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FILED
Superior Court of California
County of San Francisco

JUL - 7 2017

CLERK OF THE COURT

BY: _____ Deputy Clerk

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

13 ERIKA MCCARTNEY, in the public interest,)
14 Plaintiff,)
15 v.)
16 TCHO VENTURES, INC., a Delaware)
17 corporation; and DOES 1 through 500, inclusive,)
18 Defendants.)

CIVIL ACTION NO. CGC-15-548092
~~PROPOSED~~ STIPULATED CONSENT JUDGMENT
[Cal. Health and Safety Code Sec. 25249.6, *et seq.*]

~~PROPOSED~~ STIPULATED CONSENT JUDGMENT
McCartney v. TCHO Ventures, Inc., Case No. CGC-15-548092

1 **1. INTRODUCTION**

2 **1.1** This Action arises out of the alleged violations of California’s Safe Drinking Water
3 and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5 et seq.
4 (also known as and hereinafter referred to as “Proposition 65”) regarding TCHO Natural Cocoa
5 Powder and TCHO Roasted Cacao Nibs (hereinafter the “Covered Products.”)

6 **1.2** Plaintiff ERIKA MCCARTNEY (“MCCARTNEY”) is a California resident acting
7 as a private enforcer of Proposition 65. MCCARTNEY brings this Action in the public interest
8 pursuant to California Health and Safety Code Section 25249.6. MCCARTNEY asserts that she is
9 dedicated to, among other causes, helping safeguard the public from health hazards by reducing the
10 use and misuse of hazardous and toxic chemicals and substances, facilitating a safe environment for
11 consumers and employees, and encouraging corporate responsibility.

12 **1.3** Defendant TCHO Ventures, Inc., is a Delaware corporation, and is referred to
13 hereinafter as “TCHO Ventures.”

14 **1.4** TCHO Ventures manufactures, distributes, and sells the Covered Products.

15 **1.5** MCCARTNEY and TCHO Ventures are hereinafter sometimes referred to
16 individually as a “Party” or collectively as the “Parties.”

17 **1.6** On or about January 27, 2015, 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 TCHO
20 Ventures. A true and correct copy of the Notice of Violations is attached hereto as Exhibit A.

21 **1.7** After more than sixty (60) days passed since service of the Notice of Violations, and
22 no designated governmental agency filed a complaint against TCHO Ventures with regard to the
23 Covered Products or the alleged violations, MCCARTNEY filed a complaint (the “Complaint”) for
24 injunctive relief and civil penalties. The Complaint is based on the allegations in the Notice of
25 Violations.

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1 **1.8** The Complaint and the Notice of Violations each allege that TCHO Ventures
2 manufactured, distributed, and/or sold in California the Covered Products, which contain cadmium,
3 a chemical listed under Proposition 65 as causing birth defects or other reproductive harm, and
4 exposed consumers thereto. Further, the Complaint and Notice of Violations allege that use of the
5 Covered Products expose persons in California to cadmium without first providing clear and
6 reasonable warnings, in violation of California Health and Safety Code Section 25249.6. TCHO
7 Ventures generally denies all material and factual allegations of the Notice of Violations and the
8 Complaint, and specifically denies that the Plaintiff or California consumers have been harmed or
9 damaged by its conduct. TCHO Ventures further asserts that the cadmium levels in the Covered
10 Products is naturally occurring as the result of natural geological and plant processes in the areas
11 where the cacao plants, from which the cacao beans are sourced, are grown. MCCARTNEY and
12 TCHO Ventures each reserves all rights to allege additional facts, claims, and affirmative defenses
13 if the Court does not approve this Consent Judgment.

14 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
15 resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent
16 Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any of
17 the Parties, or by any of their respective officers, directors, shareholders, employees, agents, parent
18 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors,
19 wholesalers, or retailers, of any fact, conclusion of law, issue of law, violation of law, fault,
20 wrongdoing, or liability, including without limitation, any admission concerning any alleged
21 violation of Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment
22 shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in
23 any other or future legal proceeding. Provided, however, nothing in this Section shall affect the
24 enforceability of this Consent Judgment.

1 **1.10** The “Effective Date” of this Consent Judgment shall be the date this Consent
2 Judgment is entered as a Judgment.

3 **2. JURISDICTION AND VENUE**

4 The Parties stipulate that this Court has jurisdiction over the subject matter of this Action
5 and personal jurisdiction over the Parties, that venue is proper in this Court, and that this Court has
6 jurisdiction to enter this Consent Judgment pursuant to the terms set forth herein.

7 **3. INJUNCTIVE RELIEF, REFORMULATION, TESTING, AND WARNINGS**

8 **3.1** Beginning on the Effective Date, TCHO Ventures shall be permanently enjoined
9 from offering for sale to a consumer in California, directly selling to a consumer in California, or
10 “Distributing into California” any of the Covered Products without a Proposition 65 compliant
11 warning, consistent with Section 3.3, below, unless exempted under Section 3.2 below, without
12 Court modification of this Consent Judgment. “Distributing into California” or “Distribute into
13 California” means to ship any of the Covered Products to California for sale or to sell any of the
14 Covered Products to a distributor that TCHO Ventures knows or has reason to know will sell the
15 Covered Products in California.

