

FILED
San Francisco County Superior Court

JAN 05 2017

CLERK OF THE COURT

BY: Stella Green
Deputy Clerk

1 Melvin B. Pearlston (SBN 54291)
2 Robert B. Hancock (SBN 179438)
3 PACIFIC JUSTICE CENTER
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5 San Francisco, California 94111
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7 Attorneys for Plaintiff
8 **ERIKA MCCARTNEY**

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SAN FRANCISCO**

11 ERIKA MCCARTNEY, in the public interest,)
12 Plaintiff,)
13 v.)
14 TRADER JOE'S COMPANY, a California)
15 corporation; and DOES 1 through 500, inclusive,)
16 Defendants.)

CIVIL ACTION NO. CGC-16-551071
JK
[PROPOSED] CONSENT JUDGMENT
[Cal. Health & Safety Code
Sec. 25249.6, *et seq.*]

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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 the “Covered Product” or when referring to it in the plural, the “Covered
6 Products”): Trader Joe’s Cocoa Powder Unsweetened -- made from 100% Tumaco Cocoa Beans
7 (SKU No. 93050).

8 1.2 Plaintiff Erika McCartney (“MCCARTNEY”) is a California resident acting as a
9 private enforcer of Proposition 65. MCCARTNEY has brought this enforcement action in the
10 public interest against Trader Joe’s Company (“TRADER JOE’S” or “Defendant”) concerning
11 cadmium in the Covered Product pursuant to California Health and Safety Code Section
12 25249.7(d). MCCARTNEY is dedicated to, among other causes, helping safeguard the public
13 from health hazards by reducing the use and misuse of hazardous and toxic chemicals, facilitating
14 a safe environment for consumers and employees, and encouraging corporate responsibility.

15 1.3 Defendant TRADER JOE’S has sold and sells the Covered Product in California.
16 The Covered Product itself is manufactured, packaged, and supplied to TRADER JOE’S by Casa
17 Luker, S.A. (“CASA LUKER”). CASA LUKER has previously provided an indemnity to
18 TRADER JOE’S concerning the Covered Product’s compliance with all applicable law, including
19 Proposition 65, but has no agent for service of process in the United States. It has not been
20 named as a defendant in this case.

21 1.4 MCCARTNEY and TRADER JOE’S are hereinafter sometimes referred to
22 individually as a “Party” or collectively as the “Parties.”

23 1.5 On or about September 22, 2014, pursuant to California Health and Safety Code
24 Section 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65
25 (“Notice of Violations”) on the California Attorney General, other public enforcers, and
26 TRADER JOE’S alleging violations of California Health and Safety Code Section 25249.6 with
27 respect to unwarned exposures to cadmium arising from the sale and use of the Covered Product
28 in California.

1 1.6 After more than sixty (60) days passed since service of the Notice of Violations,
2 and with no designated governmental agency having filed a complaint against TRADER JOE'S
3 with regard to the Covered Product or the alleged violations, MCCARTNEY filed the complaint
4 in this matter ("Complaint") in this Court.

5 1.7 TRADER JOE'S generally denies all material and factual allegations contained in
6 or arising from MCCARTNEY's Notice of Violations and Complaint, assert that it has various
7 affirmative defenses to the claims asserted therein. TRADER JOE'S further specifically denies
8 that the Plaintiff or California consumers have been harmed or damaged by its conduct or the
9 products it has sold or sells, including the Covered Product.

10 1.8 The Parties enter into this Consent Judgment and settlement ("Consent Judgment"
11 or "Settlement) in order to settle, compromise, and resolve disputed claims and avoid prolonged
12 and costly litigation. For purposes of the approval and entry of this Settlement only, the Parties
13 stipulate that this Court has jurisdiction over the subject matter of this Action and personal
14 jurisdiction over the Parties, that venue is proper in this Court, and that this Court has jurisdiction
15 to enter this Consent Judgment pursuant to the terms set forth herein.

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

25 1.10 The "Effective Date" of this Settlement shall be the date upon which
26 MCCARTNEY provides TRADER JOE'S with notice that this Consent Judgment, after having
27 been fully executed by all of the Parties, has been approved and entered by the Court.

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1 **2. INJUNCTIVE RELIEF: LABELING, TESTING, AND WARNINGS**

2 2.1 Beginning on the Effective Date, TRADER JOE'S shall permanently cease and
3 desist from selling in, or offering for sale in, California any Covered Product except to the extent
4 a Proposition 65-compliant warning is provided as to such Covered Product as set forth in Section
5 2.4 below.

