

**FILED**

San Francisco County Superior Court

APR 14 2017

CLERK OF THE COURT

BY: Alieba Sheen  
Deputy Clerk

1 PACIFIC JUSTICE CENTER  
Melvin B. Pearlston (State Bar No. 54291)  
2 Robert B. Hancock (State Bar No. 179438)  
rbh@lawyer.com  
3 50 California Street, Suite 1500  
San Francisco, California 94111  
4 Telephone: 415.310.1940

5 Attorneys for Plaintiff

6 ROGERS JOSEPH O'DONNELL  
7 James Robert Maxwell (State Bar No. 143203)  
jmaxwell@rjo.com  
8 311 California Street  
San Francisco, California 94104  
9 Telephone: 415.956.2828  
Facsimile: 415.956.6457

10 Attorneys for Defendants

11  
12  
13 SUPERIOR COURT OF CALIFORNIA  
14 COUNTY OF SAN FRANCISCO

15 ERIKA MCCARTNEY, in the public interest, )  
16 Plaintiff, )  
17 v. )  
18 ADVANTAGE HEALTH MATTERS, INC., a )  
19 corporation; HEALTH MATTERS AMERICA, )  
20 INC., a Delaware corporation, and DOES 1  
21 through 500, inclusive, )  
Defendants. )

CIVIL ACTION NO. CGC-15-545930  
[PROPOSED] STIPULATED CONSENT  
JUDGMENT; [PROPOSED] ORDER  
[Cal. Health and 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 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 Organic Traditions Cacao  
5 Nibs, hereinafter the "Covered Product."

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, facilitating a safe environment for consumers and  
11 employees, and encouraging corporate responsibility.

12           1.3     Defendant and signatory hereto, HEALTH MATTERS AMERICA, INC. is a  
13 Delaware corporation, and is referred to hereinafter as "HEALTH MATTERS AMERICA."

14           1.4     HEALTH MATTERS AMERICA distributes and sells the Covered Product in  
15 California.

16           1.5     MCCARTNEY and HEALTH MATTERS AMERICA are hereinafter sometimes  
17 referred to individually as a "Party" or collectively as the "Parties."

18           1.6     On or about December 18, 2014, and March 11, 2015, pursuant to California Health  
19 and Safety Code Section 25249.7(d)(1), MCCARTNEY served 60-Day Notices of Violation of  
20 Proposition 65 ("Notice of Violations") on HEALTH MATTERS AMERICA and defendant  
21 Advantage Health Matters, Inc., the California Attorney General, and other public enforcers. True  
22 and correct copies of the Notices of Violations are attached hereto as Exhibits A and B,  
23 respectively.

24           1.7     After more than sixty (60) days passed since service of the Notices of Violation, and  
25 no designated governmental agency filed a complaint or otherwise is diligently prosecuting a claim  
26 against HEALTH MATTERS AMERICA or Advantage Health Matters, Inc. with regard to the  
27 Covered Product or the alleged violations therein, MCCARTNEY filed an initial and first amended

1 complaint (the "FAC") for injunctive relief and civil penalties. The FAC is based on the  
2 allegations in the Notice of Violations.

3 1.8 The FAC and the Notice of Violations each allege, in pertinent part that HEALTH  
4 MATTERS AMERICA manufactured, distributed, and/or sold in California the Covered Product  
5 containing cadmium, a chemical listed under Proposition 65 as a reproductive toxin, and exposed  
6 consumers at a level requiring a Proposition 65 warning. Further, the FAC and Notice of  
7 Violations allege that the Covered Product was sold in California without first providing clear and  
8 reasonable warnings, in violation of California Health and Safety Code Section 25249.6. HEALTH  
9 MATTERS AMERICA generally denies all material and factual allegations of the Notice of  
10 Violation and the FAC, filed an answer asserting various affirmative defenses, specifically denies  
11 that the Plaintiff or California consumers have been harmed or damaged by its conduct in any  
12 manner whatsoever, and maintains that the Covered Product is completely safe for its intended use.  
13 HEALTH MATTERS AMERICA and MCCARTNEY each reserve all rights to allege additional  
14 facts, claims, and affirmative defenses if the Court does not approve this Consent Judgment.

