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8 Attorneys for Plaintiff
9 **ERIKA MCCARTNEY**

FILED

Superior Court of California
County of San Francisco

JAN - 5 2018

CLERK OF THE COURT

BY: _____

Deputy Clerk

10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF SAN FRANCISCO**

12 ERIKA MCCARTNEY, in the public interest,)

13 Plaintiff,)

14 v.)

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

21 Defendants.)

CIVIL ACTION NO. CGC-16-551330

~~[PROPOSED]~~ CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 1.1 This Action arises out of the alleged violations of California’s Safe Drinking
3 Water and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5 et
4 seq. (also known as and hereinafter referred to as “Proposition 65”) regarding the following
5 product (hereinafter collectively the “Covered Product”): Ah!laska Unsweetened Baker’s Cocoa.

6 1.2 Plaintiff Erika McCartney (“MCCARTNEY”) is a California resident acting as a
7 private enforcer of Proposition 65. MCCARTNEY has brought this enforcement action in the
8 public interest against Blue Marble Brands, LLC; United Natural Foods, Inc.; and United Natural
9 Trading, LLC (collectively, “BLUE MARBLE” or “Defendants”) concerning cadmium in the
10 Covered Product pursuant to California Health and Safety Code Section 25249.7(d).

11 MCCARTNEY contends she is dedicated to, among other causes, helping safeguard the public
12 from health hazards by reducing the use and misuse of hazardous and toxic chemicals, facilitating
13 a safe environment for consumers and employees, and encouraging corporate responsibility.

14 1.3 Defendants have sold the Covered Product in California.

15 1.4 MCCARTNEY and BLUE MARBLE are hereinafter sometimes referred to
16 individually as a “Party” or collectively as the “Parties.”

17 1.5 On or about January 28, 2016, pursuant to California Health and Safety Code
18 Section 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65
19 (“Notice of Violations”) on the California Attorney General, other public enforcers, and BLUE
20 MARBLE alleging violations of California Health and Safety Code Section 25249.6 with respect
21 to unwarned exposures to cadmium arising from the sale and use of the Covered Product in
22 California.

23 1.6 After more than sixty (60) days passed since service of the Notice of Violations,
24 and with no designated governmental agency having filed a complaint against BLUE MARBLE
25 with regard to the Covered Product or the alleged violations, MCCARTNEY filed the complaint
26 in this matter (“Complaint”) in this Court.

27 1.7 BLUE MARBLE generally denies all material and factual allegations contained in
28 or arising from MCCARTNEY’s Notice of Violations and Complaint, asserts that it has various

1 affirmative defenses to the claims asserted therein. BLUE MARBLE further specifically denies
2 that the Plaintiff or California consumers have been harmed or damaged by its conduct or the
3 products it has sold or sells, including the Covered Product.

4 1.8 The Parties enter into this Consent Judgment and settlement (“Consent Judgment”
5 or “Settlement”) in order to settle, compromise, and resolve disputed claims and avoid prolonged
6 and costly litigation. For purposes of the approval and entry of this Settlement only, the Parties
7 stipulate that this Court has jurisdiction over the subject matter of this Action and personal
8 jurisdiction over the Parties, that venue is proper in this Court, and that this Court has jurisdiction
9 to enter this Consent Judgment pursuant to the terms set forth herein.

10 1.9 Nothing in this Consent Judgment, nor compliance with its terms, shall constitute
11 or be construed as an admission by any of the Parties (or by any of BLUE MARBLE’s respective
12 officers, directors, shareholders, employees, agents, subsidiaries, divisions, affiliates, suppliers or
13 licensees) of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or
14 liability, including without limitation, any admission concerning any alleged violation of
15 Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment shall
16 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
17 other or future legal proceeding. Provided, however, nothing in this Section shall affect the
18 enforceability of this Settlement.

19 1.10 The “Effective Date” of this Settlement shall be the date upon which this Consent
20 Judgment, after having been fully executed by all of the Parties, has been approved and entered
21 by the Court.