6 2.2 All Covered Products that have been manufactured for TRADER JOE'S prior to
7 the Effective Date of this Consent Judgment are exempt from the provisions of Sections 2.1, 2.3,
8 and 2.4 and are included within the release in Sections 7.1 through 7.4. To be in compliance,
9 TRADER JOE'S is not required to undertake efforts to remove such previously manufactured
10 Covered Products from the stream of commerce.

11 2.3 To facilitate the implementation of Section 2.1 and provide MCCARTNEY with a
12 means to oversee it relative to the enforcement provisions set forth in Section 5 below, the best by
13 date associated with the initial set of Covered Products TRADER JOE'S obtains following the
14 Effective Date shall be provided to counsel for MCCARTNEY by TRADER JOE'S, via mail,
15 within fourteen (14) business days thereof.

16 2.4 Clear and Reasonable Proposition 65 Warnings. For a Covered Product that is
17 subject to the Proposition 65 warning requirement based on Sections 2.1 and 2.2 above, the
18 following warning ("Warning") shall be provided for it to the extent it is sold in, or offered for
19 sale in, California by TRADER JOE'S as specified below:

20 [California Proposition 65] WARNING: This product contains
21 [cadmium,] a chemical known to the State of California to cause birth
22 defects or other reproductive harm. [For more information go to
23 www.P65Warnings.ca.gov]

24 The text in brackets in the warnings above is optional.

25 The Warning shall either be affixed to or printed on (at the point of manufacture, prior to
26 shipment to California, or prior to distribution within California) the outside packaging or
27 container of each unit of the Covered Product or provided at the point of display of the Covered
28 Product wherever it is offered for sale in California. The Warning shall be displayed with such

1 conspicuousness, as compared with other words, statements designs or devices on the outside
2 packaging or at the point of display in California, as to render it likely to be read and understood
3 by an ordinary individual prior to purchase or use. If the Warning is displayed on the product
4 container or labeling, the Warning shall be at least the same size as the largest of any other health
5 or safety warnings on the product container or labeling, and the word "WARNING" shall be in all
6 capital letters and in bold print. If presented at the point of display, the Warning shall be
7 presented on a sign or shelf label in a font no smaller than the largest type size used for other
8 information on the sign or on a shelf label for similar products.

9 **3. REQUIRED MONETARY PAYMENTS**

10 3.1 On behalf of TRADER JOE'S, using funds previously deposited by CASA
11 LUKER in contemplation of this Settlement, the Morrison & Foerster LLP Client Trust
12 ("CLIENT TRUST") shall make a total settlement payment, as further specified below, totaling
13 \$85,000, which shall be in full and final satisfaction of any and all civil penalties, payment in lieu
14 of civil penalties, and attorneys' fees and costs associated with this matter.

15 3.2 Within seven (7) business days of the Effective Date, on behalf of TRADER
16 JOE'S, the CLIENT TRUST account administrator shall issue three separate checks and send
17 them to counsel for MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California
18 Street, San Francisco, California 94111. The checks shall be payable to the following parties and
19 the payment shall be apportioned as follows:

20 3.2.1 \$30,000 (thirty thousand dollars) as civil penalties pursuant to California Health
21 and Safety Code Section 25249.7(b)(1). Of this amount, \$25,000 (twenty-five thousand dollars)
22 shall be payable to the Office of Environmental Health Hazard Assessment ("OEHHA"), and
23 \$5,000 (five thousand dollars) shall be payable to MCCARTNEY. (Because the amount allocated
24 to OEHHA is in excess of that required under Cal. Health & Safety Code § 25249.12(c)(1) and
25 the amount allocated to MCCARTNEY is less than that specified under Cal. Health & Safety
26 Code § 25249.12 (d), MCCARTNEY hereby waives any and all rights to any penalties in excess
27 of the amount specified in this Section.) MCCARTNEY's counsel shall promptly, upon
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1 remittance, forward the civil penalty made payable to OEHHA to Mike Gyurics, Fiscal
2 Operations Branch Chief of OEHHA, P.O. Box 4010, Sacramento, CA 95812-4010.

3 3.2.2 \$55,000 (Fifty-five thousand dollars) payable to Pacific Justice Center as
4 reimbursement of MCCARTNEY's attorneys' fees, costs, investigation and litigation expenses
5 ("Attorney's Fees and Costs"). Of this amount, McCartney's shall donate 5%, amounting to
6 \$2,750 (two thousand seven hundred fifty dollars) to the California chapter of the March of
7 Dimes, a qualified charitable organization dedicated to the prevention of birth defects. Counsel
8 for MCCARTNEY shall remit these funds within five (5) days of receipt of the award for fees,
9 costs, investigation and litigation expenses. Counsel for MCCARTNEY shall file a declaration
10 attesting to the foregoing within ten (10) days of the remittance to the California chapter of the
11 March of Dimes.

