

ORIGINAL

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 San Francisco County Superior Court

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**GORDON PARK-LI, Clerk**  
 BY: William E. Robinson Deputy Clerk

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 (Additional Attorneys on Signature Page)

CASE MANAGEMENT CONFERENCE SET

PLAN 1 JUL 23 2004 9:00AM

DEPARTMENT 212  
 SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

**SUMMONS ISSUED**

[UNLIMITED JURISDICTION]

11 ENVIRONMENTAL LAW FOUNDATION,  
 12 Individually and On Behalf of the General  
 13 Public,

Plaintiff,

v.

15 Borges USA Inc., Caffe Cucini, Inc.,  
 16 Colavita USA, L.L.C., De Medici Imports,  
 Ltd., Euro-USA Trading Co., Inc., Gaeta  
 17 Imports, Inc., H.J. Heinz Co., Inter-American  
 Foods, Inc., The Kroger Co., Lettieri & Co.,  
 18 Ltd., Liberty Richter, Manicafetti, Inc.,  
 Nakano Foods, Inc., Ralphs Grocery  
 19 Company which will do business in  
 California as Ralphs Grocery Company of  
 20 Ohio, Rao's Specialty Foods, Inc., Source  
 Atlantique, Incorporated, Spectrum Organic  
 21 Products, Inc., Tree of Life, Inc., VIGO  
 Importing Co., The Vons Companies, Inc.,  
 22 Vons Food Services, Inc., Wild Oats  
 Markets, Inc., and DOES 1 through 100,  
 23 inclusive,

Defendants.

CASE NO. **CGC 04428945**

**COMPLAINT FOR CIVIL  
 PENALTIES, STATUTORY,  
 EQUITABLE AND INJUNCTIVE  
 RELIEF BASED UPON:**

- (1) Violation of Cal. Health & Safety Code § 25249.6 *et seq.*;
- (2) Violation of Cal. Bus. & Prof. Code § 17200, *et seq.* - Unlawful Business Practice Predicated on Cal. Health & Safety Code § 25249.6 *et seq.*;
- (3) Violation of Cal. Bus. & Prof. Code § 17200, *et seq.* - Unlawful Business Practices predicated on violations of § 1750, *et seq.*, of the Cal. Civil Code; Consumer Legal Remedies Act;
- (4) Violation of Cal. Bus. & Prof. Code § 17200, *et seq.* - Unlawful Business Practices predicated on violations of Cal. Civil Code § 1714; Negligence; and
- (5) Violation of Cal. Bus. & Prof. Code § 17200, *et seq.* (Unfair Business Practices).

25 **TYPE OF ACTION:**  
 26 **Local Rule 2.3(1):**  
 (a) **Unfair Business Practices**

27 **PLAINTIFF**  
 28 **DEMANDS A TRIAL BY JURY**

1 Plaintiff, by its attorneys, brings this action on its own behalf and on behalf of the  
2 General Public on information and belief, except those allegations which pertain to the  
3 named Plaintiff or to its attorneys (which are alleged on personal knowledge), and hereby  
4 alleges as follows:

5 I.

6 **INTRODUCTION**  
7 **(The Hazards of Lead)**

8 1. This action seeks, among other remedies, restitution, civil penalties and  
9 injunctive relief to redress the actions of Defendants now resulting in widespread exposure  
10 of men, women and children to lead, a known toxin to the human reproductive system,  
11 threatening their health and well being. Specifically, Plaintiff challenges Defendants'  
12 manufacture, distribution, promotion and sale of vinegars that are contaminated with lead,  
13 presenting a risk of reproductive harm and other adverse health effects, resulting in human  
14 exposure to lead without prior warning. Defendants' actions, including, but not limited to,  
15 their failure to provide prior warnings as required by law, violate California Health & Safety  
16 Code §§ 25249.6 *et seq.* and constitute an unfair and unlawful business practice in violation  
17 of California Business and Professions Code § 17200, *et seq.*

18 2. According to a June 1999 report on lead by the Agency for Toxic Substances  
19 and Disease Registry ("ATSDR") (an agency of the U.S. Department of Health and Human  
20 Services):

21 Lead can affect almost every organ and system in your body. The most  
22 sensitive is the central nervous system, particularly in children. Lead also  
23 damages kidneys and the reproductive system. The effects are the same  
24 whether it is breathed or swallowed. At high levels, lead may decrease reaction  
25 time, cause weakness in fingers, wrists, or ankles, and possibly affect the  
26 memory. Lead may cause anemia, a disorder of the blood. It can also damage  
27 the male reproductive system. . . . Children are more vulnerable to lead  
28 poisoning than adults.

