

1 Melvin B. Pearlston (SBN 54291)  
2 Robert B. Hancock (SBN 179438)  
3 PACIFIC JUSTICE CENTER  
4 50 California Street, Suite 1500  
5 San Francisco, California 94111  
6 Tel: (415) 310-1940/Fax: (415) 354-3508  
7  
8 Attorneys for Plaintiff

ENDORSED  
FILED  
Superior Court of California  
County of San Francisco

JUN 22 2015

CLERK OF THE COURT  
BY: VICTORIA GONZALEZ  
Deputy Clerk

9 SUPERIOR COURT OF CALIFORNIA  
10 COUNTY OF SAN FRANCISCO

11 ERIKA MCCARTNEY, in the public interest, )  
12 Plaintiff, )  
13 v. )  
14 THEO CHOCOLATE, INC., a Washington )  
15 corporation; and DOES 1 through 500, inclusive, )  
16 Defendants. )

CGC 15-546493  
CIVIL ACTION NO.

COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES

[Cal. Health and Safety Code  
Sec. 25249.6, *et seq.*]

21  
22  
23  
24 BY FAX

## BACKGROUND FACTS

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2           10.     The People of the State of California have declared by initiative under Proposition  
3 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or  
4 other reproductive harm.” Proposition 65 § 1(b).

5           11.     To effectuate this goal, Proposition 65 prohibits exposing people to chemicals listed  
6 by the State of California as known to cause cancer, birth defects or other reproductive harm above  
7 certain levels without a “clear and reasonable warning” unless the business responsible for the  
8 exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6  
9 states, in pertinent part:  
10

11           No person in the course of doing business shall knowingly and intentionally  
12 expose any individual to a chemical known to the state to cause cancer or  
13 reproductive toxicity without first giving clear and reasonable warning to such  
individual ....

14           12.     On May 1, 1997, the State of California officially listed cadmium as a chemical  
15 known to cause reproductive toxicity. Cadmium is specifically identified as a reproductive toxicant  
16 under two subcategories: “developmental reproductive toxicity,” which means harm to the  
17 developing fetus, and “male reproductive toxicity,” which means harm to the male reproductive  
18 system. 27 California Code of Regulations (“C.C.R.”) § 27001(c). On May 1, 1998, one year  
19 after it was listed as a chemical known to cause reproductive toxicity, cadmium became subject to  
20 the clear and reasonable warning requirement regarding reproductive toxicants under Proposition  
21 65.  
22

23           13.     The level of exposure to a chemical causing reproductive toxicity under Proposition  
24 65 is determined by multiplying the level in question times the reasonably anticipated rate of  
25 exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For exposures to consumer  
26

1 products, the level of exposure is calculated using the reasonably anticipated rate of intake or  
2 exposure for average users of the consumer product. 27 C.C.R. § 25821(c)(2).

3 14. Defendant's Product contains sufficient quantities of cadmium such that consumers,  
4 including pregnant women, who consume the Product are exposed to cadmium. The primary route  
5 of exposure for the violations is direct ingestion when consumers orally ingest the Product. These  
6 exposures occur in homes, workplaces and everywhere in California where the Product is  
7 consumed.

8  
9 15. During the relevant one-year period herein, no clear and reasonable warning was  
10 provided with the Product regarding the reproductive hazards of cadmium.

11 16. Any person acting in the public interest has standing to enforce violations of  
12 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid  
13 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action  
14 within such time. Health & Safety Code § 25249.7(d).

15  
16 17. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff  
17 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the  
18 District Attorneys of every county in California, the City Attorneys of every California city with a  
19 population greater than 750,000 and to the named Defendant. In compliance with Health & Safety  
20 Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)  
21 the name and address of each violator; (2) the statute violated; (3) the time period during which  
22 violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure  
23 to cadmium from the Product, and (b) the specific type of Product sold and used in violation of  
24 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of  
25 the violations described in each Notice.  
26