12 3.3 Any failure to remit payment on or before its due date or any failure of said checks
13 to clear shall be deemed a material breach of this Settlement. In that event, the Parties agree that,
14 unless they then all stipulate otherwise: (1) this Settlement shall be deemed mutually rescinded,
15 and all Parties shall be restored to their positions prior to its execution and entry by the Court; and
16 (2) Plaintiff and Trader Joe's shall jointly take all steps necessary to set aside the Consent
17 Judgment entered in connection with the Action, including, without limitation, by way of ex parte
18 relief, stipulation or noticed motion.

19 **4. MODIFICATION**

20 This Consent Judgment may be modified only by written agreement and stipulation of the
21 Parties and upon having such stipulation reported to the Office of the California Attorney General
22 at least twenty-one days in advance of its submission to the Court for approval. MCCARTNEY
23 shall not unreasonably withhold agreement to any modification requested by TRADER JOE'S
24 based on a change or clarification in law. If, despite their meet and confer efforts, the Parties are
25 unable to reach agreement on a stipulated modification, either Party may file a noticed motion for
26 modification with the Court for good cause shown, provided a copy of the motion is also served
27 on the other Party and the Office of the California Attorney General. Should a modification
28 based on a change or clarification in law be sought by contested motion, the prevailing Party shall

1 be entitled to an award of reasonable attorneys' fees and costs incurred in connection with such
2 proceeding.

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

4 5.1 The Court shall retain jurisdiction to oversee, enforce and/or modify the terms of
5 this Consent Judgment.

6 5.2 Subject to Section 5.3, any Party may, by means of filing an application for an
7 order to show cause, enforce the terms and conditions contained in this Settlement and Consent
8 Judgment. The prevailing party in any such action or application may request that the Court
9 award its reasonable attorneys' fees and costs associated with such action or application.

10 5.3 Before filing an application for an order to show cause, MCCARTNEY shall
11 provide TRADER JOE'S with 30 (thirty) days written notice of any alleged violations of the
12 terms of Injunctive Relief contained in Section 2 herein. As long as TRADER JOE'S cures any
13 such alleged violations within the 30 (thirty) days of receipt of the written notice by ceasing the
14 sale of the Covered Product in California until such time as warnings are provided for it pursuant
15 to Section 2.4 above, then there shall be deemed no material violation.

16 **6. APPLICATION OF CONSENT JUDGMENT**

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

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

21 7.1 This Consent Judgment is a full, final, and binding resolution between
22 MCCARTNEY, on behalf of herself and in the public interest on the one hand, and TRADER
23 JOE'S on the other hand, of any and all direct or derivative violations (or claimed violations) of
24 Proposition 65 or its implementing regulations for failure to provide Proposition 65 warnings of
25 exposure to cadmium from the handling, use, or consumption of the Covered Product, and it fully
26 resolves all claims that have been or could have been asserted up to and including the Effective
27 Date for the alleged failure to provide Proposition 65 warnings for the Covered Product regarding
28 cadmium as set forth in the Notice of Violations and Complaint.

1 7.2 MCCARTNEY on her own behalf (and not in her role as a representative of the
2 public interest) further hereby releases and discharges, TRADER JOE'S and its past and present
3 officers, directors, owners, shareholders, employees, agents, parent companies, subsidiaries,
4 divisions, affiliates, suppliers (including CASA LUKER), franchisees, licensees, customers,
5 distributors, wholesalers, retailers, and all other upstream and downstream entities and persons in
6 the distribution chain of any Covered Product, and the predecessors, successors and assigns of
7 any of them (collectively, "Released Parties"), from any and all claims and causes of action and
8 obligations to pay damages, restitution, fines, civil penalties, payment in lieu of civil penalties
9 and expenses (including but not limited to expert analysis fees, expert fees, attorney's fees and
10 costs) (collectively, "Claims") based on exposure to cadmium from the Covered Product and/or
11 failure to warn about cadmium in the Covered Product to the extent the Covered Product was sold
12 prior to the Effective Date.

13 7.3 Unless modified pursuant to Section 4 above, compliance with the terms of
14 Section 2.1 or 2.4 of this Consent Judgment shall be deemed to constitute compliance with
15 Proposition 65 regarding the Covered Product.

