and
15 (2) Make the findings pursuant to California Health and Safety Code section 25249.7(f)(4),
16 approve the Settlement, and approve this Consent Judgment.
17

18 **IT IS SO STIPULATED:**
19

20 Dated: 3-30, 2015

DAVID STEINMAN

21 By: 
22 David Steinman

23
24
25 Dated: 3-30, 2015

**THE CHEMICAL TOXIN WORKING
GROUP, INC.**

26 By: 
27 David Steinman, Director
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Dated: 3/31, 2015

THE KROGER CO.
By: [Signature]
Steve Prough

APPROVED AS TO FORM:

Dated: 4/1, 2015

MICHAEL FREUND & ASSOCIATES
By: [Signature]
Michael Freund
Ryan Hoffman
Attorneys for David Steinman and The
Chemical Toxin Working Group, Inc.

Dated: _____, 2015

NIXON PEABODY LLP
By: _____
Gregory P. O'Hara
Attorneys for the Kroger Co.

ORDER AND JUDGMENT

Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is approved and Judgment is hereby entered according to its terms.

Dated: _____, 2015

Judge Wynne S. Carvill

1 Dated: _____, 2015

THE KROGER CO.

2

By: _____
Steve Prough

3

4

5

6

APPROVED AS TO FORM:

7

8

9

Dated: _____, 2015

MICHAEL FREUND & ASSOCIATES

10

By: _____
Michael Freund
Ryan Hoffman
Attorneys for David Steinman and The
Chemical Toxin Working Group, Inc.

11

12

13

14

Dated: 3-31, 2015

NIXON PEABODY LLP

15

By: _____
Gregory P. O'Hara
Attorneys for the Kroger Co.

16

17

18

19

ORDER AND JUDGMENT

20

21

Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is
approved and Judgment is hereby entered according to its terms.

22

23

24

Dated: _____, 2015

Judge Wynne S. Carvill

25

26

27

28

MICHAEL FREUND
ATTORNEY AT LAW
1915 ADDISON STREET
BERKELEY, CALIFORNIA 94704-1101

TEL 510/540-1992
FAX 510/540-5543
EMAIL FREUND1@AOL.COM

January 5, 2012

VIA CERTIFIED MAIL

David B. Dillon, Chairman and CEO
The Kroger Co.
1014 Vine Street
Cincinnati, OH 45202-1100

VIA PRIORITY MAIL

District Attorneys of All California Counties
and Select City Attorneys
(See Attached Certificate of Service)

Office of the California Attorney General
Proposition 65 Enforcement Reporting
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612-0550

Re: Notice of Violation Against The Kroger Co. for Violation of California Health & Safety Code Section 25249.5 et seq.

Dear Addressees:

I represent David Steinman, a committed environmentalist, journalist, consumer health advocate, publisher and author. His major books include *Diet for a Poisoned Planet* (1990, 2007); *The Safe Shopper's Bible* (1995); *Living Healthy in a Toxic World* (1996); and *Safe Trip to Eden: Ten Steps to Save the Planet Earth from Global Warming Meltdown* (2007). Through this Notice of Violation, Mr. Steinman seeks to reduce consumer exposures to lead in the named product set forth herein.

This letter constitutes notification that The Kroger Co. has violated the warning requirement of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act (commencing with section 25249.5 of the Health and Safety Code). The product that is the subject of this Notice of Violation and the chemical in the product identified as exceeding allowable levels are:

Ralphs Premium Quality Whole Oyster in Water – lead

The Kroger Co. has manufactured, marketed, distributed and/or sold the listed product which has exposed and continues to expose numerous individuals within California to lead. This chemical was listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer on October 1, 1992 and as a chemical known to cause developmental toxicity, and male and female reproductive toxicity on February 27, 1987. The time period of these violations commenced one year after the listed dates above. The primary route of exposure has been through ingestion.

Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to certain listed chemicals. The Kroger Co. is in violation of Proposition 65 because it failed to provide a warning to consumers that they are being exposed to lead. (22 C.C.R. section 12601.) While in the course of doing business, the company is knowingly and intentionally exposing consumers to this chemical without first providing a clear and reasonable warning. (Health and Safety Code section 25249.6.) The method of warning should be a warning that appears on the product's label. 22 C.C.R. section 12601 (b)(1) (A). There are no warnings currently present on the company's label for this product.

