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10 **SUPERIOR COURT OF CALIFORNIA**

11 **COUNTY OF SAN FRANCISCO**

12 ERIKA MCCARTNEY, in the public interest,)

13 Plaintiff,)

14 v.)

15 WHOLE FOODS MARKET CALIFORNIA,)
INC; MRS. GOOCH'S NATURAL FOOD)
16 MARKETS, INC; and DOES 1 through 500,)
Inclusive,)

17 Defendants.)
18

Civil Action No. CGC-16-555096

**[PROPOSED] CONSENT
JUDGMENT**

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

[PROPOSED] CONSENT JUDGMENT

McCartney v. Whole Foods Market California, Inc. et al. CGC-16-555096

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1 to unwarned exposures of lead arising from the sale and use of the Covered Product in California.

2 Defendants acknowledge they received the Notice of Violations.

3 1.6 After more than sixty (60) days passed since service of the Notice of Violations,
4 and with no designated governmental agency having filed a complaint against Defendants with
5 regard to the Covered Product or the Alleged Violations, MCCARTNEY filed the complaint in
6 this matter ("Complaint") in this Court.

7 1.7 Defendants generally deny all material and factual allegations contained in or
8 arising from McCartney's Notice of Violations and Complaint and assert that they have various
9 affirmative defenses to the claims asserted therein. Defendants further specifically deny that the
10 Plaintiff or California consumers have been harmed or damaged by its conduct or the products
11 they have sold or sell, including the Covered Product.

12 1.8 The Parties enter into this Consent Judgment ("Consent Judgment") in order to
13 settle, compromise, and resolve disputed claims and avoid prolonged and costly litigation. For
14 purposes of the approval and entry of this Settlement only, the Parties stipulate that this Court has
15 jurisdiction over the subject matter of this Action and personal jurisdiction over the Parties, that
16 venue is proper in this Court, and that this Court has jurisdiction to enter this Consent Judgment
17 pursuant to the terms set forth herein.

18 1.9 Nothing in this Consent Judgment, nor compliance with its terms, shall constitute
19 or be construed as an admission by any of the Parties (or by any of Defendants' respective officers,
20 directors, shareholders, employees, agents, subsidiaries, divisions, affiliates, suppliers, or
21 licensees) of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or
22 liability, including without limitation, any admission concerning any alleged violation of
23 Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment shall

1 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
2 other or future legal proceeding.

3 1.10 The "Effective Date" of this Settlement shall be ninety (90) days after the date upon
4 which this Consent Judgment, after having been fully executed by all of the Parties, has been
5 approved and entered by the Court.

6 **2. INJUNCTIVE RELIEF: WARNINGS**

7 2.1 Beginning on the Effective Date, Defendants shall be permanently enjoined from
8 selling in California any Covered Product that does not comply with Proposition 65 without a
9 warning as set forth in Paragraph 2.2 below. "Selling in California" means selling any of the
10 Covered Product to consumers in California.

11 2.2 Clear and Reasonable Proposition 65 Warnings. For a Covered Product that is
12 subject to Proposition 65 warning requirement based on sections 2.1 and above, prior to
13 Distributing such Covered Product, the following warning ("Warning") shall be specified below.

14 **WARNING:** Consuming this product can expose you to chemicals including lead,
15 which is known to the State of California to cause cancer and birth defects or other
reproductive harm. For more information go to www.P65Warnings.ca.gov/food

16 The Warning shall be either affixed on the outside container wherever it is offered for sale
17 in California or shall be placed on a shelf talker where the product is displayed for sale. The
18 Warning shall be displayed with such conspicuousness, as compared with other words, statements,
19 designs or devices on the point of display in California, as to render it likely to be read and
20 understood by any ordinary individual prior to purchase or use. The Parties agree that the form
21 and placement of the warning depicted in the document attached as Exhibit A hereto satisfies the
22 requirements of this paragraph.
23

1 The Parties agree that should the OEHHA warning regulations change, that Defendants
2 may either conform with the OEHHA regulations or conform with the terms provided in this
3 Consent Judgment, and in so doing, will be in compliance with this Consent Judgment.