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

26 1.10 The "Effective Date" of this Consent Judgment shall be the date this Consent  
27 Judgment is entered as a Judgment by the Court.

1     **2.     JURISDICTION AND VENUE**

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

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

7             3.1     Beginning on the Effective Date, HEALTH MATTERS AMERICA shall be  
8 permanently enjoined from offering for sale to a consumer in California, directly selling to a  
9 consumer in California, or "Distributing into California" any of the Covered Product for which an  
10 18 gram serving size contains more than 4.1 micrograms of cadmium unless the label of the  
11 Covered Product contains a Proposition 65 warning, consistent with Section 3.4, below.  
12 "Distributing into California" or "Distribute into California" means to ship any of the Covered  
13 Product to California for sale or to sell any of the Covered Product to a distributor that HEALTH  
14 MATTERS AMERICA knows or has reason to know will sell the Covered Product in California.  
15 Provided, however, that HEALTH MATTERS AMERICA may manufacture or package and sell  
16 Covered Product for which an 18 gram serving size contains more than 4.1 micrograms of  
17 cadmium per day without providing a Proposition 65 warning so long as such products are only for  
18 sale to consumers located outside of California and HEALTH MATTERS AMERICA does not  
19 distribute them into California.

20             After the Effective Date, HEALTH MATTERS AMERICA shall not publish on the label of  
21 the Covered Product or on its website any recipe that calls for the use of the Covered Product  
22 which would, by serving, result in an exposure to cadmium greater than 4.1 micrograms without  
23 providing a Proposition 65 warning.

24             3.2     All Covered Product that has been or will have been distributed, shipped, sold, or  
25 otherwise placed in the stream of commerce through and including the Effective Date of this  
26 Consent Judgment are exempt from the provisions of Sections 3.1, and 3.3 through 3.4 and are  
27 included within the release in Sections 8.1 through 8.4. To be in compliance with the terms of this

1 Consent Judgment, HEALTH MATTERS AMERICA is not required to undertake any efforts or  
2 conduct to remove such Covered Product from the stream of commerce or otherwise alter its  
3 labeling.

4 3.3 For a period of three (3) years from the Effective Date, each batch or lot number of  
5 the Covered Product offered for sale to any consumer in California without a Proposition 65-  
6 compliant warning shall be tested for cadmium utilizing inductively coupled plasma-mass  
7 spectrometry. All tests shall be conducted at the expense of HEALTH MATTERS AMERICA.  
8 Upon Plaintiff's written request, HEALTH MATTERS AMERICA shall provide the verified  
9 results of all tests to counsel for MCCARTNEY, via regular U.S. Mail, within fifteen (15) days of  
10 receipt of such written request. For purposes of this Consent Judgment, daily cadmium exposure  
11 levels shall be measured in micrograms and shall be calculated using the following formula:  
12 Micrograms of cadmium per gram of product, multiplied by 18 grams per serving of the product,  
13 which equals micrograms of cadmium exposure per day.

14 3.4 For the Covered Product that is subject to the warning requirement of Section 3.1,  
15 HEALTH MATTERS AMERICA shall provide the following warning ("Warning") as specified  
16 below:

17 **[California Proposition 65] WARNING:** This product contains [cadmium,] [a]  
18 chemical[s] known to the State of California to cause [cancer,] birth defects or other reproductive  
19 harm.

20 The text in brackets in the warning above is optional.

21 The Warning shall be permanently affixed to or printed on (at the point of manufacture,  
22 prior to shipment to California, or prior to distribution within California) the outside packaging or  
23 container of each unit of the Covered Product. The Warning shall be displayed with such  
24 conspicuousness, as compared with other words, statements designs or devices on the outside  
25 packaging or labeling, as to render it likely to be read and understood by an ordinary individual  
26 prior to use. If the Warning is displayed on the product container or labeling, the Warning shall be  
27 at least the same size as the largest of any other health or safety warnings on the product container

1 or labeling, and the word “WARNING” shall be in all capital letters and in bold print. If printed on  
2 the labeling itself, the Warning shall be contained in the same section of the labeling that states  
3 other safety warnings concerning the use of the Covered Product.