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A child who swallows large amounts of lead may develop blood anemia, severe stomachache, muscle weakness, and brain damage. . . . Exposure to lead is more dangerous for young and unborn children. Unborn children can be exposed to lead through their mothers. Harmful effects include premature births, smaller babies, decreased mental ability in the infant, learning difficulties, and reduced growth in young children.

ATSDR, ToxFAQs for Lead (visited May 7, 2003)  
<<http://www.atsdr.cdc.gov/tfacts13.html>>.

3. On February 27, 1987, California Governor George Deukmejian declared lead a reproductive toxin subject to Proposition 65. Proposition 65 requires that consumers must be warned before they are exposed to chemicals/metals that cause birth defects and/or reproductive harm. (The Safe Drinking Water and Toxic Enforcement Act, California Health and Safety Code § 25249.6, *et seq.*, also known as "Proposition 65").

4. By exposing consumers to lead without providing any warning, Defendants have violated and will continue to violate Proposition 65. Additionally, by committing the acts set forth herein Defendants have committed, and unless enjoined will continue to violate Proposition 65 and commit, unlawful and unfair business practices under California Business and Professions Code § 17200, *et seq.* Plaintiff is therefore entitled to civil penalties. Plaintiff is also entitled to injunctive relief to compel Defendants to:

(A) Comply with the requirements of Proposition 65 in the sale and distribution of their vinegars, including its requirement that the ultimate consumers of Defendants' vinegars be provided with a clear and reasonable warning that the ingestion of Defendants' products results in exposure to lead, a known reproductive toxin;

(B) Undertake an immediate and comprehensive public information program to alert all consumers (past, present or future) of Defendants' vinegars at issue herein of the inherent risk of lead exposure in these products; and

(C) To provide full and complete restitution to the purchasers of these products.

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**II.**

**PARTIES**

5. Plaintiff ENVIRONMENTAL LAW FOUNDATION ("ELF") is a California nonprofit organization founded on Earth Day in 1991. ELF has a longstanding interest in reducing health hazards to the public posed by lead, and particularly to protect those with the least choice and greatest vulnerability to toxic risks: children, inner city dwellers, and workers. ELF is dedicated to the preservation and enhancement of human health and the environment. ELF brings this action on its own behalf, and pursuant to California Business and Professions Code § 17204 and Health and Safety Code § 25249.7(d) in the interest of the general public.

6. Borges USA, Inc. ("Borges") is a Delaware corporation with its principal place of business located at 4652 E. Date Avenue, Fresno, California 93725. Borges sells wine vinegar, including, but not limited to, Star Premium Balsamic Vinegar, that contains lead.

7. Caffe Cucini, Inc. ("Caffe Cucini") is a corporation with its principal place of business located at 20500 S. Alameda Street, Carson, California. Caffe Cucini sells wine vinegar, including, but not limited to, Balsamic Vinegar of Modena, Selected by Donato D'Angelo, that contains lead.

8. Colavita USA, L.L.C. ("Colavita") is a company with its principal place of business located at 2537 Brunswick Avenue, Linden, New Jersey 07036. Colavita sells wine vinegar, including, but not limited to, Colavita Aged Balsamic Vinegar, Sweet Vinegar of Modena and Colavita Balsamic Vinegar of Modena, that contains lead.

9. De Medici Imports, Inc. ("De Medici") is a New York corporation with its principal place of business located at 315 West 57<sup>th</sup> Street, Suite 205, New York, New York 10019. De Medici sells wine vinegar, including, but not limited to, Lorenzo de' Medici Aceto Balsamico di Modena, that contains lead.