4 3. NOTICE AND CURE/MEET AND CONFER

5 3.1 At any time more than 30 days after the Effective Date of this Consent
6 Judgment, McCartney may provide one of the Defendants with a Notice of Violation, alleging
7 that COVERED PRODUCT does not comply with section 2.1 of this Consent Judgment.
8 McCartney shall provide with the Notice of Violation sent to the Defendant in question copies of
9 documents and laboratory analysis that support the allegations of non-compliance.

10 3.2 Within 30 days of receiving such a Notice of Violation ("NOV"),
11 Defendant receiving the NOV shall provide to McCartney its Notice of Election to contest or not
12 to contest the Notice of Violation. If Defendant receiving the NOV elects not to contest the
13 NOV, it shall, within 10 business days after providing its Notice of Election, label the
14 COVERED PRODDUCT with a warning and provide McCartney with written notice confirming
15 such actions has been taken. If Defendant receiving the NOV elects not to contest and otherwise
16 complies with this paragraph, it shall be deemed to be in compliance with this Consent Judgment
17 and McCartney may take no further action related to the alleged non-compliant products and the
18 NOV and McCartney may not hold Defendants liable for any other remedies, including
19 injunctive relief, penalties, sanctions, monetary award, attorney's fees, or costs associated with
20 the investigation and prosecution of the alleged non-compliant products the Notice of Violation
21 for which Defendant elected – pursuant to this paragraph – to settle and not to contest. Each
22 Defendant may avail itself of this provision three times *in toto* (three for Whole Foods Market
23 California, Inc. and three for Mrs. Gooch's Natural Food Markets, Inc.)

24 3.3 In the event Defendant receiving the NOV elects to contest the allegations
25 contained in any Notice of Violation McCartney sends pursuant to this Section, Defendant

1 receiving the NOV may provide McCartney along with its Notice of Election any evidence that,
2 in Defendant's judgment, supports its position. In the event McCartney agrees with Defendant's
3 position, it shall within 15 days of receiving such Notice of Election and evidence notify
4 Defendant receiving the NOV of its agreement and McCartney shall take no further action
5 regarding the Alleged Non-Compliant COVERED PRODUCTS subject to the Notice and the
6 evidence that Defendant provided. If McCartney disagrees with Defendant's position,
7 McCartney shall, within 30 days, notify Defendant receiving the NOV of such and shall in
8 writing provide Defendant receiving the NOV with the reasons for McCartney's disagreement.
9 Thereafter, the Parties shall meet and confer to attempt to resolve their dispute or mutually
10 acceptable terms.

11 3.4 If within 60 days of receipt of a Notice of Violation either a.) there is no
12 resolution of the meet and confer process required under paragraph 2.3; b.) Defendant receiving
13 the NOV fails to provide written Notice of Election not to contest the Notice of Violation; or c.)
14 Defendant receiving the NOV fails to correct any uncontested violations identified in the Notice
15 of Violation within 30 days, then McCartney may – at its election – seek to enforce the terms and
16 conditions contained in this Consent Judgment in the Superior Court of the State of California, or
17 may initiate an enforcement action for new violations pursuant to Health & Safety Code §
18 25249.7(d). In any such proceeding, McCartney may seek whatever fines, costs, penalties or
19 remedies as may be provided by law for any violation of Proposition 65 or this Consent
20 Judgment.

19 4. REQUIRED MONETARY PAYMENTS

20 4.1 Defendants shall issue the following payments and send them to counsel for
21 McCartney, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,
22 California 94111. The checks shall be payable to the following parties and the payment shall be
23 apportioned as follows:

4.2 \$22,500 as civil penalties pursuant to California Health and Safety Code Section 252497(b)(1). Of this amount, \$16,875 shall be payable to OEHHHA, \$3,000 shall be payable to McCartney, and \$2,625 shall be payable to CancerCare, a qualified 501(c)(3) charitable organization, dedicated to providing financial aid to cancer patients for treatment costs. McCartney hereby waives any statutory entitlement to penalties in excess of \$3,000. McCartney's counsel shall promptly forward all checks to the payees indicated.

4.3 \$47,500 payable to Robert B. Hancock as reimbursement of McCartney's attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and Costs"). Of this sum, counsel shall donate \$3,000 to CancerCare.