16 7.4 It is possible that other Claims not known to MCCARTNEY arising out of the
17 facts alleged in the Notice of Violations or the Complaint will develop or be discovered.
18 MCCARTNEY acknowledges on behalf of herself (and not in her role as a representative of the
19 public interest) that the Claims released herein include all known and unknown Claims and
20 waives California Civil Code Section 1542 as to any such unknown Claims. California Civil
21 Code Section 1542 reads as follows:

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

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

1 7.5 MCCARTNEY, on one hand, and TRADER JOE’S, on the other hand, each
2 release and waive all Claims they may have against each other for any statements or actions made
3 or undertaken by them in connection with the Notice of Violations and Complaint or the
4 allegations contained therein. However, this shall not affect or limit any Party’s right to seek to
5 enforce the terms of this Settlement and Consent Judgment. In addition, going forward, the
6 Parties shall not cause any aspect of the Action, the Notice of Violations, the Complaint, or the
7 terms of this Settlement not otherwise available in the public record to be reported to the public or
8 any media or news reporting outlet. Any statement to the public or any media or news reporting
9 outlet shall be limited to what is available in the public record and documents publicly filed.
10 Regardless of the form or formality of a communication or statement to the media or other person
11 or entity, neither any Party nor their counsel shall disparage the other. Notwithstanding these
12 obligations, the Parties may make such disclosures regarding the Action and terms of this
13 Settlement as necessary to auditors or as otherwise required by state or federal law.

14 **8. CONSTRUCTION AND SEVERABILITY**

15 8.1 The terms and conditions of this Consent Judgment and Settlement have been
16 reviewed by the respective counsel for the Parties prior to its signing, and each Party has had an
17 opportunity to fully discuss the terms and conditions with its counsel. In any subsequent
18 interpretation or construction of this Settlement, the terms and conditions shall not be construed
19 against any Party.

20 8.2 In the event that any of the provisions of this Settlement is held by a court to be
21 unenforceable, the validity of the remaining enforceable provisions shall not be adversely
22 affected.

23 8.3 The terms and conditions of this Settlement shall be governed by and construed in
24 accordance with the laws of the State of California.

25 **9. PROVISION OF NOTICE**

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

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For Erika McCartney:
Robert B. Hancock
PACIFIC JUSTICE CENTER
50 California Street, Suite 1500
San Francisco, California 94111

For Trader Joe's Company:
Daniel J. Faria
O'Melveny & Myers LLP
400 S. Hope Street
Los Angeles, CA 90071

With a copy to:
Robert L. Falk
MORRISON & FOERSTER LLP
425 Market Street, 32nd Floor
San Francisco, California 94105

10. COURT APPROVAL

10.1 MCCARTNEY has previously complied with the reporting form requirements referenced in California Health & Safety Code section 25249.7(f) relative to this Settlement but, to ensure an accurate public record is maintained and that changes made in response to comments previously received from the California Attorney General's office are reflected therein, MCCARTNEY's counsel shall provide an updated copy of it to the California Attorney General's office within ten (10) days of its execution.

MCCARTNEY shall also file and serve the California Attorney General's office with an updated Motion for Court Approval of a Consent Judgment as to TRADER JOE'S based on this updated version of the Settlement as fully executed by the Parties. MCCARTNEY and her counsel shall be responsible on their own to establish in the Motion for Court Approval that such Attorney's Fees and Costs are appropriate for the work done in this matter. Consistent with Section 3.2.2 above, MCCARTNEY and her counsel agree not to seek more than \$55,000 in fee and cost reimbursement. TRADER JOE'S shall not oppose the amount of attorney's fees and costs for which MCCARTNEY seeks court approval as long as the request does not exceed \$55,000. The Parties shall otherwise continue to use their reasonable best efforts to support the Court's approval of the Settlement and entry of the associated Consent Judgment.

1 10.2 If the California Attorney General objects to any term in this Settlement, the
2 Parties shall use their best efforts to resolve the concern in a timely manner, and, if possible, prior
3 to the hearing on the Motion for Court Approval.

4 10.3 If, despite the Parties' best efforts, the Court does not approve this Settlement and
5 enter a Consent Judgment thereon, TRADER JOE'S shall have the option of (a) proceeding to try
6 and resolve the matter amicably or (b) determining that the Settlement is null and void and of no
7 force or effect, in which event, all payment-related obligations set forth in Section 3 above shall
8 be deemed never to have existed and MCCARTNEY may thereafter proceed of her own accord.