16 **3.2** All units of the Covered Products that have been or will have been distributed,
17 shipped, or sold, or otherwise placed in the stream of commerce through and including the
18 Effective Date of this Consent Judgment are exempt from the provisions of Sections 3.1 and 3.3
19 and are included within the release in Sections 8.1 through 8.4. To be in compliance with the terms
20 of this Consent Judgment, TCHO Ventures is not required to undertake any efforts or conduct to
21 remove such Covered Products from the stream of commerce.

22 **3.3 Clear and Reasonable Warnings**

23 For the Covered Products that are subject to the warning requirement of Section 3.1, TCHO
24 Ventures shall provide the following warning (“Warning”) as specified below:
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1 **WARNING:** Consuming this product can expose you to chemicals including
2 cadmium, which is known to the State of California to cause birth defects or other
3 reproductive harm. For more information go to www.P65Warnings.ca.gov/food

4 The Warning shall be provided in the manners described in 27 Cal. Admin Code Sections
5 25602 and 25607.1.

6 Notwithstanding the above, TCHO Ventures may modify the above Warning language to
7 include any additional Proposition 65 chemicals and/or to comply with changes to Proposition 65's
8 implementing regulations regarding the content and methods of transmission of warnings.

9 Displaying the Warning on the outside packaging or container of each unit of the Covered
10 Products is deemed to be a clear and reasonable warning under, and to fully comply with, Health &
11 Safety Section 25249.6 and the implementing regulations at Title 27 California Code of
12 Regulations Sections 25601 through 25605.2, as they may be hereinafter amended.

13 **4. SETTLEMENT PAYMENT**

14 **4.1** TCHO VENTURES shall make a total payment of \$95,000, except as otherwise
15 provided in Section 4.4 below, within ten days of the Effective Date, which shall be in full and final
16 satisfaction of any and all civil penalties, payment in lieu of civil penalties, and attorneys' fees and
17 costs.

18 **4.2** The payment will be in the form of separate checks sent to counsel for
19 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,
20 California 94111. The checks shall be payable to the following parties and the payment shall be
21 apportioned as follows:

22 **4.3** \$20,000 as civil penalties pursuant to California Health and Safety Code Section
23 25249.7(b)(1). Of this amount, \$15,000 shall be payable to the Office of Environmental Health
24 Hazard Assessment ("OEHHA"), and \$5,000 shall be payable to MCCARTNEY. (Cal. Health &
25 Safety Code § 25249.12(c)(1) & (d)). MCCARTNEY's counsel will forward the civil penalty to
26 OEHHA.

1 **4.4** \$75,000 payable to Robert B. Hancock as reimbursement of MCCARTNEY's
2 attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and Costs.")
3 MCCARTNEY and her counsel agree not to seek more than \$75,000. TCHO Ventures shall not
4 oppose the amount of Attorney's Fees and Costs for which MCCARTNEY seeks approval.

5 **5. MODIFICATION OF CONSENT JUDGMENT**

6 **5.1** This Consent Judgment may be modified only by: (i) Written agreement and
7 stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment
8 by the Court; or (ii) Upon entry of a modified Judgment by the Court pursuant to a motion by one
9 of the Parties after exhausting the meet and confer process set forth as follows. If either Party
10 requests or initiates a modification, then it shall meet and confer with the other Party in good faith
11 before filing a motion with the Court seeking to modify it. MCCARTNEY is entitled to
12 reimbursement of all reasonable attorneys' fees and costs regarding the Parties' meet and confer
13 efforts for any modification requested or initiated by TCHO Ventures. Similarly, TCHO Ventures
14 is entitled to reimbursement of all reasonable attorney's fees and costs regarding the Parties' meet
15 and confer efforts for any modification requested or initiated by MCCARTNEY. If, despite their
16 meet and confer efforts, the Parties are unable to reach agreement on any proposed modification the
17 party seeking the modification may file the appropriate motion and the prevailing party on such
18 motion shall be entitled recover its reasonable fees and costs associated with such motion. One
19 basis, but not the exclusive basis, for TCHO Ventures to seek a modification of this Consent
20 Judgment is if Proposition 65 is changed, narrowed, limited, or otherwise rendered inapplicable in
21 whole or in part to the Covered Products or cadmium due to legislative change, a change in the
22 implementing regulations, court decisions, or other legal basis.

23 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT**

24 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or terminate
25 this Consent Judgment.
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1 **6.2** Any Party may, by motion or application for an order to show cause filed with this
2 Court, enforce the terms and conditions contained in this Consent Judgment. The prevailing party
3 in any such motion or application may request that the Court award its reasonable attorneys' fees
4 and costs associated with such motion 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 officers, directors, successors and assigns, and it shall benefit the Parties and their respective
8 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,
9 affiliates, franchisees, licensees, customers, distributors, wholesalers, retailers, predecessors,
10 successors, and assigns.