10. Euro-USA Trading Co. ("Euro-USA") is a Connecticut corporation with its principal place of business located at 5 Tyler Drive, North Franklin, Connecticut 06254. Euro-USA sells wine vinegar, including, but not limited to, Bionature Organic Balsamic

1 Vinegar from Modena, that contains lead.

2 11. Gaeta Imports, Inc. ("Gaeta") is a New York corporation with its principal  
3 place of business located at 41 John Street, Babylon, New York 11702. Gaeta sells wine  
4 vinegar, including, but not limited to, Gaeta Balsamic Vinegar of Modena (4 years) and  
5 Gaeta Balsamic Vinegar of Modena (Aged 2 years), that contains lead.

6 12. H. J. Heinz Co. ("Heinz") is a Pennsylvania corporation with its principal place  
7 of business located at 60<sup>th</sup> Floor U S Steel Bldg., 600 Grant Street, Pittsburgh, PA 15219.  
8 Heinz sells wine vinegar, including, but not limited to, to Heinz Imported Balsamic Vinegar  
9 of Modena, that contains lead.

10 13. Inter-American Foods, Inc. ("Inter-American") is a corporation with its  
11 principal place of business located at 1014 Vine Street, Cincinnati, Ohio 45202-1141. Inter-  
12 American sells wine vinegar, including, but not limited to, Private Selection Balsamic  
13 Vinegar, aged 6 years and Private Selection Balsamic Vinegar, aged up to 8 years, that  
14 contains lead.

15 14. The Kroger Co. ("Kroger") is a Ohio corporation with its principal place of  
16 business located at 1014 Vine Street, Cincinnati, Ohio 45202-1100. Kroger sells wine  
17 vinegar, including, but not limited to, Colavita Aged Balsamic Vinegar, Sweet Vinegar of  
18 Modena, Private Selection Balsamic Vinegar, aged 6 years, Barengo Balsamic Vinegar di  
19 Modena, Private Selection Balsamic Vinegar, aged up to 8 years, Colavita Balsamic Vinegar  
20 of Modena, Heinz Imported Balsamic Vinegar of Modena, Modenaceti Balsamic Vinegar of  
21 Modena, Star Premium Balsamic Vinegar, and Alessi Aceto Balsamico di Modena (4 Anno),  
22 that contains lead.

23 15. Lettieri & Co., Ltd. ("Lettieri") is a California corporation with its principal  
24 place of business located at 410 E. Grand Avenue, South San Francisco, California 94080.  
25 Lettieri sells wine vinegar, including, but not limited to, Antiqua Balsamic Vinegar of  
26 Modena, organic, green label, and Antiqua Balsamic Vinegar of Modena Riserva '90, that  
27 contains lead.

28 16. Liberty Richter is a company with its principal place of business located at 400

1 Lyster Avenue, Saddle Brook, New Jersey 07663. Liberty Richter sells wine vinegar,  
2 including, but not limited to, Mazzetti Balsamic Vinegar "extra aged quality" straw case and  
3 Mazzetti Balsamic Vinegar (brown label), that contains lead.

4 17. Manicaretti, Inc. ("Manicaretti") is a California corporation with its principal  
5 place of business located at 5332 College Avenue, Suite 200, Oakland, California 94618.  
6 Manicaretti sells wine vinegar, including, but not limited to, rustichella d'abruzzo Balsamic  
7 Vinegar of Modena, that contains lead.

8 18. Nakano Foods, Inc. ("Nakano Foods") is a Michigan corporation with its  
9 principal place of business located at 55 East Euclid Avenue, Suite 300, Mount Prospect,  
10 Illinois 60056. Nakano Foods sells wine vinegar, including, but not limited to, Barengo  
11 Balsamic Vinegar di Modena, that contains lead.

12 19. Ralphs Grocery Company which will do business in California as Ralphs  
13 Grocery Company of Ohio ("Ralphs") is a Ohio corporation with its principal place of  
14 business located at 1014 Vine Street, Cincinnati, Ohio 45202-1100. Ralphs sells wine  
15 vinegar, including, but not limited to, Colavita Aged Balsamic Vinegar, Sweet Vinegar of  
16 Modena, Private Selection Balsamic Vinegar, aged 6 years, Barengo Balsamic Vinegar di  
17 Modena, Private Selection Balsamic Vinegar, aged up to 8 years, Colavita Balsamic Vinegar  
18 of Modena, Heinz Imported Balsamic Vinegar of Modena, Modenaceti Balsamic Vinegar of  
19 Modena, Star Premium Balsamic Vinegar, and Alessi Aceto Balsamico di Modena (4 Anno),  
20 that contains lead.

