

BILL LOCKYER  
Attorney General  
THEODORA BERGER  
Senior Assistant Attorney General  
EDWARD G. WEIL  
Supervising Deputy Attorney General  
SUSAN S. FIERING  
Deputy Attorney General  
State Bar No. 121621  
1515 Clay Street, Suite 2000  
Oakland, CA 94612

Attorneys for People of the State of California  
ex rel. Bill Lockyer, Attorney General of the

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA, ex rel.  
BILL LOCKYER, Attorney General of the State of  
California,

Plaintiff,

v.

SAFEWAY, INC.; THE KROGER COMPANY;  
ALBERTSON'S INC.; TRADER JOE'S COMPANY;  
WHOLE FOODS MARKET, INC.; and WHOLE  
FOODS MARKET CALIFORNIA, INC.; and DOES 1  
through 100,

Defendants,

Case No.:

COMPLAINT FOR CIVIL  
PENALTY AND INJUNCTIVE  
RELIEF

Business Tort/Unfair Business  
Practice (07)  
Toxic Tort/Environmental (30)

**I. INTRODUCTION**

1. This complaint seeks an injunction and civil penalties to remedy defendants' failure to warn consumers that fish sold by defendants expose consumers to chemicals known to the State of California to cause cancer and reproductive harm. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6, also known as

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1 "Proposition 65," businesses must provide persons with a "clear and reasonable warning" before  
2 exposing them to such chemicals.

## 3 **II. PARTIES**

4 2. Plaintiffs are the People of the State of California, by and through the Attorney  
5 General of California, Bill Lockyer. Health and Safety Code section 25249.7(c) provides that  
6 actions to enforce Proposition 65 may be brought by the Attorney General in the name of the  
7 People of the State of California. Government Code section 12607 authorizes the Attorney  
8 General to bring an action for equitable relief in the name of the People of the State of California  
9 against any person to protect the natural resources of the State from pollution, impairment, or  
10 destruction. Business and Professions Code section 17200 provides that actions to prohibit  
11 unfair and unlawful business practices may be brought by the Attorney General in the name of  
12 the People of the State of California.

13 3. Defendant SAFEWAY, INC. is a business entity that distributes and/or sells some  
14 or all of the following fresh or frozen fish to consumers within the state of California: Swordfish,  
15 Ahi (Yellowfin) tuna, Albacore tuna, shark.

16 4. Defendant THE KROGER COMPANY is a business entity that distributes and/or  
17 sells some or all of the following fresh or frozen fish to consumers within the state of California:  
18 Swordfish, Ahi (Yellowfin) tuna, Albacore tuna, shark.

19 5. Defendant ALBERTSON'S INC. is a business entity that distributes and/or sells  
20 some or all of the following fresh or frozen fish to consumers within the state of California:  
21 Swordfish, Ahi (Yellowfin) tuna, Albacore tuna, shark.

22 6. Defendant TRADER JOE'S COMPANY is a business entity that distributes  
23 and/or sells some or all of the following fresh or frozen fish to consumers within the state of  
24 California: Swordfish, Ahi (Yellowfin) tuna, Albacore tuna, shark.

25 7. Defendant WHOLE FOODS MARKET, INC. is a business entity that distributes  
26 and/or sells some or all of the following fresh or frozen fish to consumers within the state of  
27 California: Swordfish, Ahi (Yellowfin) tuna, Albacore tuna, shark.

28 8. Defendant WHOLE FOODS MARKET CALIFORNIA, INC. is a business entity

1 that distributes and/or sells some or all of the following fresh or frozen fish to consumers within  
2 the state of California: Swordfish, Ahi (Yellowfin) tuna, Albacore tuna, shark.

3 9. The true names and capacities of the defendants sued herein as Does 1 through  
4 100 are unknown to plaintiff, who therefore sues them by such fictitious names. Plaintiff will  
5 amend this complaint to allege the true names and capacities of these defendants when they have  
6 been determined. Each of the fictitiously named defendants is responsible in some manner for  
7 the conduct alleged herein.

### 8 **III. JURISDICTION AND VENUE**

9 10. This Court has jurisdiction pursuant to California Constitution Article VI, section  
10 10, because this case is a cause not given by statute to other trial courts.

11 11. This Court has jurisdiction over the defendants named above because they do  
12 sufficient business in California, or otherwise have sufficient minimum contacts in California to  
13 render the exercise of jurisdiction over them by the California courts consistent with traditional  
14 notions of fair play and substantial justice.

15 12. Venue is proper in this Court because the cause arises in the City and County of  
16 San Francisco where some of the violations of law have occurred.

### 17 **IV. STATUTORY BACKGROUND**

#### 18 **A. Proposition 65**

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

21 17. The warning requirement of Proposition 65 is contained in Health and Safety  
22 Code section 25249.6, which provides:

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

26 18. Implementing regulations promulgated by the Health and Welfare Agency provide  
27 that the warning method "must be reasonably calculated, considering the alternative methods  
28 available under the circumstances, to make the warning message available to the individual prior

1 to exposure." (22 CCR § 12601(a).)

2 19. The regulations prescribe certain types of warnings that are considered valid,  
3 including: (A) warnings on labels, (B) identification at the retail outlet through "shelf labeling,  
4 signs, menus, or a combination thereof," and (C) " a system of signs, public advertising  
5 identifying the system and toll-free information services, that provides clear and reasonable  
6 warnings." 22 CCR §§ 12601(b)(1)(A)-(C).