Proposition 65 requires that notice and intent to sue be given to a violator 60-days before the suit is filed. With this letter, David Steinman gives notice of the alleged violation to the noticed party and the appropriate governmental authorities. This Notice of Violation covers all violations of Proposition 65 that are currently known to Mr. Steinman from information now available to us. Mr. Steinman is continuing his investigation that may reveal further violations. A summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, and referenced as Appendix A, has been provided to the noticed party.

If you have any questions, please contact my office at your earliest convenience.

Sincerely,



Michael Freund

cc: David Steinman

Attachments:

Certificate of Merit

Certificate of Service

OEHHA Summary to The Kroger Co.

Additional Supporting Information for Certificate of Merit (to Attorney General only)

CERTIFICATE OF MERIT

Health and Safety Code Section 25249.7 (d)

I, Michael Freund hereby declare:

1. This Certificate of Merit accompanies the attached Notice of Violation in which it is alleged that the party identified in the Notice has violated Health and Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am the attorney for the noticing party David Steinman. Mr. Steinman is a committed environmentalist, journalist, consumer health advocate, publisher and author. The Notice of Violation alleges that the party identified has exposed persons in California to lead from the specified consumer product. Please refer to the Notice of Violation for additional details regarding the product names and alleged violations.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action. In particular, I have consulted with the chemists who conducted the laboratory testing for lead regarding this product and I have relied on the testing results. The testing was conducted by a reputable testing laboratory by experienced scientists. These facts, studies or other data derived through this investigation overwhelmingly demonstrate that the party identified in the Notice of Violation exposes persons to lead through ingestion.
4. Based on the information obtained through these consultants and on other information in my possession, I believe there is sufficient evidence that human exposures exist from exposure to the listed product from the noticed party. Furthermore, 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 plaintiff’s 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 California Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health & 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

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Alameda. I am over the age of eighteen years and not a party to the within entitled action; my business address is 1915 Addison Street, Berkeley, California 94704. On January 5, 2012 I served the within:

Notice of Violation and Certificate of Merit Against The Kroger Co. for Violation of California Health & Safety Code Section 25249.5 et seq. (Supporting Documentation sent to Attorney General only)

on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box in Berkeley, California as follows:

See attached Service List

I, Michael Freund, declare under penalty of perjury that the foregoing is true and correct.

Executed on January 5, 2012 at Berkeley, California.



Michael Freund

SERVICE LIST

District Attorney of Alameda County
1225 Fallon Street, Room 900
Oakland, CA 94612

District Attorney of Colusa County
547 Market Street
Colusa, CA 95932

District Attorney of Contra Costa
County
627 Ferry Street
Martinez, CA 94553

District Attorney of Alpine County
P.O. Box 248
Markleeville, CA 96120

District Attorney of Del Norte
County
450 H Street, Ste 171
Crescent City, CA 95531

District Attorney of Amador County
708 Court Street, #202
Jackson, CA 95642

District Attorney of Butte County
25 County Center Drive
Oroville, CA 95965

District Attorney of El Dorado
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515 Main Street
Placerville, CA 95667

District Attorney of Calaveras
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1400 West Lacey
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255 N. Forbes Street
Lakeport, CA 95453

District Attorney of Humboldt
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825 5th Street
Eureka, CA 95501

District Attorney of Imperial County
939 Main Street
El Centro, CA 92243

District Attorney of Lassen County
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Los Angeles, CA 90012

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Madera, CA 93637

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1215 Truxtun Avenue
Bakersfield, CA 93301

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District Attorney of Mono County
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Alturas, CA 96101-4020

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San Bernardino, CA 92415

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San Diego, CA 92101

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Riverside, CA 92501

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Francisco County
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Sacramento, CA 95814

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Obispo County
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San Luis Obispo, CA 93408

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Hollister, CA 95023

District Attorney of San Mateo
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Redwood City, CA 94063

District Attorney of Sierra County
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Downieville, CA 95936

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1105 Santa Barbara Street
Santa Barbara, CA 93101

District Attorney of Siskiyou County
P.O. Box 986
Yreka, CA 96097

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675 Texas Street, Suite 4500
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Santa Cruz, CA 95060

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District Attorney of Yolo County
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Woodland, CA 95695

District Attorney of Trinity County
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Weaverville, CA 96093