21 20. Rao's Specialty Foods, Inc. ("Rao's") is a New York corporation with its  
22 principal place of business located at 17 Battery Place, Suite 643, New York, New York  
23 10004. Rao's sells wine vinegar, including, but not limited to, Rao's Homemade Balsamic  
24 Vinegar, Modena Italy, that contains lead.

25 21. Source Atlantique, Incorporated ("Source Atlantique") is a Delaware  
26 corporation with its principal place of business located at 140 Sylvan Avenue, Englewood  
27 Cliffs, New Jersey 07632. Source Atlantique sells wine vinegar, including, but not limited  
28 to, Modenaceti Balsamic Vinegar of Modena, that contains lead.

1           22.    Spectrum Organic Products, Inc. ("Spectrum") is a California corporation with  
2 its principal place of business located at 5341 Old Redwood Highway, Suite 400, Petaluma,  
3 California 94954. Spectrum sells wine vinegar, including, but not limited to, Spectrum  
4 Naturals Organic Balsamic Vinegar, that contains lead.

5           23.    Tree of Life, Inc. ("Tree of Life") is a Delaware corporation with its principal  
6 place of business located at 2501 71<sup>st</sup> Street, North Bergen, New Jersey 07047. Tree of Life  
7 sells wine vinegar, including, but not limited to, Mazzetti Balsamic Vinegar "extra aged  
8 quality" straw case, and Mazzetti Balsamic Vinegar (brown label), that contains lead.

9           24.    VIGO Importing Company ("VIGO") is a company with its principal place of  
10 business located at 4701 West Comanche Avenue, Tampa, Florida 33614. VIGO sells wine  
11 vinegar, including, but not limited to, Alessi Aceto Balsamico di Modena (4 Anno), that  
12 contains lead.

13           25.    The Vons Companies, Inc. ("Vons") is a Michigan corporation with its  
14 principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, California  
15 94588-3229. Vons sells wine vinegar, including, but not limited to, Star Premium Balsamic  
16 Vinegar, Safeway Select Verdi Balsamic Vinegar of Modena, and Modenaceti Balsamic  
17 Vinegar of Modena, that contains lead.

18           26.    Vons Food Services, Inc. ("Vons Food") is a California corporation with its  
19 principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, California  
20 94588-3229. Vons Food sells wine vinegar, including, but not limited to, Star Premium  
21 Balsamic Vinegar, Safeway Select Verdi Balsamic Vinegar of Modena, and Modenaceti  
22 Balsamic Vinegar of Modena, that contains lead.

23           27.    Wild Oats Markets, Inc. ("Wild Oats") is a Delaware corporation with its  
24 principal place of business located at 3375 Mitchell Lane, Boulder, Colorado 80301. Wild  
25 Oats sells wine vinegar, including, but not limited to, Modenaceti Balsamic Vinegar of  
26 Modena, Gaeta Balsamic Vinegar of Modena (4 years), Colavita Aged Balsamic Vinegar,  
27 Sweet Vinegar of Modena, Antiqua Balsamic Vinegar of Modena, organic, Lorenzo de'  
28 Medici Aceto Balsamico di Modena, and Antiqua Balsamic Vinegar of Modena Riserva '90,

1 that contains lead.

2 28. Each of the Defendants identified in the First and Second Causes of Action  
3 have employed ten (10) or more persons at all times relevant to this action.

4 29. The true names and capacities of Defendants sued herein under California  
5 Code of Civil Procedure §474 as DOES 1 through 100, inclusive, are presently unknown to  
6 Plaintiff, who therefore sues these Defendants by such fictitious names. Plaintiff will seek to  
7 amend this Complaint and include these Doe Defendants' true names and capacities when  
8 they are ascertained. Each of the fictitiously named Defendants is responsible in some  
9 manner for the conduct alleged herein and for the injuries suffered by the general public.