4 Although Health Matters America remains free to warn in any manner consistent with the  
5 requirements above, displaying the Warning on the outside packaging, labeling, or container of  
6 each unit of the Covered Product is deemed to be a clear and reasonable warning under this  
7 Consent Judgment.

#### 8 4. SETTLEMENT PAYMENT

9 4.1 In complete resolution of all of Plaintiff’s claims, HEALTH MATTERS AMERICA  
10 shall make a total payment of \$60,000, which shall be in full and final satisfaction of any and all  
11 civil penalties, payment in lieu of civil penalties, and attorneys’ fees and costs incurred in  
12 connection with Plaintiff’s investigation and litigation of this matter through entry of this Consent  
13 Judgment by the Court.

14 4.2 The payment shall be made in three separate installments, in the form of separate  
15 checks sent to counsel for MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California  
16 Street, San Francisco, California 94111. The checks shall be payable to the following parties and  
17 shall be apportioned as follows: Within ten (10) days of the Effective Date: \$20,000 (twenty  
18 thousand dollars). Of this amount, \$15,000 (fifteen thousand dollars) shall be deemed penalties,  
19 with \$11,250 payable to the Office of Environmental Health Hazard Assessment (OEHHA”), and  
20 \$3,750 (three thousand seven hundred fifty) shall be payable to MCCARTNEY. (Cal. Health &  
21 Safety Code § 25249.12(c)(1) & (d)). MCCARTNEY’s counsel shall have sole responsibility for  
22 delivering OEHHA’s portion of the civil penalty to OEHHA. The remaining \$5,000 (five thousand  
23 dollars) shall be payable to Robert B. Hancock as partial reimbursement of MCCARTNEY’s  
24 attorneys’ fees, costs and investigation expenses. Two additional installments, of \$20,000 (twenty  
25 thousand dollars) each shall be paid in remaining satisfaction of MCCARTNEY’s attorneys’ fees,  
26 costs and investigation expenses. The second and third installments shall be due 60 (sixty) days and  
27 one hundred twenty (120) days after the Effective Date.

1 **5. MODIFICATION OF CONSENT JUDGMENT**

2 5.1 This Consent Judgment may be modified only by: (i) written agreement and  
3 stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment  
4 by the Court; or (ii) upon entry of a modified Judgment by the Court pursuant to a motion by one of  
5 the Parties after exhausting the meet and confer process set forth as follows. If either Party  
6 requests or initiates a modification of this Consent Judgment, then it shall meet and confer with the  
7 other Party in good faith before filing a motion with the Court seeking to modify it.  
8 MCCARTNEY is entitled to reimbursement of all reasonable attorneys' fees and costs regarding  
9 the Parties' meet and confer efforts for any modification requested or initiated by HEALTH  
10 MATTERS AMERICA. Similarly, HEALTH MATTERS AMERICA is entitled to reimbursement  
11 of all reasonable attorney's fees and costs regarding the Parties' meet and confer efforts for any  
12 modification requested or initiated by MCCARTNEY. If, despite their meet and confer efforts, the  
13 Parties are unable to reach agreement on any proposed modification, the party seeking the  
14 modification may file the appropriate motion and the prevailing party on such motion shall be  
15 entitled to recover its reasonable fees and costs associated with such motion. One basis, but not the  
16 exclusive basis, for HEALTH MATTERS AMERICA to seek a modification of this Consent  
17 Judgment is if Proposition 65 is changed, narrowed, limited, or otherwise rendered inapplicable in  
18 whole or in part to the Covered Product or cadmium due to legislative change, a change in the  
19 implementing regulations, court decisions, or other legal basis.

20 in the event that MCCARTNEY or the Attorney General's Office enters into an agreement  
21 or consent judgment with any other person or entity that received a 60-Day Notice of Violation of  
22 Proposition 65 alleging cadmium in cacao nibs, where such agreement or consent judgment  
23 establishes a serving size of less than 18 grams for purposes of determining whether the 4.1  
24 microgram Proposition 65 cadmium MADL is exceeded, or at such time, if ever, that the California  
25 Office of Health Hazard Assessment or the FDA establishes a serving size for cacao nibs that is  
26 less than 18 grams, then that allowable level shall be deemed incorporated into this Consent  
27 Judgment, and HEALTH MATTERS AMERICA shall be permitted to distribute, sell or offer to