District Attorney of Yuba County
215 Fifth Street
Marysville, CA 95901

District Attorney of Tulare County
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Visalia, CA 93291

District Attorney of Tuolumne
County
423 No. Washington Street
Sonora, CA 95370

San Jose City Attorney's Office
200 East Santa Clara Street
San Jose, CA 95113

Los Angeles City Attorney's Office
800 City Hall East
200 N. Main Street
Los Angeles, CA 90012

San Diego City Attorney's Office
1200 3rd Avenue #1620
San Diego, CA 92101

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

California Attorney General's
Office
Attention: Proposition 65
Coordinator
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612

David Dillon, Chairman & CEO
The Kroger Co.
1014 Vine Street
Cincinnati, OH 45202

LAW OFFICE OF
MICHAEL FREUND

1919 ADDISON STREET, SUITE 105
BERKELEY, CALIFORNIA 94704-1101

TEL (510) 540-1992
FAX (510) 540-5543
EMAIL FREUND1@AOL.COM

February 24, 2012

VIA CERTIFIED MAIL

David B. Dillon, Chairman and CEO
The Kroger Co.
1014 Vine Street
Cincinnati, OH 45202-1100

VIA PRIORITY MAIL

District Attorneys of All California Counties
and Select City Attorneys
(See Attached Certificate of Service)

Office of the California Attorney General
Proposition 65 Enforcement Reporting
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612-0550

Re: Notice of Violation Against The Kroger Co. for Violation of California Health & Safety Code Section 25249.5 et seq.

Dear Addressees:

I represent David Steinman, a committed environmentalist, journalist, consumer health advocate, publisher and author. His major books include Diet for a Poisoned Planet (1990, 2007); The Safe Shopper's Bible (1995); Living Healthy in a Toxic World (1996); and Safe Trip to Eden: Ten Steps to Save the Planet Earth from Global Warming Meltdown (2007). Through this Notice of Violation, Mr. Steinman seeks to reduce consumer exposures to lead in the named products set forth herein.

This letter constitutes notification that The Kroger Co. has violated the warning requirement of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act (commencing with section 25249.5 of the Health and Safety Code). The products subject to this Notice of Violation and the chemical in the products identified as exceeding allowable levels are:

Ralphs Mandarin Oranges, Peeled Segments in Light Syrup – lead
Ralphs Premium Quality Smoked Oysters in Cottonseed Oil – lead

The Kroger Co. has manufactured, marketed, distributed and/or sold the listed products which have exposed and continue to expose numerous individuals within California to lead. This chemical was listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer on October 1, 1992 and as a chemical known to cause developmental toxicity, and male and female reproductive toxicity on February 27, 1987. The time period of these violations commenced one year after the listed dates above. The primary route of exposure has been through

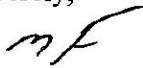
ingestion.

Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to certain listed chemicals. The Kroger Co. is in violation of Proposition 65 because it failed to provide a warning to consumers that they are being exposed to lead. (22 C.C.R. section 12601.) While in the course of doing business, the company is knowingly and intentionally exposing consumers to this chemical without first providing a clear and reasonable warning. (Health and Safety Code section 25249.6.) The method of warning should be a warning that appears on the product's label. 22 C.C.R. section 12601 (b)(1) (A). There are no warnings currently present on the company's label for these products.

Proposition 65 requires that notice and intent to sue be given to a violator 60-days before the suit is filed. With this letter, David Steinman gives notice of the alleged violations to the noticed party and the appropriate governmental authorities. This Notice of Violation covers all violations of Proposition 65 that are currently known to Mr. Steinman from information now available to us. Mr. Steinman is continuing his investigation that may reveal further violations. A summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, and referenced as Appendix A, has been provided to the noticed party.

If you have any questions, please contact my office at your earliest convenience.

Sincerely,



Michael Freund

cc: David Steinman

Attachments:

Certificate of Merit

Certificate of Service

OEHHA Summary to The Kroger Co.