10 30. At all times herein mentioned in the causes of action into which this paragraph  
11 is incorporated by reference, each and every defendant was an agent or employee of each and  
12 every other defendant. In doing the things alleged in the cause of action into which this  
13 paragraph is incorporated by reference, each and every defendant was acting within the  
14 course and scope of this agency or employment, and was acting with the consent, permission,  
15 and authorization of each of the remaining Defendants. All actions of each defendant  
16 alleged in the causes of action into which this paragraph is incorporated by reference were  
17 ratified and approved by every other defendant or their officers or managing agents, and by  
18 agreeing to actively conceal the true facts as alleged herein. Alternatively, Defendants aided,  
19 conspired with and/or facilitated the wrongful conduct of other Defendants.

20 **III.**

21 **JURISDICTION AND VENUE**

22 31. This Court has jurisdiction over all causes of action asserted herein pursuant to  
23 the California Constitution, Article XI, Section 10, because this case is a cause not given by  
24 statute to other trial courts.

25 32. This Court has jurisdiction over Defendants named herein because Defendants  
26 either are located in this State or are foreign corporations authorized to do business in  
27 California and registered with the California Secretary of State, or who do sufficient business  
28 in California, have sufficient minimum contacts with California, or otherwise intentionally



1 avail themselves of the markets within California through the promotion, sale, marketing and  
2 distribution of their products in California to render the exercise of jurisdiction by the  
3 California courts permissible under traditional notions of fair play and substantial justice.

4 33. Venue is proper in this Court because the products at issue are advertised,  
5 promoted, sold and used in this County, a substantial portion of the transactions complained  
6 of herein occurred here, contracts relating to the purchase of this product were entered into,  
7 made and were to be performed in this County, and Defendants have received substantial  
8 compensation from the sale of the product at issue in this County by doing business here and  
9 making numerous misrepresentations which had an effect in this County.

10 34. With respect to violations of Health and Safety Code § 25249.6, *et seq.*, on  
11 November 29, 2003, pursuant to Health and Safety Code § 25249.7, Plaintiff mailed  
12 appropriate notices of the violations of section 25249.6 of Proposition 65 by each of the  
13 Defendants, as alleged herein. The "Notices of Violation of Proposition 65" were mailed to  
14 each of the these Defendants, as well as to the California Attorney General, the District  
15 Attorney of every county in California, and the City Attorneys of any cities with populations  
16 according to the most recent decennial census of over 750,000 in whose jurisdiction some of  
17 the violations of Proposition 65 occurred. Each notice included a certificate of merit  
18 executed by Plaintiff's attorneys stating that the person executing the certificate had  
19 consulted with one or more persons with relevant and appropriate experience or expertise  
20 who has reviewed the facts, studies or other data regarding exposure to lead, and that, based  
21 on that information, the person executing the certificate believes there is a reasonable and  
22 meritorious case for this private action. The factual information sufficient to establish the  
23 basis of the certificate of merit has been attached to the certificate of merit served on the  
24 California Attorney General.

25 35. None of these public prosecutors has commenced and is diligently prosecuting  
26 an action against the violations at issue herein, although the notice period provided in §  
27 25249.7 has elapsed since such notice was provided.

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IV.

**STATUTORY AND REGULATORY BACKGROUND**

36. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute passed as Proposition 65 by a vote of the People in 1986.

37. Proposition 65 provides the circumstances under which persons must be warned before they are exposed to chemicals/metals that cause cancer, birth defects, or other reproductive harm. Health and Safety Code § 25249.6 states the warning requirement:

"No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in section 25249.10."

38. Proposition 65 establishes a procedure by which the Governor lists chemicals known to the state to cause reproductive toxicity. Health and Safety Code § 25249.8. Pursuant to this authority, Governor George Deukmejian on February 27, 1987 placed lead on the list of reproductive toxins. The State of California has established the specific regulatory level for lead at 0.5 micrograms/day. 26 CCR § 22 12805(a).

39. The warning requirement under Proposition 65 for a given chemical goes into effect one year after the Governor places that chemical on the list. Health and Safety Code § 25249.10(b). Therefore, lead became subject to a Proposition 65 warning on February 27, 1988.

V.