1 sell to California consumers any cacao nibs that it sells without a Proposition 65 Warning so long  
2 as such products do not exceed the 4.1 microgram cadmium MADL based on the revised serving  
3 size incorporated herein. Should MCCARTNEY in the future enter into any such agreement or  
4 consent judgment it shall notify HEALTH MATTERS AMERICA of such within 30 days after  
5 such agreement has been fully executed. Should a Court of Appeal hold that cacao nibs with  
6 specified levels of cadmium sold without a warning do not violate Proposition 65, then that level or  
7 shall be deemed incorporated into this Consent Judgment, and HEALTH MATTERS AMERICA  
8 shall be permitted to distribute, sell or offer to sell to California consumers any cacao nibs that it  
9 sells without a Proposition 65 Warning so long as such products comply with the allowable level  
10 for cadmium.

## 11 6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT

12 6.1 This Court shall retain jurisdiction of this matter to enforce, modify or terminate this  
13 Consent Judgment.

14 6.2 Any Party may, by motion or application for an order to show cause filed with this  
15 Court, enforce the terms and conditions contained in this Consent Judgment. The prevailing party  
16 in any such motion or application may request that the Court award its reasonable attorneys' fees  
17 and costs associated with such motion or application.

## 18 7. APPLICATION OF CONSENT JUDGMENT

19 This Consent Judgment shall apply to and be binding upon the Parties and their respective  
20 officers, directors, successors and assigns, and it shall benefit the Parties and their respective  
21 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,  
22 affiliates, franchisees, licensees, customers (including "Co-Brand" customers; excluding only  
23 "Private Labeler" customers), distributors, wholesalers, retailers, predecessors, successors, and  
24 assigns. "Private Labelers" excluded from the benefits of this Consent Judgment are companies  
25 who rebrand and offer Defendants' manufactured or distributed products under their own brand,  
26 not under Defendants' brand. "Co-Brand" customers who shall benefit from this Consent  
27 Judgment are companies who offer Defendants' manufactured or distributed products with their



1 own brand and the Defendants' brand both displayed on the product packaging.

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

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

23 8.2 Compliance with the terms of this Consent Judgment shall be deemed to constitute  
24 compliance by any Released Party with Proposition 65 regarding alleged exposures to cadmium  
25 from the Covered Product as set forth in the Notice of Violations and the FAC.

26 8.3 It is possible that other claims or alleged violations relating to Covered Products or  
27 other cacao based products distributed or sold by Health Matters America or Advantage Health

1 Matters through the Effective Date not known to MCCARTNEY will develop or be discovered.  
2 MCCARTNEY, on behalf of herself, and each of her successors, assigns, legatees, heirs, attorneys,  
3 and personal representatives only, acknowledges that any such claims concerning such products  
4 distributed or sold by Health Matters America or Advantage Health Matters through the Effective  
5 Date are released herein as to the Released Parties including all known and unknown claims, and  
6 waives California Civil Code Section 1542 as to any such unknown claims. California Civil Code  
7 Section 1542 reads as follows:

8                   **"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**  
9                   ~~**WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO**~~  
10                   **EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING**  
11                   **THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST**  
                    **HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT**  
                    **WITH THE DEBTOR."**

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

14       8.4    MCCARTNEY, on one hand, and HEALTH MATTERS AMERICA, on the other  
15 hand, each release and waive all Claims they may have against each other for any statements or  
16 actions made or undertaken by them in connection with the Notice of Violations or the FAC.  
17 However, this shall not affect or limit any Party's right to seek to enforce the terms of this Consent  
18 Judgment.

19    **9.    CONSTRUCTION AND SEVERABILITY**

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

24       9.2    In the event that any of the provisions of this Consent Judgment are held by a court  
25 to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely  
26 affected.

27       9.3    The terms and conditions of this Consent Judgment shall be governed by and

1 construed in accordance with the laws of the State of California.

