

May 5, 2010

Steven A. Burd
Chairman, President and Chief Executive Officer
Safeway Inc.
5918 Stoneridge Mall Road
Pleasanton, California 94588

Dear Mr. Burd:

The Center for Science in the Public Interest (“CSPI”) demands that Safeway Inc. (“Safeway”) commit to provide adequate notice to its Club Card customers (“Customers”) who have purchased food products subject to Class 1 recalls.¹

If Safeway fails to adopt a policy to ensure adequate notice, and fails to provide adequate notice as soon as practicable after it learns that products it has sold are subject to a Class 1 recall, CSPI plans to bring a lawsuit on behalf of Safeway’s Customers. The lawsuit will allege that Safeway sold defective and dangerous Recalled Products, and then failed to tell its Customers who bought the product. This letter details Safeway’s illegal practices and offers settlement before CSPI files a lawsuit.

Class 1 Recalls

Recalled Products are health hazards because there is a reasonable probability that the products will cause serious health problems or death.² The longer Recalled Products remain in

¹ The FDA and the USDA use three classes of recall: Class 1, Class 2, and Class 3. (The USDA represents the classes by the Roman numerals I, II, and III. This letter refers to both FDA Class 1 recalls and USDA Class I recalls as “Class 1 Recalls” and to products subject to Class 1 Recalls as “Recalled Products.”)

The FDA and the USDA have separate definitions of recall class, but both agencies follow the same general rule of Class 1/I being the most dangerous, Class 2/II being potentially dangerous, and Class 3/III being the least dangerous. The FDA’s guidelines define Class I recalls as “Dangerous or defective products that predictably could cause serious health problems or death.” FDA CONSUMER HEALTH INFO., U.S. FOOD AND DRUG ADMIN., FDA 101: PRODUCT RECALLS 2 (Oct. 2009).

www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM143332.pdf.

The USDA’s guidelines define Class 1 recalls as “[involving] a health hazard situation in which there is a *reasonable* probability that eating the food will cause health problems or death.” Food Safety and Inspection Serv., U.S. Dep’t of Agric., FSIS Food Recalls.

http://www.fsis.usda.gov/factsheets/FSIS_Food_Recalls/index.asp (last visited Apr. 9, 2010).

² FDA CONSUMER HEALTH INFO., U.S. FOOD AND DRUG ADMIN., FDA 101: PRODUCT RECALLS 2 (Oct. 2009) www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM143332.pdf. Food Safety and Inspection Serv., U.S. Dep’t of Agric., FSIS Food Recalls, www.fsis.usda.gov/factsheets/FSIS_Food_Recalls/index.asp (last visited Apr. 9, 2010).

commerce, the greater the likelihood that they will cause illness or injury.³

Safeway's Club Card Membership Program

Safeway's Club Card membership program encourages and entices Customers to return to Safeway through special promotions, pricing, and benefits. Online, Safeway touts its Club Card membership as providing "exclusive savings all across the store AND anytime [Customers] shop online at Safeway.com."⁴

Safeway already uses Club Cards with Customer contact information to track purchases. Safeway can easily identify which Customers purchased products subject to Class 1 recalls, and then advise those Customers that they have purchased a product that puts them at risk of a serious health problem or death.

Many of Safeway's competitors already do just that, reducing the risk of severe harm to their own customers. Safeway should follow suit.

Safeway's Illegal Practices

Because a Class 1 recalled product contains a deadly contaminant, the product is both "adulterated" and "misbranded" in violation of both the United States Food, Drug and Cosmetic Act, and state food and drug laws, such as California's Sherman Law, California Health and Safety Code § 110660.

Safeway has engaged in unfair and deceptive acts and practices by selling dangerous products and then failing to inform its Customers that they are at risk. Safeway's practices violate state consumer protections laws such as Massachusetts G.L. c. 93A, Texas Business & Professions Code § 17.41 *et seq.*, District of Columbia Code § 28-3905 *et seq.*, New Jersey Statutes Ann. 56:8-1 *et seq.*, and California Business & Professions Code Section 17200. Safeway's practices are also negligent and a breach of the warranty of merchantability.

As the retailer of dangerous Recalled Products, Safeway is responsible for the injury caused by its actions. Consumer injury occurs both (1) when a Customer purchases a product subject to a Class 1 recall, and (2) when Safeway fails to inform the Customer in a meaningful manner. Each occurrence is a separate injury.⁵

If litigation is necessary, CSPI plans to seek an injunction prohibiting Safeway from failing to inform Customers — by mail, telephone calls, email, signs in Safeway stores, and statements at Safeway.com — that Safeway sold the Customers products subject to Class 1 recalls; disgorgement or restitution for purchased Recalled Products, damages, and attorneys' fees.

³ USDA FSIS, *Improving Recalls at the Food Safety and Inspection Service: Report of the Recall Policy Working Group*, available at www.fsis.usda.gov/OPPDE/rdad/FRPubs/02-045N/Recall_Rpt.pdf.

⁴ www.safeway.com/ifl/Grocery/Club-Card (last visited Apr. 9, 2010).

⁵ E.g., *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 813 N.E.2d 476 (Mass. 2004).

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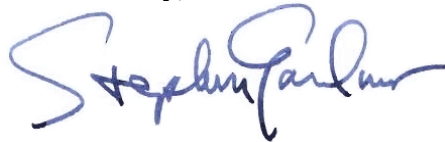
Offer of Settlement

CSPI will forestall filing suit if it can obtain Safeway's agreement to inform all Customers who bought Recalled Products by (1) posting a warning online at Safeway.com, (2) posting signs in the stores that sold Recalled Products, and (3) immediately contacting each Customer — by telephone, letter, and (when possible) email and text messaging — to advise them not to consume the product and offering a full refund of the amount paid for the product.

This offer of settlement will remain open for 30 days from the date of this letter, after which it shall be automatically withdrawn and become null and void.

Please have your own counsel contact me if your company is willing to discuss settlement or needs additional information about this lawsuit.

Sincerely,

A handwritten signature in blue ink that reads "Stephen Gardner". The signature is fluid and cursive, with the first name "Stephen" written in a larger, more prominent script than the last name "Gardner".

Stephen Gardner
Litigation Director

cc: Michael F. Jacobson, Ph.D.
Executive Director

Katherine Campbell
Staff Attorney

Steven A. Skalet, Esq.
Mehri & Skalet, PLLC