Additional Supporting Information for Certificate of Merit (to Attorney General only)

CERTIFICATE OF MERIT

Health and Safety Code Section 25249.7 (d)

I, Michael Freund hereby declare:

1. This Certificate of Merit accompanies the attached Notice of Violation in which it is alleged that the party identified in the Notice has violated Health and Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am the attorney for the noticing party David Steinman. Mr. Steinman is a committed environmentalist, journalist, consumer health advocate, publisher and author. The Notice of Violation alleges that the party identified has exposed persons in California to lead from the specified consumer product. Please refer to the Notice of Violation for additional details regarding the product names and alleged violations.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action. In particular, I have consulted with the chemists who conducted the laboratory testing for lead regarding this product and I have relied on the testing results. The testing was conducted by a reputable testing laboratory by experienced scientists. These facts, studies or other data derived through this investigation overwhelmingly demonstrate that the party identified in the Notice of Violation exposes persons to lead through ingestion.
4. Based on the information obtained through these consultants and on other information in my possession, I believe there is sufficient evidence that human exposures exist from exposure to the listed product from the noticed party. Furthermore, 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 plaintiff’s 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 California Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health & 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.

Dated: February 23, 2012



Michael Freund
Attorney for David Steinman

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Alameda. I am over the age of eighteen years and not a party to the within entitled action; my business address is 1915 Addison Street, Berkeley, California 94704. On February 27, 2012 I served the within:

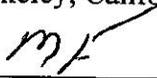
Notice of Violation and Certificate of Merit Against The Kroger Co. for Violation of California Health & Safety Code Section 25249.5 et seq. (Supporting Documentation sent to Attorney General only)

on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box in Berkeley, California as follows:

See attached Service List

I, Michael Freund, declare under penalty of perjury that the foregoing is true and correct.

Executed on February 27, 2012 at Berkeley, California.



Michael Freund

SERVICE LIST

District Attorney of Alameda County
1225 Fallon Street, Room 900
Oakland, CA 94612

District Attorney of Colusa County
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Napa, CA 94559

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2222 "M" Street
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Santa Ana, CA 92701

District Attorney of Modoc
County
204 S Court Street
Alturas, CA 96101-4020

District Attorney of Placer
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Auburn, CA 95603

District Attorney of San
Bernardino County
316 N. Mountain View Avenue
San Bernardino, CA 92415

District Attorney of Plumas
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Quincy, CA 95971

District Attorney of San Diego
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330 West Broadway, Suite 1320
San Diego, CA 92101

District Attorney of Riverside
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4075 Main Street
Riverside, CA 92501

District Attorney of San
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San Francisco, CA 94103

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District Attorney of San Mateo
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Santa Barbara, CA 93101

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District Attorney of Yolo County
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District Attorney of Trinity County
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Weaverville, CA 96093

District Attorney of Yuba County
215 Fifth Street
Marysville, CA 95901

District Attorney of Tulare County
221 S. Mooney Ave, Room 224
Visalia, CA 93291

District Attorney of Tuolumne
County
423 No. Washington Street
Sonora, CA 95370

San Jose City Attorney's Office
200 East Santa Clara Street
San Jose, CA 95113

Los Angeles City Attorney's Office
800 City Hall East
200 N. Main Street
Los Angeles, CA 90012

San Diego City Attorney's Office
1200 3rd Avenue #1620
San Diego, CA 92101

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

California Attorney General's
Office
Attention: Proposition 65
Coordinator
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612

David Dillon, Chairman & CEO
The Kroger Co.
1014 Vine Street
Cincinnati, OH 45202

LAW OFFICE OF
MICHAEL FREUND

1919 ADDISON STREET, SUITE 105
BERKELEY, CALIFORNIA 94704-1101

TEL (510) 540-1992
FAX (510) 540-5543
EMAIL FREUND1@AOL.COM

February 20, 2013

VIA CERTIFIED MAIL

David B. Dillon, Chairman and CEO
The Kroger Co.
1014 Vine Street
Cincinnati, OH 45202-1100

VIA PRIORITY MAIL

District Attorneys of All California Counties
and Select City Attorneys
(See Attached Certificate of Service)

Office of the California Attorney General
Proposition 65 Enforcement Reporting
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612-0550

Re: Notice of Violation Against The Kroger Co. for Violation of California Health & Safety Code Section 25249.5 et seq.