9 **11. EXECUTION AND COUNTERPARTS**

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

13 **12. ENTIRE AGREEMENT, AUTHORIZATION**

14 12.1 This Settlement contains the sole and entire agreement and understanding of the
15 Parties with respect to the entire subject matter herein, and any and all prior discussions,
16 negotiations, commitments and understandings related hereto. No representations, oral or
17 otherwise, express or implied, other than those contained herein have been made by any party.
18 No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to
19 exist or to bind any party.

20 12.2 Each signatory to this Settlement certifies that he or she is fully authorized by the
21 party he or she represents to enter to this Settlement. Except as explicitly provided herein, each
22 party shall bear its own fees and costs.

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

24 13.1 This Consent Judgment has come before the Court upon the request of the Parties.
25 The Parties request the Court to fully review this Consent Judgment and, being fully informed
26 regarding the matters which are the subject of this action, to:

27 (a) Find that the terms and provisions of this Consent Judgment represent a
28 good faith settlement of all matters raised by the allegations of the Complaint, that the matter has

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been diligently prosecuted, and that the public interest is served by such settlement; and

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

IT IS SO STIPULATED:

Dated: _____ Erika McCartney

Dated: _____ TRADER JOE'S COMPANY
By: _____
(Print Name)
Its: _____
(Title)

APPROVED AS TO FORM:

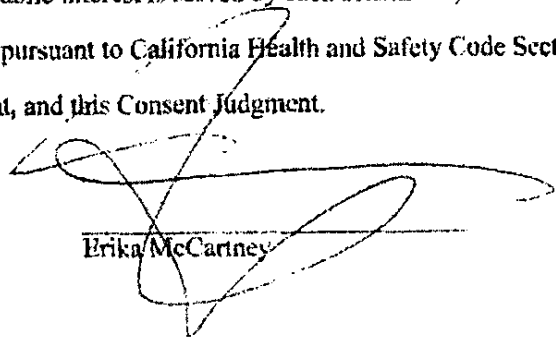
Dated: _____ PACIFIC JUSTICE CENTER
By: _____
Robert B. Hancock
Attorneys for Plaintiff
ERIKA MCCARTNEY

Dated: _____ O'MELVENY & MYERS LLP
By: _____
Daniel Faria
Attorneys for Defendant
TRADER JOE'S COMPANY

1 been diligently prosecuted, and that the public interest is served by such settlement; and
2 (b) Make the findings pursuant to California Health and Safety Code Section
3 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

4 **IT IS SO STIPULATED:**

5 Dated: 11/5/16


Erika McCartney

8 Dated: _____

TRADER JOE'S COMPANY


11 By: _____
(Print Name)

12 Its: _____
(Title)

14 **APPROVED AS TO FORM:**

16 Dated: 11/5/16

PACIFIC JUSTICE CENTER

18 By: 
Robert B. Hancock
Attorneys for Plaintiff
ERIKA MCCARTNEY

21 Dated: _____

O'MELVENY & MYERS LLP

23 By: _____
Daniel Faria
Attorneys for Defendant
TRADER JOE'S COMPANY

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been diligently prosecuted, and that the public interest is served by such settlement; and

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

IT IS SO STIPULATED:

Dated: _____

Erika McCartney

Dated: November 10, 2016

TRADER JOE'S COMPANY



By: Kathryn Cahon
(Print Name)

Its: General Counsel
(Title)

APPROVED AS TO FORM:

Dated: _____

PACIFIC JUSTICE CENTER

By: _____
Robert B. Hancock
Attorneys for Plaintiff
ERIKA MCCARTNEY

Dated: _____

O'MELVENY & MYERS LLP

By: _____
Daniel Faria
Attorneys for Defendant
TRADER JOE'S COMPANY

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been diligently prosecuted, and that the public interest is served by such settlement; and

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

IT IS SO STIPULATED:

Dated: _____

Erika McCartney

Dated: _____

TRADER JOE'S COMPANY

By: _____
(Print Name)

Its: _____
(Title)

APPROVED AS TO FORM:


Dated: _____

PACIFIC JUSTICE CENTER

By: _____
Robert B. Hancock
Attorneys for Plaintiff
ERIKA MCCARTNEY

Dated: November 10, 2016

O'MELVENY & MYERS LLP

By: 

Daniel Faria
Attorneys for Defendant
TRADER JOE'S COMPANY


ORDER AND 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: _____

1/5/11



Judge of the Superior Court

HAROLD KAHN

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