1           18. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney  
2 General, the District Attorneys of every county in California, the City Attorneys of every California  
3 city with a population greater than 750,000 and to the named Defendant. In compliance with  
4 Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that Plaintiff's  
5 counsel: (1) has consulted with one or more persons with relevant and appropriate experience or  
6 expertise who reviewed facts, studies or other data regarding the exposures to Cadmium alleged in  
7 each Notice; and (2) based on the information obtained through such consultations, believes that  
8 there is a reasonable and meritorious case for a citizen enforcement action based on the facts  
9 alleged in each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. §  
10 3102, each Certificate served on the Attorney General included factual information - provided on a  
11 confidential basis – sufficient to establish the basis for the Certificate, including the identity of the  
12 person(s) consulted by the Plaintiff's counsel and the facts, studies or other data reviewed by such  
13 persons.  
14

15           19. None of the public prosecutors with the authority to prosecute violations of  
16 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against  
17 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of  
18 Plaintiff's Notices.  
19

20           20. Defendant both knows and intends that individuals will consume the Product, thus  
21 exposing them to cadmium.  
22

23           21. Under Proposition 65, an exposure is "knowing" where the party responsible for  
24 such exposure has:

25                   knowledge of the fact that a[n] ... exposure to a chemical listed pursuant  
26                   to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that  
                    the ... exposure is unlawful is required.

1 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final  
2 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §  
3 12201).

4  
5 22. Defendant has also been informed of the cadmium in the Product by the 60-Day  
6 Notice of Violation and accompanying Certificate of Merit served on them.

7 23. Defendant also has constructive knowledge that its Product contains cadmium due to  
8 the widespread media coverage concerning the problem of Cadmium in consumer products in  
9 general, and, in particular, cocoa products.

10 24. As an entity that manufactures, imports, distributes and/or sells the Product for use  
11 in the California marketplace, Defendant knows or should know that the Product contains cadmium  
12 and that individuals who consume the Product will be exposed to cadmium. The cadmium  
13 exposures to consumers who consume the Product are a natural and foreseeable consequence of  
14 Defendant's placing the Product into the stream of commerce.

15  
16 25. Nevertheless, Defendant continues to expose consumers to cadmium without prior  
17 clear and reasonable warnings regarding the reproductive hazards of cadmium.

18 26. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior  
19 to filing this Complaint.

20  
21 27. Any person "violating or threatening to violate" Proposition 65 may be enjoined in  
22 any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is  
23 defined to mean "to create a condition in which there is a substantial probability that a violation  
24 will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not  
25 to exceed \$2,500 per day for each violation of Proposition 65.  
26

1 **CAUSE OF ACTION**

2 **(Violations of the Health & Safety Code 25249.6)**

3 28. Plaintiff realleges and incorporates by reference as if specifically set forth herein  
4 Paragraphs 1 through 27, inclusive.

5 29. By placing the Product into the stream of commerce, each Defendant is a person in  
6 the course of doing business within the meaning of Health & Safety Code § 25249.11.  
7

8 30. Cadmium is a chemical listed by the State of California as known to cause birth  
9 defects and other reproductive harm.

10 31. Defendant knows that average use of the Product will expose users of the Product to  
11 cadmium. Defendant intends that the Product be used in a manner that results in exposures to  
12 cadmium from the Products.

13 32. Defendant has failed to provide clear and reasonable warnings regarding the  
14 reproductive toxicity of cadmium to users of the Products.  
15

16 33. By committing the acts alleged above, Defendant has at all times relevant to this  
17 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to  
18 cadmium without first giving clear and reasonable warnings to such individuals regarding the  
19 reproductive toxicity of cadmium.

20 **PRAYER FOR RELIEF**

21 Wherefore, Plaintiff prays for judgment against Defendant as follows:

22 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil  
23 penalties against the Defendant in the amount of \$2,500 per day for each violation of Proposition  
24 65;  
25  
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1           2.       That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and  
2 permanently enjoin Defendant from offering the Product for sale in California without either  
3 reformulating the Products such that no Proposition 65 warnings are required or providing prior  
4 clear and reasonable warnings, as Plaintiff shall specify in further application to the Court;


5           3.       That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendant to  
6 take action to stop ongoing unwarranted exposures to cadmium resulting from use of Product sold,  
7 as Plaintiff shall specify in further application to the Court;

8           4.       That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable  
9 theory or doctrine, grant Plaintiff her reasonable attorneys' fees and costs of suit; and  
10

11          5.       That the Court grant such other and further relief as may be just and proper.  
12

13 Dated: June 19, 2015

PACIFIC JUSTICE CENTER

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16 By:   
17 Robert B. Hancock  
18 Attorneys for Plaintiff  
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