22 **2. INJUNCTIVE RELIEF: WARNINGS**

23 2.1 Beginning on the Effective Date, BLUE MARBLE shall be permanently enjoined
24 from Distributing into California any Covered Product without a warning as set forth in paragraph
25 2.2 below. For purposes of this Consent Judgment, “Distributing into California” means to (1)
26 sell directly to any person in California; (2) distribute to any person in California for resale; or (3)
27 distribute to any third party outside California who BLUE MARBLE knows or has reason to
28 know may redistribute into California.

1 2.2 Clear and Reasonable Proposition 65 Warnings

2 For a Covered Product that is subject to the Proposition 65 warning requirement
3 based on Sections 2.1 and above, prior to Distributing into California such Covered Product in the
4 future, the following warning ("Warning") shall be provided as specified below:

5 **WARNING:** Consuming this product can expose you to cadmium, a chemical known to
6 the State of California to cause birth defects or other reproductive harm. For more information go
7 to www.P65Warnings.ca.gov/food.

8 The Warning shall either be affixed to or printed on (at the point of manufacture, prior to
9 shipment to California, or prior to distribution within California) the outside packaging or
10 container of each unit of the Covered Product or provided at the point of display of the Covered
11 Product wherever it is offered for sale in California. The Warning shall be displayed with such
12 conspicuousness, as compared with other words, statements designs or devices on the outside
13 packaging or at the point of display in California, as to render it likely to be read and understood
14 by an ordinary individual prior to purchase or use. If the Warning is displayed on the product
15 container or labeling, the Warning shall be at least the same size as the largest of any other health
16 or safety warnings on the product container or labeling, and the word "WARNING" shall be in all
17 capital letters and in bold print. If presented at the point of display, the Warning shall be
18 presented on a sign or shelf label in a font no smaller than the largest type size used for other
19 information on the sign or on a shelf label for similar products.

20 **3. REQUIRED MONETARY PAYMENTS**

21 3.1 Within fourteen (14) business days of the Effective Date, BLUE MARBLE shall
22 issue three separate checks and send them to counsel for MCCARTNEY, Robert B. Hancock,
23 Pacific Justice Center, 50 California Street, San Francisco, California 94111. The checks shall
24 be payable to the following parties and the payment shall be apportioned as follows:

25 3.2 \$12,500 as civil penalties pursuant to California Health and Safety Code Section
26 25249.7(b)(1). Of this amount, \$9,375 shall be payable to the Office of Environmental Health
27 Hazard Assessment ("OEHHA"), and \$3,125 shall be payable to MCCARTNEY.

1 MCCARTNEY's counsel shall promptly, upon remittance, forward the civil penalty made
2 payable to OEHHA.

3 3.3 \$59,500 payable to Robert B. Hancock as reimbursement of MCCARTNEY's
4 attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and Costs.")

5 3.4 Any failure to remit payment on or before its due date or any failure of said checks
6 to clear shall be deemed a material breach of this Settlement. In that event, the Parties agree that,
7 unless they then all stipulate otherwise: (1) this Settlement shall be deemed mutually rescinded,
8 and all Parties shall be restored to their positions prior to its execution and entry by the Court; and
9 (2) Plaintiff and Defendants shall jointly take all steps necessary to set aside the Consent
10 Judgment entered in connection with the Action, including, without limitation, by way of *ex parte*
11 relief, stipulation or noticed motion.

12 **4. MODIFICATION**

13 This Consent Judgment may be modified only by written agreement and stipulation of the
14 Parties and upon having such stipulation reported to the Office of the California Attorney General
15 at least twenty-one days in advance of its submission to the Court for approval.

16 **5. OVERSIGHT AND ENFORCEMENT OF TERMS**

17 5.1 The Court shall retain jurisdiction to oversee, enforce and/or modify the terms of
18 this Consent Judgment.

19 5.2 Any Party may, by means of filing an application for an order to show cause,
20 enforce the terms and conditions contained in this Settlement and Consent Judgment. The
21 prevailing party in any such action or application may request that the Court award its reasonable
22 attorneys' fees and costs associated with such action or application.

23 **6. APPLICATION OF CONSENT JUDGMENT**

24 This Consent Judgment shall apply to and be binding upon the Parties and their respective
25 privies, successors, and assigns, and it shall be deemed to inure to the benefit of the Parties and
26 their respective privies, successors and assigns.

