

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 Attorneys for Plaintiff

ENDORSED
FILED
Superior Court of California
County of San Francisco

APR 06 2016

CLERK OF THE COURT
BY: DAVID W. YUEN
Deputy Clerk

9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

BY FAX

11 ERIKA MCCARTNEY, in the public interest,)

12 Plaintiff,)

13 v.)

14 BLUE MARBLE BRANDS, LLC, a Delaware)
15 limited liability company; UNITED NATURAL)
16 FOODS, INC., a Delaware corporation;)
17 UNITED NATURAL TRADING, LLC, a)
18 Delaware limited liability company; and DOES 1)
19 through 500, inclusive,)

20 Defendants.)

CIVIL ACTION NO. 16-551330

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

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

1 Erika McCartney, in the public interest, based on information and belief, except for
2 information pertaining directly to Plaintiff, hereby makes the following allegations.

3
4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants' continuing failure to adequately warn
6 individuals in California that they are being exposed to cadmium, a chemical known to the State of
7 California to cause birth defects and other reproductive harm. Such exposures have occurred, and
8 continue to occur, through the manufacture, distribution, sale and consumption of "Ah!laska
9 Unsweetened Baker's Cocoa" (the "Product"). The Product is available through a multitude of
10 retail channels including, without limitation: (a) third-party traditional brick-and-mortar retail
11 locations; (b) via the internet through third-party retail websites; and (c) directly at Defendants'
12 online store. Consumers are exposed to cadmium when they consume the Product.

13
14 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is
15 unlawful for businesses to knowingly and intentionally expose individuals in California to
16 chemicals known to the State to cause cancer, birth defects or other reproductive harm without
17 providing clear and reasonable warnings to individuals prior to their exposure. Defendants
18 introduce a product contaminated with cadmium into the California marketplace, exposing
19 consumers of the Product to cadmium.

20
21 3. Despite the fact that the Defendants expose consumers to cadmium, during the
22 relevant period, Defendants provided no warning about the reproductive hazards associated with
23 cadmium exposure. Defendants' conduct thus violates the warning provision of Proposition 65,
24 Health & Safety Code § 25249.6.

PARTIES

1
2 4. Plaintiff brings this enforcement action in the public interest pursuant to Health &
3 Safety Code § 25249.7(d).

4 5. Defendant BLUE MARBLE BRANDS, LLC is a Delaware limited liability
5 company with its principal place of business at 313 Iron Horse Way, Providence, Rhode Island.
6 This Defendant is a person in the course of doing business within the meaning of Health & Safety
7 Code § 25249.11. This Defendant manufactures, distributes and/or sells the Product for sale and
8 use in California.

9
10 6. Defendant UNITED NATURAL FOODS, INC. is a Delaware corporation with its
11 principal place of business at 313 Iron Horse Way, Providence, Rhode Island. This Defendant is a
12 person in the course of doing business within the meaning of Health & Safety Code § 25249.11.
13 This Defendant manufactures, distributes and/or sells the Product for sale and use in California.

14 7. Defendant UNITED NATURAL TRADING, LLC is a Delaware limited liability
15 company with its principal place of business at 96 Executive Avenue, Edison, New Jersey. This
16 Defendant is a person in the course of doing business within the meaning of Health & Safety Code
17 § 25249.11. This Defendant manufactures, distributes and/or sells the Product for sale and use in
18 California.

19
20 8. Defendants BLUE MARBLE BRANDS, LLC, UNITED NATURAL FOODS,
21 INC., and UNITED NATURAL TRADING, LLC are related entities, and are agents of one
22 another. There is unity of interest and ownership among Defendants such that the separate
23 personalities of the entities do not exist, and to treat them as separate would sanction a fraud or
24 promote injustice. Accordingly, each Defendant is the alter ego of the others.

1 9. The true names of DOES 1 through 500 are unknown to Plaintiff at this time. When
2 their identities are ascertained, the Complaint shall be amended to reflect their true names.
3

4 **JURISDICTION AND VENUE**

5 10. The Court has jurisdiction over this action pursuant to Health & Safety Code §
6 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
7 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
8 other trial courts.
9

10 11. This Court has jurisdiction over Defendants are business entities that do sufficient
11 business, have sufficient minimum contacts in California or otherwise intentionally avail
12 themselves of the California market through the sale, marketing or use of the Product in California
13 and/or by having such other contacts with California so as to render the exercise of jurisdiction over
14 them by the California courts consistent with traditional notions of fair play and substantial justice.
15

16 12. Venue is proper in San Francisco County Superior Court because one or more of the
17 violations arise in the County of San Francisco, and no defendant has designated a principal office
18 in California.
19

