

DEC 13 2004

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CASE MANAGEMENT CONFERENCE SET

PLAN I MAR 8 2005 9:00AM

SUPERIOR COURT OF THE STATE OF CALIFORNIA

DEPARTMENT 212

COUNTY OF SAN FRANCISCO, UNLIMITED JURISDICTION

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

Plaintiff,

v.

14 ALBECO, INC., ALBERTSON'S INC.,
15 ANDRONICO'S MARKETS, INC.,
16 ARDEN GROUP, INC., BELL MARKETS,
17 BERBERIAN ENTERPRISES, INC.,
18 BRISTOL FARMS, CALA FOODS, INC.,
19 DEHOFF ENTERPRISES, INC.,
20 DRAEGER'S SUPER MARKETS,
21 GELSON'S MARKETS, RALEY'S,
22 STATER BROS. MARKETS, SUR LA
23 TABLE, INC., and DOES 1 through 100,
24 inclusive,

Defendants.

CASE NO. 04-435440

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).

TYPE OF ACTION:

Local Rule 2.3(1):

(a) Unfair Business Practices

**Plaintiff DEMANDS A TRIAL
BY JURY**

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

6 I.

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

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

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

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

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

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

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

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

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

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

23 II.

24 PARTIES

25 5. Plaintiff ENVIRONMENTAL LAW FOUNDATION ("ELF") is a California
26 nonprofit organization founded on Earth Day in 1991. ELF has a longstanding interest in
27 reducing health hazards to the public posed by lead, and particularly to protect those with
28 the least choice and greatest vulnerability to toxic risks: children, inner city dwellers, and

1 workers. ELF is dedicated to the preservation and enhancement of human health and the
2 environment. ELF brings this action on its own behalf, and pursuant to California Business
3 and Professions Code § 17204 and Health and Safety Code § 25249.7(d) in the interest of
4 the general public.

5 6. Albeco, Inc. ("Albeco") is a California corporation with its principal place of
6 business located at 100 Harbor Drive, Sausalito, California 94965. Albeco sells wine
7 vinegar, including, but not limited to, Lorenza de' Medici Aceto Balsamico Di Modena,
8 Modenaceti Balsamic Vinegar of Modena, Colavita Aged Balsamic Vinegar Sweet Vinegar
9 of Modena, Monari Federzoni 1912 Balsamic Vinegar of Modena (green label), Monari
10 Federzoni Balsamic Vinegar of Modena (blue label), Balsamic Vinegar of Modena "Fondo
11 Carrate" produced by Azienda Agricola Elsa, and Balsamic Vinegar Aceto Balsamico Di
12 Modena Fini, that contains lead.

13 7. Albertson's, Inc. ("Albertson's") is a Delaware corporation with its principal
14 place of business located at 250 E. Parkcenter Blvd., Boise, Idaho. Albertson's sells wine
15 vinegar, including, but not limited to, Colavita Aged Balsamic Vinegar of Modena Sweet
16 Vinegar of Modena and Modenaceti Balsamic Vinegar of Modena, that contains lead.

17 8. Andronico's Markets, Inc. ("Andronico's") is a California corporation with its
18 principal place of business located at 1109 Washington Avenue, Albany, California 94706.
19 Andronico's sells wine vinegar, including, but not limited to, Caroliva Vinagre Balsamico
20 Aged 18 Years, Colavita Aged Balsamic Vinegar Sweet Vinegar of Modena, Colavita
21 Balsamic Vinegar of Modena, and Modenaceti Balsamic Vinegar of Modena, that contains
22 lead.

23 9. Arden Group, Inc. ("Arden Group") is a Delaware corporation with its mailing
24 address located at P.O. Box 512256 Los Angeles, California 90051. Arden Group sells
25 wine vinegar, including, but not limited to, Colavita Aged Balsamic Vinegar of Modena
26 (Sweet), FINI Balsamic Vinegar of Modena, Alessi Balsamic Vinegar of Modena (4 Anno),
27 Rao's Homemade Balsamic Vinegar, Modenaceti Balsamic Vinegar of Modena, and Monari
28 Federzoni Aged Balsamic Vinegar (green label), that contains lead.

1 10. Bell Markets, Inc. ("Bell Markets") is a California corporation with its
2 principal place of business located at 1100 W. Artesia Blvd., Compton, California 90220.
3 Bell Markets sells wine vinegar, including, but not limited to, Colavita Aged Balsamic
4 Vinegar of Modena Sweet Vinegar of Modena, Private Selection Balsamic Vinegar (6
5 years), and Private Selection Balsamic Vinegar (aged up to 8 years), that contains lead.