4.4 Any failure to remit any of the foregoing payments results in mutual rescission of the agreement, as though no resolution had been had. In that event, the parties stipulate to vacating the Consent Judgment, and will cooperate in securing an order for the same.

4.5 McCartney shall provide Defendants with a W-9 for each entity receiving a monetary payment. Defendants shall then have 20 days from the date of receipt of the signed Consent Judgment and receipt of the applicable W-9s to make payment.

5. MODIFICATION

This Consent Judgment may be modified only by written agreement and stipulation of the Parties and upon having such stipulation reported to the Office of the California Attorney General at least twenty-one (21) days in advance of its submission to the Court for approval.

6. OVERSIGHT AND ENFORCEMENT OF TERMS

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

1 6.2 Any Party may, by means of filing an application for an order to show cause,
2 enforce the terms and conditions contained in this Settlement and Consent Judgment. The
3 prevailing party in any such action or application may request that the Court award its reasonable
4 attorneys' fees and costs associated with such action or application.

5 7. **APPLICATION OF CONSENT JUDGMENT**

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

9 8. **BINDING EFFECT, CLAIMS COVERED AND RELEASED**

10 8.1 This Consent Judgment is a full, final, and binding resolution between McCartney,
11 on behalf of herself and in the public interest on the one hand, and Defendants on the other hand,
12 of any and all direct or derivative violations (or claimed violations) of Proposition 65 or its
13 implementing regulations for failure to provide Proposition 65 warnings of exposure to lead from
14 the handling use, or consumption of the Covered Product, and it fully resolves all claims that have
15 been or could have been asserted up to and including the Effective Date for the alleged failure to
16 provide Proposition 65 warnings for the Covered Product regarding lead as set forth in the Notice
17 of Violations and Complaint.

18 8.2 McCartney on her own behalf (and not in her role as a representative of the public
19 interest) further hereby releases and discharges Defendants and their past and present officers,
20 directors, owners, shareholders, employees, agents, parent companies, subsidiaries, divisions,
21 affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers, retailers, and all
22 other upstream and downstream entities and persons in the distribution chain of any Covered
23 Product, and the predecessors, successors, and assigns of any of them (collectively, "Released

1 Parties”), from any and all claims and causes of action and obligations to pay damages, restitution,
2 fines, civil penalties, payment in lieu of civil penalties and expenses (including but not limited to
3 expert analysis fees, expert fees, attorneys’ fees and costs) (collectively, “Claims”) based on
4 exposure to lead from the Covered Product and/or failure to warn about lead in the Covered
5 Product to the extent that the Covered Product was sold prior to the Effective Date. Excluded from
6 this release is United Natural Foods, Inc. and any related or affiliated entity, Blue Marble Brands,
7 LLC and any related or affiliated entity, and. United Natural Trading, LLC, d/b/a Woodstock
8 Farms Manufacturing, or any related or affiliated entity, such entities being the subject of a
9 separate action and consent judgment.

10 8.3 Unless modified pursuant to Section 4 above, compliance with the terms of Section
11 2.1 of this Consent Judgment shall be deemed to constitute compliance with Proposition 65
12 regarding the Covered Product.

13 8.4 It is possible that other Claims not known to McCartney arising out of the facts
14 alleged in the Notice of Violations or the Complaint will develop or be discovered. McCartney
15 acknowledges on behalf of herself (and not in the role as representative of the public interest) that
16 the Claims released herein include all known and unknown Claims and waives California Civil
17 Code Section 1542 as to any such unknown Claims. California Civil Code Section 1542 reads as
18 follows:

19 **“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
20 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
21 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN**
22 **BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER**
23 **SETTLEMENT WITH THE DEBTOR.”**

1 McCartney acknowledges and understands the significance and consequences of this specific
2 waiver of the California Civil Code section 1542.