Dear Addressees:

I represent The Chemical Toxin Working Group, a California non-profit corporation dedicated to reducing the amount of chemical toxins in consumer products. The Chemical Toxin Working Group was created by David Steinman, a committed environmentalist, journalist, consumer health advocate, publisher and author. His major books include Diet for a Poisoned Planet (1990, 2007); The Safe Shopper's Bible (1995); Living Healthy in a Toxic World (1996); and Safe Trip to Eden: Ten Steps to Save the Planet Earth from Global Warming Meltdown (2007). Through this Notice of Violation, The Chemical Toxin Working Group seeks to reduce consumer exposures to lead in the products set forth herein.

This letter constitutes notification that the Kroger Co. ("Kroger") has violated the warning requirement of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act (commencing with section 25249.5 of the Health and Safety Code). The product subject to this Notice of Violation and the chemical in the product identified as exceeding allowable levels is:

Ralphs Lite Mandarin Oranges, Peeled Segments in Mandarin Orange Juice – lead

The Kroger Co. has manufactured, marketed, distributed and/or sold the above product which has exposed and continue to expose numerous individuals within California to lead. This chemical was listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer on October 1, 1992 and as a chemical known to cause developmental toxicity, and male and female reproductive toxicity on February 27, 1987. The time period of these violations commenced one

year after the listed dates above. The primary route of exposure has been through ingestion.

Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to certain listed chemicals. Kroger is in violation of Proposition 65 because the company failed to provide a warning to consumers that they are being exposed to lead. (22 C.C.R. section 12601.) While in the course of doing business, the company is knowingly and intentionally exposing consumers to this chemical without first providing a clear and reasonable warning. (Health and Safety Code section 25249.6.) The method of warning should be a warning that appears on the product's label. 22 C.C.R. section 12601 (b)(1) (A). There are no warnings currently present on the company's label for these products.

Proposition 65 requires that notice and intent to sue be given to a violator 60-days before the suit is filed. With this letter, The Chemical Toxin Working Group gives notice of the alleged violations to the noticed party and the appropriate governmental authorities. This Notice of Violation covers all violations of Proposition 65 that are currently known to the noticing party from information now available. The Chemical Toxin Working Group is continuing its investigation that may reveal further violations. A summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, and referenced as Appendix A, has been provided to the noticed party.

If you have any questions, please contact my office at your earliest convenience.

Sincerely,



Michael Freund

cc: The Chemical Toxin Working Group

Attachments:

Certificate of Merit

Certificate of Service

OEHHA Summary to The Kroger Co.

Additional Supporting Information for Certificate of Merit (to Attorney General only)

CERTIFICATE OF MERIT

Health and Safety Code Section 25249.7 (d)

I, Michael Freund hereby declare:

1. This Certificate of Merit accompanies the attached Notice of Violation in which it is alleged that the party identified in the Notice has violated Health and Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am the attorney for the noticing party The Chemical Toxin Working Group. The Notice of Violation alleges that the party identified has exposed persons in California to lead from specified consumer products without providing a Proposition 65 warning. Please refer to the Notice of Violation for additional details regarding the product names and alleged violations.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action. In particular, I have consulted with the laboratory who conducted the testing for lead regarding these products and I have relied on the testing results. The testing was conducted by a reputable testing laboratory by experienced scientists. These facts, studies or other data derived through this investigation overwhelmingly demonstrate that the party identified in the Notice of Violation exposes persons to lead through ingestion.
4. Based on the information obtained through the testing laboratory and on other information in my possession, I believe there is sufficient evidence that human exposures exist from exposure to the listed products from the noticed party. Furthermore, 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

plaintiff's 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 California Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health & 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.

Dated: February 19, 2013



Michael Freund
Attorney for The Chemical Toxin Working Group

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Alameda. I am over the age of eighteen years and not a party to the within entitled action. My business address is 1919 Addison Street, Suite 105, Berkeley, California 94704. On February 20, 2013 I served the within:

Notice of Violation Against The Kroger Co. for Violation of California Health & Safety Code Section 25249.5 et seq. and Certificate of Merit

on the parties in said action, via electronic mail to the California Attorney General and by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box in Berkeley, California addressed as follows:

See attached Service List

I, Michael Freund, declare under penalty of perjury that the foregoing is true and correct. Executed on February 20, 2013 at Berkeley, California



Michael Freund

Service List

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District Attorney, Amador County
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District Attorney, Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249

District Attorney, Colusa County
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Colusa, CA 95932

District Attorney, Contra Costa County
900 Ward Street
Martinez, CA 94553

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