**FACTS**

42. Vinegar is a condiment regularly used in almost every type of food and style of cooking. It's a ubiquitous ingredient for dressings, mayonnaise and mustards.

43. Regulations under the Nutrition Labeling and Education Act of 1990 have set the serving size for vinegar at one (1) tablespoon. 21 C.F.R. § 101.12(b) (Table 2).

44. Defendants manufacture, sell, and/or distribute a variety of vinegars labeled, marketed and intended for human consumption, including, but not limited to those listed in

1 paragraphs 6-27, *supra*. These vinegars are manufactured, distributed and/or sold in the  
2 State of California for the purpose of distribution and retail sale in California.

3 45. The vinegar at issue in this Complaint contains lead which results in human  
4 exposure to the lead upon its consumption without prior warning.

5 46. Plaintiff is informed and believes and thereon alleges that the Defendants knew  
6 and/or reasonably should have known, that the foreseeable use of their vinegar results in  
7 exposure to lead, and that the levels of lead so released exceed the lead exposure levels (*i.e.*,  
8 0.5 micrograms per day) which trigger Proposition 65's warning requirements.

9 47. Nevertheless, and in violation of California Business and Professions Code §  
10 17200, *et seq.* and California Health and Safety Code § 25249.6, *et seq.*, the Defendants have  
11 not labeled, marked or used signs, shelf warnings, or any indicia whatsoever that warns or  
12 informs the public that their vinegars contain and expose consumers to lead, a chemical  
13 known to the State of California to cause reproductive toxicity. Defendants have in the  
14 course of doing business, knowingly and intentionally, and recklessly and negligently,  
15 exposed individuals to a chemical known to the State of California to cause reproductive  
16 toxicity without first providing a clear and reasonable warning as required by California  
17 Health and Safety Code §§ 25249.6 and 25249.11(f). Defendants have also promoted and  
18 marketed its vinegar for sale without any warning regarding the levels of lead exposure. As  
19 a direct result of Defendants' acts and omissions, the general public in California is being  
20 regularly, unlawfully, and involuntarily exposed to lead, a known reproductive toxin.

21 **FIRST CAUSE OF ACTION**

22 (California Health and Safety Code §§ 25249.6 *et seq.*)  
23 (Against Defendants Borges, Colavita, Euro-USA, Heinz,  
24 Inter-American, Kroger, Lettieri, Liberty Richter, Nakano Foods,  
25 Ralphs, Rao's, Spectrum, Tree of Life, VIGO, Vons, Vons Food, Wild Oats)

26 48. Plaintiff incorporates by reference ¶¶ 1 through 47 as if fully set forth herein.

27 49. The people of the State of California have declared in Proposition 65 their  
28 right "[t]o be informed about exposure to chemicals that cause cancer, birth defects or other  
reproductive harm." Proposition 65, § 1(b).

50. To carry out those statutory purposes, Proposition 65 requires that a clear and

1 reasonable warning be given by persons who, in the course of doing business, knowingly and  
2 intentionally expose any individual to a chemical known to the State of California to cause  
3 reproductive harm.

4 51. On February 27, 1987, Governor Deukmejian listed lead as a chemical known  
5 to the State of California to cause reproductive toxicity. No warning need by given  
6 concerning a chemical so listed until one year after the chemical first appears on the list. *Id.*,  
7 § 25249.10(b). Lead, therefore, one year later became subject to the warning requirements  
8 of Proposition 65.

9 52. Proposition 65 provides that any person "violating or threatening to violate"  
10 the statute may be enjoined in any court of competent jurisdiction. *Id.*, § 25249.7. In  
11 addition, violators are liable for civil penalties of up to \$2,500.00 per day per violation,  
12 recoverable in a civil action. *Id.*, § 25249.7(b).

13 53. Defendants have engaged and continue to engage in conduct which violates  
14 Health and Safety Code § 25249.6. This conduct includes the manufacturing, packaging,  
15 marketing, distributing and selling of vinegars the foreseeable use of which results in  
16 exposing the public to lead, known to the State of California to cause reproductive toxicity,  
17 without first providing a clear and reasonable warning pursuant to Health and Safety Code  
18 §§ 25249.6 and 25249.11(f). Defendants have, therefore, in the course of doing business,  
19 knowingly and intentionally exposed individuals to a chemical known to the State of  
20 California to cause reproductive toxicity without first providing a clear and reasonable  
21 warning.