27 **7. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

28 7.1 This Consent Judgment is a full, final, and binding resolution between

1 MCCARTNEY, on behalf of herself and in the public interest on the one hand, and BLUE
2 MARBLE on the other hand, of any and all direct or derivative violations (or claimed violations)
3 of Proposition 65 or its implementing regulations for failure to provide Proposition 65 warnings
4 of exposure to cadmium from the handling, use, or consumption of the Covered Product, and it
5 fully resolves all claims that have been or could have been asserted up to and including the
6 Effective Date for the alleged failure to provide Proposition 65 warnings for the Covered Product
7 regarding cadmium as set forth in the Notices of Violations and Complaint.

8 7.2 MCCARTNEY on her own behalf (and not in her role as a representative of the
9 public interest) further hereby releases and discharges, BLUE MARBLE and its past and present
10 officers, directors, owners, shareholders, employees, agents, parent companies, subsidiaries,
11 divisions, affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers,
12 retailers, and all other upstream and downstream entities and persons in the distribution chain of
13 any Covered Product, and the predecessors, successors and assigns of any of them (collectively,
14 "Released Parties"), from any and all claims and causes of action and obligations to pay damages,
15 restitution, fines, civil penalties, payment in lieu of civil penalties and expenses (including but not
16 limited to expert analysis fees, expert fees, attorney's fees and costs) (collectively, "Claims")
17 based on exposure to cadmium from the Covered Product and/or failure to warn about cadmium
18 in the Covered Product to the extent the Covered Product was Distributed into California prior to
19 the Effective Date.

20 7.3 Unless modified pursuant to Section 4 above, compliance with the terms of
21 Section 2.1 and 2.2 of this Consent Judgment shall be deemed to constitute compliance with
22 Proposition 65 regarding the Covered Product.

23 7.4 It is possible that other Claims not known to MCCARTNEY arising out of the
24 facts alleged in the Notice of Violations or the Complaint will develop or be discovered.
25 MCCARTNEY acknowledges on behalf of herself (and not in her role as a representative of the
26 public interest) that the Claims released herein include all known and unknown Claims and
27 waives California Civil Code Section 1542 as to any such unknown Claims. California Civil
28 Code Section 1542 reads as follows:

1 "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR
2 DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME
3 OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE
4 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

5 MCCARTNEY acknowledges and understands the significance and consequences of this specific
6 waiver of California Civil Code section 1542.

7 7.5 MCCARTNEY, on one hand, and BLUE MARBLE, on the other hand, each
8 release and waive all Claims they may have against each other for any statements or actions made
9 or undertaken by them in connection with the Notice of Violation and Complaint or the
10 allegations contained therein. However, this shall not affect or limit any Party's right to seek to
11 enforce the terms of this Settlement and Consent Judgment. In addition, going forward, the
12 Parties shall not cause any aspect of the Action, the Notice of Violations, the Complaint, or the
13 terms of this Settlement not otherwise available in the public record to be reported to the public or
14 any media or news reporting outlet. Any statement to the public or any media or news reporting
15 outlet shall be limited to what is available in the public record and documents publicly filed.
16 Regardless of the form or formality of a communication or statement to the media or other person
17 or entity, neither any Party nor their counsel shall disparage the other. Notwithstanding these
18 obligations, the Parties may make such disclosures regarding the Action and terms of this
19 Settlement as necessary to auditors or as otherwise required by state or federal law.

20 **8. CONSTRUCTION AND SEVERABILITY**

21 8.1 The terms and conditions of this Consent Judgment and Settlement have been
22 reviewed by the respective counsel for the Parties prior to its signing, and each Party has had an
23 opportunity to fully discuss the terms and conditions with its counsel. In any subsequent
24 interpretation or construction of this Settlement, the terms and conditions shall not be construed
25 against any Party.

26 8.2 In the event that any of the provisions of this Settlement is held by a court to be
27 unenforceable, the validity of the remaining enforceable provisions shall not be adversely
28 affected.

1 8.3 The terms and conditions of this Settlement shall be governed by and construed in
2 accordance with the laws of the State of California.