6 11. Berberian Enterprises, Inc.. ("Berberian Enterprises") is a California
7 corporation with its principal place of business located at 5315 Santa Monica Blvd., Los
8 Angeles, California 90029. Berberian sells wine vinegar, including, but not limited to,
9 Monari Federzoni Aged Balsamic Vinegar (green label), Colavita Aged Balsamic Vinegar
10 of Modena (Sweet), and Mazzetti Balsamic Vinegar, that contains lead.

11 12. Bristol Farms, Inc. ("Bristol Farms") is a California corporation with its
12 principal place of business located at 915 East 230th Street, Carson, California 90745.
13 Bristol Farms sells wine vinegar, including, but not limited to, Monari Federzoni Aged
14 Balsamic Vinegar, FINI Balsamic Vinegar of Modena, Lorenza de' Medici Aceto
15 Balsamico di Modena, Caroliva Vinaigre Balsamico Reserva 18 Anos, Modenaceti
16 Balsamic Vinegar of Modena, Colavita Balsamic Vinegar of Modena, Colavita Aged
17 Balsamic Vinegar of Modena (Sweet), Monari Federzoni Balsamic Vinegar of Modena
18 (green label) and Mazzetti Balsamic Vinegar of Modena, that contains lead.

19 13. Cala Foods, Inc. ("Cala Foods") is a California corporation with its principal
20 place of business located at 1100 W. Artesia Blvd, Compton, California 90220. Cala Foods
21 sells wine vinegar, including, but not limited to, Colavita Aged Balsamic Vinegar of
22 Modena Sweet Vinegar of Modena, Private Selection Balsamic Vinegar (6 years), and
23 Private Selection Balsamic Vinegar (aged up to 8 years), that contains lead.

24 14. DeHoff Enterprises, Inc. ("DeHoff Enterprises") is a California corporation
25 with its principal place of business located at 1 Waters Park Drive, Suite 103, San Mateo,
26 California 94403. DeHoff Enterprises sells wine vinegar, including, but not limited to,
27 Colavita Balsamic Vinegar of Modena Sweet Vinegar of Modena, Mazzetti Balsamic
28 Vinegar of Modena and Barengo Balsamic Vinegar of Modena, that contains lead.

1 times relevant to this action:

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

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

16 **III.**

17 **JURISDICTION AND VENUE**

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

21 24. This Court has jurisdiction over Defendants named herein because Defendants
22 either are located in this State or are foreign corporations authorized to do business in
23 California and registered with the California Secretary of State, or who do sufficient
24 business in California, have sufficient minimum contacts with California, or otherwise
25 intentionally avail themselves of the markets within California through the promotion, sale,
26 marketing and distribution of their products in California to render the exercise of
27 jurisdiction by the California courts permissible under traditional notions of fair play and
28 substantial justice.

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

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

22 27. None of these public prosecutors has commenced and is diligently prosecuting
23 an action against the violations at issue herein, although the notice period provided in §
24 25249.7 has elapsed since such notice was provided.

25 IV.

26 STATUTORY AND REGULATORY BACKGROUND

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

1 knew and/or reasonably should have known, that the foreseeable use of their vinegar results
2 in exposure to lead, and that the levels of lead so released exceed the lead exposure levels
3 (i.e., 0.5 micrograms per day) which trigger Proposition 65's warning requirements.

4 37. Nevertheless, and in violation of California Business and Professions Code §
5 17200, *et seq.* and California Health and Safety Code § 25249.6, *et seq.*, the Defendants
6 have not labeled, marked or used signs, shelf warnings, or any indicia whatsoever that warns
7 or informs the public that their vinegars contain and expose consumers to lead, a chemical
8 known to the State of California to cause reproductive toxicity. Defendants have in the
9 course of doing business, knowingly and intentionally, and recklessly and negligently,
10 exposed individuals to a chemical known to the State of California to cause reproductive
11 toxicity without first providing a clear and reasonable warning as required by California
12 Health and Safety Code §§ 25249.6 and 25249.11(f). Defendants have also promoted and
13 marketed its vinegar for sale without any warning regarding the levels of lead exposure. As
14 a direct result of Defendants' acts and omissions, the general public in California is being
15 regularly, unlawfully, and involuntarily exposed to lead, a known reproductive toxin.

16 **FIRST CAUSE OF ACTION**

17 (California Health and Safety Code §§ 25249.6 *et seq.*)
18 (Against All Defendants)

19 38. Plaintiff incorporates by reference ¶¶ 1 through 37 as if fully set forth herein.

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

23 40. To carry out those statutory purposes, Proposition 65 requires that a clear and
24 reasonable warning be given by persons who, in the course of doing business, knowingly
25 and intentionally expose any individual to a chemical known to the State of California to
26 cause reproductive harm.