22 54. By the above-described acts, Defendants are liable, pursuant to Health and  
23 Safety Code § 25249.7(b), for a civil penalty of up to \$2,500.00 per day per individual  
24 exposure to lead through Defendants' vinegars.

25 WHEREFORE, Plaintiff prays for judgment against Defendants Borges, Colavita,  
26 Euro-USA, Heinz, Inter-American, Kroger, Lettieri, Liberty Richter, Nakano Foods, Ralphs,  
27 Rao's, Spectrum, Tree of Life, VIGO, Vons, Vons Food, and Wild Oats as set forth below.

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**SECOND CAUSE OF ACTION**

(Unlawful Business practices in violation of  
California Business and Professions Code § 17200 *et seq.*)  
(Predicated on California Health and Safety Code § 25249.6)  
(Against Defendants Borges, Colavita, Euro-USA, Heinz,  
Inter-American, Kroger, Lettieri, Liberty Richter, Nakano Foods,  
Ralphs, Rao's, Spectrum, Tree of Life, VIGO, Vons, Vons Food, Wild Oats)

55. Plaintiff incorporates by reference ¶¶ 1 through 54 as if fully set forth herein.

56. California Business and Professions Code § 17200 provides that unfair competition shall mean and include any "unlawful . . . business practice."

57. Proposition 65 requires that a clear and reasonable warning be given by persons who, in the course of doing business, knowingly and intentionally expose any individual to a chemical known to the State of California to cause reproductive harm.

58. Defendants have, in the course of doing business, knowingly and intentionally exposed individuals to lead without first providing a clear and reasonable warning in violation of Proposition 65 and thereby engaged in a *per se* unlawful business practice constituting unfair competition in violation of California Business and Professions Code §§ 17200 *et seq.*

WHEREFORE, Plaintiff prays for judgment against Defendants Borges, Colavita, Euro-USA, Heinz, Inter-American, Kroger, Lettieri, Liberty Richter, Nakano Foods, Ralphs, Rao's, Spectrum, Tree of Life, VIGO, Vons, Vons Food, and Wild Oats as set forth below.

**THIRD CAUSE OF ACTION**

(Unlawful Business Practice in Violation of  
California Business and Professions Code § 17200,  
Predicated on Violation of California Civil Code  
§ 1750, *et seq.*: Consumer Legal Remedies Act)  
(Against All Defendants)

59. Plaintiff incorporates by reference ¶¶ 1 through 47 as if fully set forth herein.

60. California Business & Professions Code § 17200 provides that unfair competition shall mean and include an "unlawful . . . business practice."

61. The acts and practices alleged herein were intended to result in the sale of Defendants' products to the consuming public, and violated and continue to violate the Consumer Legal Remedies Act (the "Act"), California Civil Code § 1750, *et seq.*, in at least

1 the following respects:

2 (a) In violation of § 1770(a)(5) of the Act, Defendants' acts and practices  
3 constitute misrepresentation that their goods have characteristics, uses, and benefits which  
4 they do not have (*i.e.*, that these vinegars can be consumed safely when in fact, they  
5 expose men, women and children to lead); and

6 (b) In violation of § 1770(a)(7) of the Act, Defendants' acts and practices  
7 constitute misrepresentation that their goods are of a particular standard, quality and/or  
8 grade when they are another (*i.e.*, that these vinegars are safe under normal use when in  
9 fact, they expose men, women and children to lead under normal use);

10 Accordingly, Defendants have also violated Business & Professions Code § 17200  
11 proscription against engaging in an unlawful business practice.

12 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth below.

13  
14 **FOURTH CAUSE OF ACTION**  
15 (Unlawful Business Practice in Violation of  
16 California Business and Professions Code § 17200,  
17 Predicated on Violation of California  
18 Civil Code § 1714: Negligence.)  
19 (Against All Defendants)

20 62. Plaintiff incorporates by reference ¶¶1 through 47, 59-61, as if fully set forth  
21 herein.