3 **9. PROVISION OF NOTICE**

4 All notices required to be given to either Party to this Consent Judgment by the other shall
5 be in writing and sent to the following agents listed below by: (a) first-class, registered, (b)
6 certified mail, (c) overnight courier, (d) personal delivery, or (e) electronic mail, to the following:

7 For Erika McCartney:
8 Robert B. Hancock
9 PACIFIC JUSTICE CENTER
10 50 California Street, Suite 1500
11 San Francisco, California 94111
12 rbh@lawyer.com

13 For BLUE MARBLE:
14 Laura J. Carroll
15 ZUBER LAWLER & DEL DUCA, LLP
16 777 South Figueroa Street, Suite 3700
17 Los Angeles, California 90017
18 lcarroll@zuberlaw.com

19 **10. COURT APPROVAL**

20 10.1 The Parties shall use their reasonable best efforts to support the Court's approval
21 of the Settlement and entry of the associated Consent Judgment.

22 10.2 If the California Attorney General objects to any term in this Settlement, the
23 Parties shall use their best efforts to resolve the concern in a timely manner, and, if possible, prior
24 to the hearing on the Motion for Court Approval.

25 10.3 If, despite the Parties' best efforts, the Court does not approve this Settlement and
26 enter a Consent Judgment thereon, the parties shall have the option of (a) undertaking further
27 discussions toward resolving the matter amicably or (b) determining that the Settlement is null
28 and void and of no force or effect, in which event, all payment-related obligations set forth in
Section 3 above shall be deemed never to have existed and the parties may thereafter proceed of
their own accord.

1 **11. EXECUTION AND COUNTERPARTS**

2 This Consent Judgment and Settlement may be executed in counterparts, which taken
3 together shall be deemed one document. A facsimile or .pdf signature shall be construed as valid
4 and as the original signature.

5 **12. ENTIRE AGREEMENT, AUTHORIZATION**

6 12.1 This Settlement contains the sole and entire agreement and understanding of the
7 Parties with respect to the entire subject matter herein, and any and all prior discussions,
8 negotiations, commitments and understandings related hereto. No representations, oral or
9 otherwise, express or implied, other than those contained herein have been made by any party.
10 No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to
11 exist or to bind any party.

12 12.2 Each signatory to this Settlement certifies that he or she is fully authorized by the
13 party he or she represents to enter to this Settlement. Except as explicitly provided herein, each
14 party shall bear its own fees and costs.

15 **13. REQUEST FOR FINDINGS AND FOR APPROVAL**

16 13.1 This Consent Judgment has come before the Court upon the request of the Parties.
17 The Parties request the Court to fully review this Consent Judgment and, being fully informed
18 regarding the matters which are the subject of this action, to:

19 (a) Find that the terms and provisions of this Consent Judgment represent a
20 good faith settlement of all matters raised by the allegations of the Complaint, that the matter has
21 been diligently prosecuted, and that the public interest is served by such settlement; and

22 (b) Make the findings pursuant to California Health and Safety Code Section
23 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

24 **IT IS SO STIPULATED.**

25 Dated: 10/31/17

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27 _____
28 Erika McCartney

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Dated: 11/7/17

BLUE MARBLE BRANDS, LLC

By: [Signature]

Its: Assistant General Counsel

Dated: 11/7/17

UNITED NATURAL BRANDS, INC.

By: [Signature]

Its: Assistant General Counsel

Dated: 11/7/17

UNITED NATURAL TRADING, LLC.

By: [Signature]

Its: Assistant General Counsel

APPROVED AS TO FORM:

Dated: 11/2/17

PACIFIC JUSTICE CENTER

By: [Signature]

Robert B. Hancock
Attorneys for Plaintiff

Dated: 11/8/17

ZUBER LAWLER & DEL DUCA LLP

By: [Signature]

Laura J. Carroll
Attorneys for Defendants

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JUDGMENT

Based upon the Parties' Stipulation, and good cause appearing therefor, this Consent Judgment is approved and judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: 1/5/10

Richard B. Ulmer (4/5/10)
Judge of the Superior Court

HON. RICHARD B. ULMER