27 41. On February 27, 1987, Governor Deukmejian listed lead as a chemical known
28 to the State of California to cause reproductive toxicity. No warning need be given
concerning a chemical so listed until one year after the chemical first appears on the list. *Id.*,

1 § 25249.10(b). Lead, therefore, one year later became subject to the warning requirements
2 of Proposition 65.

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

7 43. Defendants have engaged and continue to engage in conduct which violates
8 Health and Safety Code § 25249.6. This conduct includes the manufacturing, packaging,
9 marketing, distributing and selling of vinegars the foreseeable use of which results in
10 exposing the public to lead, known to the State of California to cause reproductive toxicity,
11 without first providing a clear and reasonable warning pursuant to Health and Safety Code
12 §§ 25249.6 and 25249.11(f). Defendants have, therefore, in the course of doing business,
13 knowingly and intentionally exposed individuals to a chemical known to the State of
14 California to cause reproductive toxicity without first providing a clear and reasonable
15 warning.

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

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

20 **SECOND CAUSE OF ACTION**
21 (Unlawful Business practices in violation of
22 California Business and Professions Code § 17200 *et seq.*)
(Predicated on California Health and Safety Code § 25249.6)
(Against All Defendants)

23 45. Plaintiff incorporates by reference ¶¶ 1 through 44 as if fully set forth herein.

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

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

1 48. Defendants have, in the course of doing business, knowingly and intentionally
2 exposed individuals to lead without first providing a clear and reasonable warning in
3 violation of Proposition 65 and thereby engaged in a *per se* unlawful business practice
4 constituting unfair competition in violation of California Business and Professions Code §§
5 17200 *et seq.*

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

7 **THIRD CAUSE OF ACTION**
8 (Unlawful Business Practice in Violation of
9 California Business and Professions Code § 17200,
10 Predicated on Violation of California Civil Code
11 § 1750, *et seq.*: Consumer Legal Remedies Act)
12 (Against All Defendants)

13 49. Plaintiff incorporates by reference ¶¶ 1 through 48 as if fully set forth herein.

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

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

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

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

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

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

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FOURTH CAUSE OF ACTION
(Unlawful Business Practice in Violation of
California Business and Professions Code § 17200,
Predicated on Violation of California
Civil Code § 1714: Negligence.)
(Against All Defendants)

52. Plaintiff incorporates by reference ¶¶ 1 through 51 as if fully set forth herein.

53. Defendants had a duty to properly and safely produce, manufacture and sell their products in a manner that would not result in exposure to a hazard to human health. Defendants were negligent in their manufacturing, distribution and/or sale of their vinegars by allowing and/or causing the products to contain lead that exposes children, women and men to it when such vinegars are ingested. The Defendants were negligent in that they knew, or in the exercise of reasonable care should or could have known, that 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.

54. Defendants, in failing to use the requisite degree of ordinary care and skill in the management of their manufacturing processes, violated the requirements of California Civil Code § 1714. Accordingly, the Defendants have violated California Business and Professions Code § 17200's proscription against engaging in an unlawful business practice by violating California Civil Code §§ 17200 *et seq.*

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

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

55. Plaintiff incorporates by reference paragraphs 1 through 54 above.

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

57. As alleged in the preceding paragraphs, the misrepresentation and

1 nondisclosure by Defendants of the material facts detailed above constitutes an unfair
2 business practice within the meaning of Business and Professions Code § 17200.

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

4 VI.

5 THE NEED FOR INJUNCTIVE RELIEF

6 58. By committing the acts alleged herein, the Defendants have caused
7 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the
8 absence of equitable relief, the general public will continue to be involuntarily exposed to
9 lead which is contained in Defendants' vinegars, creating substantial risk of irreparable
10 physical injury.

11 VII.

12 PRAYER FOR RELIEF

13 WHEREFORE, Plaintiff prays for the following relief:

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

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

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

25 (3) failing and refusing to make full and complete restitution to the
26 members of the general public of all monies acquired by means of any act found by this
27 court to be an unlawful or unfair business practice under Business and Professions Code
28 §§ 17200 *et seq.* and taking all other steps necessary to make members of the public

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whole from the acts and omissions of Defendants complained of herein;

B. An award of statutory penalties of \$2500 for each violation of Proposition 65 throughout the State of California

C. Reasonable attorneys' fees and costs;

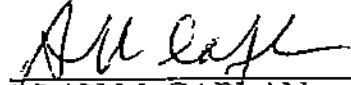
D. Such other and further relief as this Court may deem necessary and proper.

DATED: October 13, 2004

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