22 63. Defendants had a duty to properly and safely produce, manufacture and sell  
23 their products in a manner that would not result in exposure to a hazard to human health.  
24 Defendants were negligent in their manufacturing, distribution and/or sale of their  
25 vinegars by allowing and/or causing the products to contain lead that exposes children,  
26 women and men to it when such vinegars are ingested. The Defendants were negligent in  
27 that they knew, or in the exercise of reasonable care should or could have known, that  
28 their conduct would allow or cause lead to contaminate its vinegars. The lead contained  
in these products was thus a foreseeable consequence of Defendants' negligence in using  
it in the manufacturing process.

64. Defendants, in failing to use the requisite degree or ordinary care and skill in

1 the management of their manufacturing processes, violated the requirements of California  
2 Civil Code § 1714. Accordingly, the Defendants have violated California Business and  
3 Professions Code § 17200's proscription against engaging in an unlawful business practice  
4 by violating California Civil Code §§ 17200 *et seq.*

5 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth below.

6 **FIFTH CAUSE OF ACTION**  
7 (Violation of California Business and Professions  
8 Code § 17200, *et seq.* – Unfair Business Practices)  
9 (Against All Defendants)

10 65. Plaintiff incorporates by reference paragraphs 1 through 57, 59-64, above.

11 66. California Business and Profession Code § 17200 provides that unfair  
12 competition shall mean and include any "unfair . . . business practice."

13 67. As alleged in the preceding paragraphs, the misrepresentation and  
14 nondisclosure by Defendants of the material facts detailed above constitutes an unfair  
15 business practice within the meaning of Business and Professions Code § 17200.

16 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth below.

17 **VI.**

18 **THE NEED FOR INJUNCTIVE RELIEF**

19 68. By committing the acts alleged herein, the Defendants have caused  
20 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the  
21 absence of equitable relief, the general public will continue to be involuntarily exposed to  
22 lead which is contained in Defendants' vinegars, creating substantial risk of irreparable  
23 physical injury.  
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VII.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

A. A temporary restraining order, preliminary and permanent injunction enjoining the Defendants, their agents, employees, assigns, and all persons acting in concert or participating with them from:

(1) selling and distributing their vinegars which contain lead in California, without first providing, to the ultimate consumers and users, a clear and reasonable warning that the foreseeable consumption of such vinegars results in exposure to lead, a chemical known to the State of California to be a reproductive toxin;

(2) failing to undertake a court-approved public information campaign to warn and inform the general public that consumption of Defendants' vinegars which contain lead results in exposure to lead, a chemical known to the State of California to be a reproductive toxin and identifying steps that may be taken to reduce such exposure;

(3) failing and refusing to make full and complete restitution to the members of the general public of all monies acquired by means of any act found by this court to be an unlawful or unfair business practice under Business and Professions Code §§ 17200 *et seq.* and taking all other steps necessary to make members of the public whole from the acts and omissions of Defendants complained of herein;

B. An award of statutory penalties of \$2,500 for each violation of Proposition 65 throughout the State of California as against each Defendant identified in the First and Second Causes of Action;

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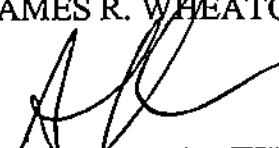
- 1 C. Reasonable attorneys' fees and costs;  
2 D. Such other and further relief as this court may deem necessary and proper.

3  
4 DATED: February 11, 2004

BUSHNELL, CAPLAN & FIELDING, LLP  
ALAN M. CAPLAN  
APRIL M. STRAUSS, Of Counsel

6 ALTSHULER, BERZON, NUSSBAUM,  
7 RUBIN & DEMAIN  
8 FRED H. ALTSHULER

9 ENVIRONMENTAL LAW FOUNDATION  
10 JAMES R. WHEATON

11   
12 \_\_\_\_\_  
13 ALAN M. CAPLAN  
14 Attorney for Plaintiff

15 **DEMAND FOR JURY TRIAL**


16 Plaintiff hereby demands a trial by jury on each and every cause of action.

17 DATED: February 11, 2004

BUSHNELL, CAPLAN & FIELDING, LLP  
ALAN M. CAPLAN  
APRIL M. STRAUSS, Of Counsel

19 ALTSHULER, BERZON, NUSSBAUM,  
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