7 20. Proposition 65 also establishes a procedure by which the state is to develop a list  
8 of chemicals "known to the State to cause cancer or reproductive toxicity." Health & Safety  
9 Code section 25249.8. No warning need be given concerning a listed chemical until one year  
10 after the chemical first appears on the list. Id., § 25249.10(b).

11 21. Proposition 65 provides that any person "violating or threatening to violate" the  
12 statute may be enjoined in any court of competent jurisdiction. Health & Safety Code, §  
13 25249.7. To "threaten to violate" is defined to mean "to create a condition in which there is a  
14 substantial probability that a violation will occur." Id., § 25249.11(e). In addition, violators are  
15 liable for civil penalties of up to \$2,500 per day for each violation, recoverable in a civil action.  
16 Id., § 25249.7(b). Actions to enforce the law "may be brought by the Attorney General in the  
17 name of the People of the State of California or by any district attorney". Id., § 25249.7(c).

18 **B. The Unfair Competition Act**

19 22. California Business and Professions Code section 17200 provides that "unfair  
20 competition shall mean and include unlawful, unfair or fraudulent business practice." Section  
21 17203 of the Business and Professions Code provides that "(a)ny person performing or proposing  
22 to perform an act of unfair competition within this state may be enjoined in any court of  
23 competent jurisdiction."

24 23. Section 17206(a) provides that any person violating Section 17200 "shall be liable  
25 for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation,  
26 which shall be assessed and recovered in a civil action brought in the name of the people of the  
27 State of California by the Attorney General or by any district attorney." Under section 17205,

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1 these penalties are "cumulative to each other and to the remedies or penalties available under all  
2 other laws of this state."

### 3 **V. FACTS**

4 24. Methylmercury compounds were listed under Proposition 65 as a chemical known  
5 to the State of California to cause cancer on May 1, 1996. Methyl mercury was listed as a  
6 chemical known to the State of California to cause reproductive toxicity on July 1, 1987.  
7 Mercury and mercury compounds were listed as chemicals known to cause reproductive toxicity  
8 on July 1, 1990. 22 CCR § 12000.

9 25. Defendants sell some or all of the following fresh or frozen fish to consumers  
10 within the state of California: Swordfish, Ahi (Yellowfin) tuna, Albacore tuna, shark (hereinafter  
11 "Fish"). The Fish contain mercury and mercury compounds and methyl mercury and  
12 methylmercury compounds, which are ingested by persons eating the Fish. Each defendant  
13 knows or has known since at least July 1, 1988 that the Fish contain methyl mercury; since May  
14 1, 1997 that the Fish contain methylmercury compounds; and since July 1, 1991 that the Fish  
15 contain mercury and mercury compounds, and that persons eating the Fish are exposed to these  
16 chemicals.

17 26. From at least July 1, 1988 to the present, Defendants have failed to provide  
18 consumers of the Fish with a clear and reasonable warning that they are being exposed to a  
19 chemical known to the State of California to cause birth defects or other reproductive harm.

20 27. From at least May 1, 1997 to the present Defendants have failed to provide  
21 consumers of the Fish with a clear and reasonable warning that they are being exposed to a  
22 chemical known to the State of California to cause cancer.

### 23 **VI. FIRST CAUSE OF ACTION**

24 (For Violation of Proposition 65)

25 28. Paragraphs 1 through 27 are realleged as if fully set forth herein.

26 29. Plaintiffs are informed and believe, and based on such information and belief  
27 allege, that each defendant employs ten or more persons.

28 30. By committing the acts alleged above, each defendant has, in the course of doing

1 business, knowingly and intentionally exposed individuals to lead, a chemical known to the state  
2 of California to cause cancer and reproductive toxicity, without first giving clear and reasonable  
3 warning to such individuals, within the meaning of Health and Safety Code section 25249.6.

4 31. Said violations render each defendant liable to plaintiff for civil penalties of up to  
5 \$2,500 per day for each violation.

## 6 **VII. SECOND CAUSE OF ACTION**

7 (For Unlawful Business Practices)

8 32. Paragraphs 1 through 31 are realleged as if fully set forth herein.

9 33. By committing the acts alleged above, each defendant has engaged in unlawful  
10 business practices which constitute unfair competition within the meaning of Business and  
11 Professions Code section 17200.

12 34. Said violations render each defendant liable to plaintiff for civil penalties of up to  
13 \$2,500 per day for each violation.

## 14 **PRAYER FOR RELIEF**

15 WHEREFORE, plaintiffs pray that the Court:

16 1. Pursuant to the First and Second Causes of Action, grant civil penalties according  
17 to proof;

18 2. Pursuant to Health and Safety Code section 25249.7, and Business and  
19 Professions Code sections 17203, enter such preliminary injunctions, permanent injunctions, or  
20 other orders prohibiting defendant from exposing persons within the State of California to  
21 mercury and mercury compounds and methyl mercury and methylmercury compounds without  
22 providing clear and reasonable warnings, as plaintiffs shall specify in further application to the  
23 court;

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- 3. Award plaintiffs their costs of suit;
- 4. Grant such other and further relief as the court deems just and proper.

Respectfully submitted,  
BILL LOCKYER, Attorney General  
of the State of California  
RICHARD M. FRANK  
Chief Assistant Attorney General  
THEODORA BERGER  
Senior Assistant Attorney General  
EDWARD G. WEIL  
Supervising Deputy Attorney General  
SUSAN S. FIERING  
Deputy Attorney General

By: \_\_\_\_\_  
SUSAN S. FIERING  
Deputy Attorney General  
Attorneys for the People