3 8.5 McCartney, on the one hand, and Defendants, on the other hand, each release and
4 waive all Claims they may have against each other for any statements or actions made or
5 undertaken by them in connection with the Notice of Violation and Complaint or the allegations
6 contained therein. However, this shall not affect or limit any party's right to seek to enforce the
7 terms of this Settlement and Consent Judgment. In addition, going forward, the parties shall not
8 cause any aspect of the Action, the Notice of Violations, the Complaint, or the terms of this
9 Settlement not otherwise available in the public record to be reported to the public or any media
10 or news reporting outlet. Any statement to the public or any media or news reporting outlet shall
11 be limited to what is available in the public record and documents publicly filed. Regardless of
12 the form or formality of a communication or statement to the media or other person or entity,
13 neither any Party nor their counsel shall disparage the other. Notwithstanding these obligations,
14 the Parties may make such disclosure regarding the Action and terms of this Settlement as
15 necessary to auditors or as otherwise required by state or federal law.

16 **9. CONSTRUCTION AND SEVERABILITY**

17 9.1 The terms and conditions of this Consent Judgment and Settlement have been
18 reviewed by the respective counsel for the parties prior to its signing, and each party has had an
19 opportunity to fully discuss the terms and conditions with its counsel. In any subsequent
20 interpretation or construction of this Settlement, the terms and conditions shall not be construed
21 against any Party.

22 9.2 In the event that any of the provision of this Settlement is held by a court to be
23 unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

1 9.3 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 **10. 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) certified
6 mail, (c) overnight courier, or (d) personal delivery to the following:

7 **For Erika McCartney:**

8 PACIFIC JUSTICE CENTER
9 Robert B. Hancock
10 50 California Street, Suite 1500
11 San Francisco, California 94111

12 **For Whole Foods Market California, Inc. and Mrs. Gooch's Natural Food Markets, Inc.:**

13 BLAXTER BLACKMAN LLP
14 J.T. Wells Blaxter
15 601 California Street, Suite 1505
16 San Francisco, California 94108

17 **11. COURT APPROVAL**

18 11.1 The Parties shall use their reasonable best efforts to support the Court's approval
19 of the Settlement and entry of the associated Consent Judgment.

20 11.2 If the California Attorney General objects to any term in this Settlement, the Parties
21 shall use their best efforts to resolve the concern in a timely manner, and, if possible, prior to the
22 hearing on the Motion for Court Approval.

23 11.3 If, despite the Parties' best efforts, the Court does not approve this Settlement and
enter a Consent Judgment thereon, the parties shall have the option of (a) proceeding to try and
resolve the matter amicably, or (b) determining that the Settlement is null and void and of no force

1 or effect, in which event, all payment-related obligations set forth in Section 3 above shall be
2 deemed never to have existed and the parties may thereafter proceed of their own accord.

3 **12. EXECUTION AND COUNTERPARTS**

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

7 **13. ENTIRE AGREEMENT, AUTHORIZATION**

8 13.1 This Consent Judgment contains the sole and entire agreement and understanding
9 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,
10 negotiations, commitments, and understandings related hereto. No representations, oral or
11 otherwise, express or implied, other than those contained herein have been made by any party.

12 13.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized
13 by the party he or she represents to enter into this Consent Judgment. Except as explicitly provided
14 herein, each party shall bear its own fees and costs.

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


16 14.1 This Consent Judgment has come before the Court upon the request of the Parties.
17 The Parties request the Court fully review this Consent Judgment and, being fully informed
18 regarding the matters which are the subject to this action, to:

19 (a) Find that the terms and provisions of this Consent Judgment represent a good faith
20 settlement of all matters raised by the allegations of the Complaint, that the matter has been
21 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 25249.7(f)(4),
23 and approve this Consent Judgment.

1 IT IS SO STIPULATED:

2 Dated: 1/10/19


Erika McCartney

4 Dated: 1-7-19

WHOLE FOODS MARKET CALIFORNIA,
INC.

By: 

7 Dated: 1-7-19

MRS. GOOCH'S NATURAL FOOD
MARKETS, INC.

By: 

10 APPROVED AS TO FORM:

Its: ABC, L.P.
PACIFIC JUSTICE CENTER

12 Dated: 1/10/19

By: 

Elizabeth D. Sonnichsen
Attorneys for Plaintiff

15 Dated: 1/10/19

BLAXTER BLACKMAN LLP

By: 

J.T. Wells Blaxter
Attorney for Defendants