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

12 **8.1** This Consent Judgment is a full, final, and binding resolution between
13 MCCARTNEY, on behalf of herself and in the public interest, and TCHO Ventures, of any and all
14 direct or derivative violations (or claimed violations) of Proposition 65 or its implementing
15 regulations for failure to provide Proposition 65 warnings of exposure to cadmium from the
16 handling, use, or consumption of the Covered Products and fully resolves all claims that have been
17 or could have been asserted in this Action up to and including the Effective Date for alleged failure
18 to provide Proposition 65 warnings for the Covered Products regarding cadmium as alleged in the
19 Notice of Violations and in the Complaint. MCCARTNEY, on behalf of herself and in the public
20 interest, hereby forever releases and discharges, TCHO Ventures and its past and present officers,
21 directors, owners, shareholders, employees, agents, attorneys, parent companies, subsidiaries,
22 divisions, affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers, private
23 labelers, co-packers, retailers, and all other upstream and downstream entities and persons in the
24 distribution chain of any Covered Products, and the predecessors, successors and assigns of any of
25 them (collectively, "Released Parties"), from any and all claims and causes of action and
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1 obligations to pay damages, restitution, fines, civil penalties, payment in lieu of civil penalties and
2 expenses (including but not limited to expert analysis fees, expert fees, attorney's fees and costs)
3 (collectively, "Claims") arising under, based on, or derivative of Proposition 65 or its implementing
4 regulations up through the Effective Date based on alleged exposure to cadmium from the Covered
5 Products and/or failure to warn about cadmium, as set forth in the Notice of Violations and the
6 Complaint.

7 **8.2** Compliance with the terms of this Consent Judgment shall be deemed to constitute
8 compliance by any Released Party with Proposition 65 regarding alleged exposures to cadmium
9 from the Covered Products as set forth in the Notice of Violations and the Complaint.

10 **8.3** It is possible that other Claims not known to MCCARTNEY arising out of the facts
11 alleged in the Notice of Violations or the Complaint and relating to cadmium in the Covered
12 Products that were manufactured, sold or Distributed into California before the Effective Date will
13 develop or be discovered. MCCARTNEY, on behalf of herself only, acknowledges that the Claims
14 released herein include all known and unknown Claims and waives California Civil Code Section
15 1542 as to any such unknown Claims. California Civil Code Section 1542 reads as follows:

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

21 MCCARTNEY, on behalf of herself only, acknowledges and understands the significance and
22 consequences of this specific waiver of California Civil Code section 1542.

23 **8.4** MCCARTNEY, on one hand, and TCHO Ventures, on the other hand, each release
24 and waive all Claims they may have against each other for any statements or actions made or
25 undertaken by them in connection with the Notice of Violations or the Complaint. However, this
26 shall not affect or limit any Party's right to seek to enforce the terms of this Consent Judgment.

1 **9. CONSTRUCTION AND SEVERABILITY**

2 **9.1** The terms and conditions of this Consent Judgment have been reviewed by the
3 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to fully
4 discuss the terms and conditions with its counsel. In any subsequent interpretation or construction
5 of this Consent Judgment, the terms and conditions shall not be construed against any Party.

6 **9.2** In the event that any of the provisions of this Consent Judgment is held by a court to
7 be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
8 affected.

9 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
10 construed in accordance with the laws of the State of California.

11 **10. PROVISION OF NOTICE**

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

15 **For Erika McCartney:**

16 Melvin B. Pearlston
17 Robert B. Hancock
18 PACIFIC JUSTICE CENTER
19 50 California Street, Suite 1500
20 San Francisco, California 94111

21 **For TCHO Ventures, Inc.:**

22 Brena M. Roos, Esq.
23 Perkins Coie LLP
24 1201 Third Avenue, Suite 4900
25 Seattle, Washington 98101-3099

26 **11. COURT APPROVAL**

1 **11.1** Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall
2 notice a Motion for Court Approval. The Parties shall use their best efforts to support entry of this
3 Consent Judgment.

4 **11.2** If the California Attorney General objects to any term in this Consent Judgment, the
5 Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to
6 the hearing on the motion.

7 **11.3** If, despite the Parties' best efforts, the Court does not approve this Stipulated
8 Consent Judgment it shall be null and void and have no force or effect.

9 **12. EXECUTION AND COUNTERPARTS**

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

13 **13. ENTIRE AGREEMENT, AUTHORIZATION**

14 **13.1** This Consent Judgment contains the sole and entire agreement and understanding of
15 the 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. No
18 other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist
19 or to bind any Party.

20 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized
21 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly
22 provided herein, each Party shall bear its own fees and costs.

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

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

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

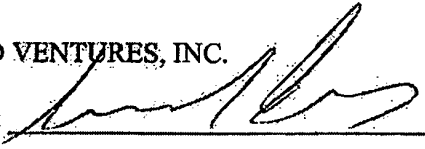
IT IS SO STIPULATED.

Dated: 5/10/17



Erika McCartney

Dated: 5/9/17

TCHO VENTURES, INC.
Name: 


Title: CEO

~~ORDER AND JUDGMENT~~

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

4 IT IS SO ORDERED, ADJUDGED AND DECREED.

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6 Dated: dn, 2017.



7 Judge of the Superior Court

8 HON. HAROLD KAHN
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