2 **10. PROVISION OF NOTICE**

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

6 **For Erika McCartney:**

7 Melvin B. Pearlston  
8 Robert B. Hancock  
9 PACIFIC JUSTICE CENTER  
50 California Street, Suite 1500  
San Francisco, California 94111

10 **For Health Matters America, Inc.:**

11 Jerry Zeifman  
12 Health Matters America, Inc.  
2501 Broadway Street, Unit 2  
13 Buffalo, NY 14227

14 **With Copy to:**

15 James Robert Maxwell  
16 ROGERS JOSEPH O'DONNELL  
311 California Street  
San Francisco, California 94104

17 **11. COURT APPROVAL**

18 11.1 Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall  
19 file a Motion for Court Approval. The Parties shall use their best efforts to support entry of this  
20 Consent Judgment.

21 11.2 If the California Attorney General objects to any term in this Consent Judgment, the  
22 Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to  
23 the hearing on the motion.

24 11.3 If, despite the Parties' best efforts, the Court does not approve this Stipulated  
25 Consent Judgment, it shall be null and void and have no force or effect.

26 **12. EXECUTION AND COUNTERPARTS**

27 This Stipulated Consent Judgment may be executed in counterparts, which taken together

1 shall be deemed one document. A facsimile or .pdf signature shall be construed as valid and as the  
2 original signature.

3 **13. ENTIRE AGREEMENT, AUTHORIZATION**

4 **13.1** This Consent Judgment contains the sole and entire agreement and understanding of  
5 the Parties with respect to the entire subject matter herein, and any and all prior discussions,  
6 negotiations, commitments and understandings related hereto. No representations, oral or  
7 otherwise, express or implied, other than those contained herein have been made by any Party with  
8 respect to the subject matter herein. No other agreements, oral or otherwise, unless specifically  
9 referred to herein, shall be deemed to exist or to bind any Party with respect to the subject matter  
10 herein.

11 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized  
12 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly  
13 provided herein, each Party shall bear its own fees and costs.

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

15 **14.1** This Consent Judgment has come before the Court upon the request of the Parties.  
16 The Parties request that the Court fully review this Consent Judgment and, being fully informed  
17 regarding the matters which are the subject of this action:

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

21 and

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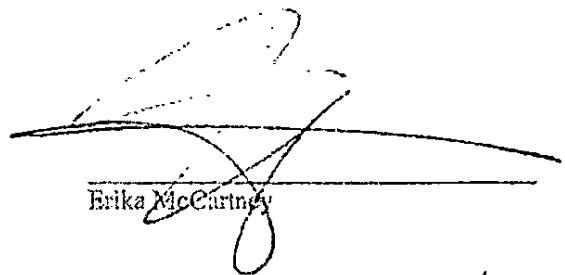
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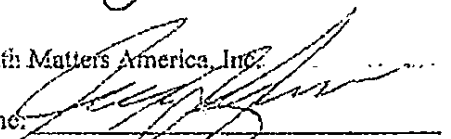
(b) Make the required findings pursuant to California Health and Safety Code Section 25249.7(f)(4), and approve this Consent Judgment.

IT IS SO STIPULATED.

Dated: 2/5/17

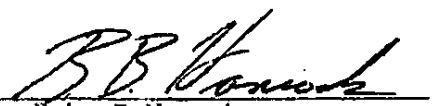
  
Erika McCartney

Dated: JAN 30 / 2017

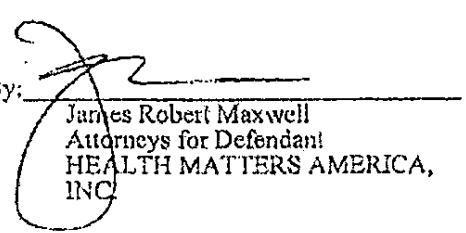
Health Matters America, Inc.  
Name:   
Title: PRESIDENT

APPROVED AS TO FORM:

Dated: 2/9, 2017

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

Dated: 1/31, 2017

ROGERS JOSEPH O'DONNELL  
By:   
James Robert Maxwell  
Attorneys for Defendant  
HEALTH MATTERS AMERICA,  
INC

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ORDER AND JUDGMENT

Based upon the Parties' Stipulation, and good cause appearing therefor, this Consent Judgment is approved in accordance with Health and Safety Code Section 25249.7(f)(4) and judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: 4/14, 2017

  
\_\_\_\_\_  
Judge of the Superior Court  
HAROLD KAHN