20 **BACKGROUND FACTS**

21 13. The People of the State of California have declared by initiative under Proposition
22 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or
23 other reproductive harm.” Proposition 65 § 1(b).
24

25 14. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals listed
26 by the State of California as known to cause cancer, birth defects or other reproductive harm above

1 certain levels without a “clear and reasonable warning” unless the business responsible for the
2 exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6
3 states, in pertinent part:

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

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

16 16. The level of exposure to a chemical causing reproductive toxicity under Proposition
17 65 is determined by multiplying the level in question times the reasonably anticipated rate of
18 exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For exposures to consumer
19 products, the level of exposure is calculated using the reasonably anticipated rate of intake or
20 exposure for average users of the consumer product. 27 C.C.R. § 25821(c)(2).
21

22 17. The Product contains sufficient quantities of cadmium such that consumers who
23 consume the Product are exposed to cadmium. The primary route of exposure for the violations is
24 direct ingestion when consumers orally ingest the Product. These exposures occur in homes,
25 workplaces and everywhere in California where the Product is consumed.
26

1 18. During the relevant one-year period herein, no clear and reasonable warning was
2 provided with the Product regarding the reproductive hazards of cadmium.

3 19. Any person acting in the public interest has standing to enforce violations of
4 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid
5 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action
6 within such time. Health & Safety Code § 25249.7(d).

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

17 21. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney
18 General, the District Attorneys of every county in California, the City Attorneys of every California
19 city with a population greater than 750,000 and to each named Defendant. In compliance with
20 Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that Plaintiff’s
21 counsel: (1) has consulted with one or more persons with relevant and appropriate experience or
22 expertise who reviewed facts, studies or other data regarding the exposures to cadmium alleged in
23 each Notice; and (2) based on the information obtained through such consultations, believes that
24
25
26

1 there is a reasonable and meritorious case for a citizen enforcement action based on the facts
2 alleged in each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. §
3 3102, each Certificate served on the Attorney General included factual information - provided on a
4 confidential basis – sufficient to establish the basis for the Certificate, including the identity of the
5 person(s) consulted by the Plaintiff’s counsel and the facts, studies or other data reviewed by such
6 persons.

7
8 22. None of the public prosecutors with the authority to prosecute violations of
9 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
10 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of
11 Plaintiff’s Notices.

12 23. Defendants know and intend that individuals will consume the Product, thus
13 exposing them to cadmium.

14 24. Under Proposition 65, an exposure is “knowing” where the party responsible for
15 such exposure has:

16
17 knowledge of the fact that a[n] ... exposure to a chemical listed pursuant
18 to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that
the ... exposure is unlawful is required.

19 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
20 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
21 12201).

22 25. Defendants have further been informed of the cadmium in the Product by the 60-
23 Day Notice of Violation and accompanying Certificate of Merit served on them.
24
25
26

1 32. By placing the Product into the stream of commerce, each Defendant is a person in
2 the course of doing business within the meaning of Health & Safety Code § 25249.11.

3 33. Cadmium is a chemical listed by the State of California as known to cause birth
4 defects and other reproductive harm.

5 34. Defendants know that use of the Product will expose users of the Product to
6 cadmium. Defendants intend that the Product be used in a manner that results in exposures to
7 cadmium from the Product.

8 35. On information and belief, Defendants have failed to provide clear and reasonable
9 warnings regarding the reproductive toxicity of cadmium to users of the Products.
10

11 36. By committing the acts alleged above, Defendants have at times relevant to this
12 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to
13 cadmium without first giving clear and reasonable warnings to such individuals regarding the
14 reproductive toxicity of cadmium.

15 **PRAYER FOR RELIEF**

16 Wherefore, Plaintiff prays for judgment against Defendants as follows:
17

18 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil
19 penalties against each Defendant in the amount of up to \$2,500 per day for each violation of
20 Proposition 65;

21 2. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and
22 permanently enjoin each Defendant from offering the Product for sale in California without either
23 reformulating the Product such that no Proposition 65 warnings are required or providing prior
24 clear and reasonable warnings, as Plaintiff shall specify in further application to the Court;
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

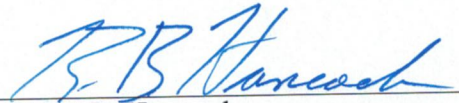
3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order each Defendant to take action to stop ongoing unwarranted exposures to cadmium resulting from use of Product sold, as Plaintiff shall specify in further application to the Court;

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

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

Dated: April 5, 2016.

PACIFIC JUSTICE CENTER

By: 
Robert B. Hancock
Attorneys for Plaintiff