

1 Melvin B. Pearlston (SBN 54291)
2 Robert B. Hancock (SBN 179438)
3 PACIFIC JUSTICE CENTER
4 50 California Street, Suite 1500
5 San Francisco, California 94111
6 Tel: (415) 310-1940/Fax: (415) 354-3508
7
8 Attorneys for Plaintiff
9 **ERIKA MCCARTNEY**

FILED
San Francisco County Superior Court

APR 28 2017

CLERK OF THE COURT
BY: *Jana Gonzales*
Deputy Clerk

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

11 ERIKA MCCARTNEY, in the public interest,)
12 Plaintiff,)
13 v.)
14 FRONTIER NATURAL PRODUCTS CO-OP,)
15 an Iowa corporation; FRONTIER)
16 DISTRIBUTION, LLC, an Iowa limited liability)
17 company; and DOES 1 through 500, inclusive,)
18 Defendants.)

CIVIL ACTION NO. CGC-15-546495
^{ML}
[PROPOSED] CONSENT JUDGMENT
[Cal. Health & Safety Code
Sec. 25249.6, *et seq.*]

1 **1. INTRODUCTION**

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

6 1.2 Plaintiff Erika McCartney (“MCCARTNEY”) is a California resident acting as a
7 private enforcer of Proposition 65. MCCARTNEY has brought this enforcement action in the
8 public interest against Frontier Co-op, f/k/a Frontier Natural Products Co-op, and Frontier
9 Distribution, LLC (collectively “FRONTIER” or “Defendants”) concerning cadmium in the
10 Covered Product pursuant to California Health and Safety Code Section 25249.7(d).

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

14 1.3 Defendants have sold and sell the Covered Product in California.

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

17 1.5 On or about April 8, 2015, pursuant to California Health and Safety Code Section
18 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65 (“Notice
19 of Violations”) on the California Attorney General, other public enforcers, and FRONTIER
20 alleging violations of California Health and Safety Code Section 25249.6 with respect to
21 unwarned exposures to cadmium arising from the sale and use of the Covered Product in
22 California.

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

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

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

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

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

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

22 **2. INJUNCTIVE RELIEF: WARNINGS**

23 2.1 Beginning on the Effective Date, FRONTIER shall be permanently enjoined from
24 Distributing into California any Covered Product without a warning as set forth in paragraph 2.2
25 below. Relative to the above, “Distributing into California” means to (1) sell directly to any
26 person in California; (2) distribute to any person in California for resale; or (3) distribute to any
27 third party outside California who FRONTIER knows will redistribute into California.

28 2.2 Clear and Reasonable Proposition 65 Warnings

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

4 [California Proposition 65] WARNING: This product contains [cadmium,] a chemical
5 known to the State of California to cause birth defects or other reproductive harm.

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

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

19 **3. REQUIRED MONETARY PAYMENTS**

20 3.1 Within seven (7) business days of the Effective Date, FRONTIER shall issue three
21 separate checks and send them to counsel for MCCARTNEY, Robert B. Hancock, Pacific Justice
22 Center, 50 California Street, San Francisco, California 94111. The checks shall be payable to the
23 following parties and the payment shall be apportioned as follows:

24 3.2 \$15,000 (fifteen thousand dollars) as civil penalties pursuant to California Health
25 and Safety Code Section 25249.7(b)(1). Of this amount, \$11,250 (eleven thousand two hundred
26 fifty dollars) shall be payable to the Office of Environmental Health Hazard Assessment
27 (“OEHHA”), and \$3,750 (three thousand seven hundred fifty dollars) shall be payable to
28

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

3 3.3 \$46,250 (Forty-six thousand two hundred fifty dollars) payable to Robert B.
4 Hancock as reimbursement of MCCARTNEY's attorneys' fees, costs, investigation and litigation
5 expenses ("Attorney's Fees and Costs.")

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

13 **4. MODIFICATION**

14 This Consent Judgment may be modified only by written agreement and stipulation of the
15 Parties and upon having such stipulation entered as a modified Consent Judgment by the Court.

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

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

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

23 **6. APPLICATION OF CONSENT JUDGMENT**

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

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

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

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

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

19 7.3 Unless modified pursuant to Section 4 above, compliance with the terms of
20 Section 2.1 of this Consent Judgment shall be deemed to constitute compliance with
21 Proposition 65 regarding the Covered Product.

22 7.4 It is possible that other Claims not known to MCCARTNEY arising out of the
23 facts alleged in the Notice of Violation or the Complaint will develop or be discovered.
24 MCCARTNEY acknowledges on behalf of herself (and not in her role as a representative of the
25 public interest) that the Claims released herein include all known and unknown Claims and
26 waives California Civil Code Section 1542 as to any such unknown Claims. California Civil
27 Code Section 1542 reads as follows:
28

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

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

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

20 **8. CONSTRUCTION AND SEVERABILITY**

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

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

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

3 **9. PROVISION OF NOTICE**

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

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

10 For Frontier:
11 Peg Carew Toledo
12 PEG CAREW TOLEDO, LAW CORPORATION
 3001 Douglas Boulevard, Suite 340
 Roseville, California 95661

13
14 **10. COURT APPROVAL**

15 10.1 The Parties shall use their reasonable best efforts to support the Court's approval
16 and entry of the Consent Judgment.

17 10.2 If the California Attorney General objects to any term in this Consent Judgment,
18 the Parties shall use their best efforts to resolve the concern in a timely manner, and, if possible,
19 prior to the hearing on the Motion for Court Approval.

20 10.3 If, despite the Parties' best efforts, the Court does not approve and enter this
21 Consent Judgment, it shall be null and void and have no force or effect.

22 **11. EXECUTION AND COUNTERPARTS**

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

26 **12. ENTIRE AGREEMENT, AUTHORIZATION**

27 12.1 This Consent Judgment contains the sole and entire agreement and understanding
28 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,

1 negotiations, commitments and understandings related hereto. No representations, oral or
2 otherwise, express or implied, other than those contained herein have been made by any party.
3 No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to
4 exist or to bind any party.


5 12.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized
6 by the Party he or she represents to enter into this Consent Judgment. Except as explicitly
7 provided herein, each Party shall bear its own fees and costs.

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

9 13.1 This Consent Judgment has come before the Court upon the request of the Parties.
10 The Parties request the Court to fully review this Consent Judgment and, being fully informed
11 regarding the matters which are the subject of this Action, to make the findings pursuant to
12 California Health and Safety Code Section 25249.7(f)(4), and approve this Consent Judgment.

13 **IT IS SO STIPULATED.**

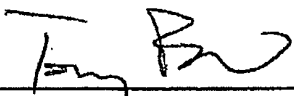
14 Dated: 2/16/17



Erika McCartney

17 Dated: 2/21/17


18 FRONTIER CO-OP, F/K/A FRONTIER
19 NATURAL PRODUCTS CO-OP

20 By: 

21 Its: CEO

22 Dated: 2/21/17

23 FRONTIER DISTRIBUTION, LLC

24 By: 

25 Its: CEO

26 APPROVED AS TO FORM:
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: 2/16/17

PACIFIC JUSTICE CENTER

By: *RB Hancock*
Robert B. Hancock
Attorneys for Plaintiff

Dated: February 21, 2017

PEG CAREW TOLEDO, LAW CORPORATION

By: *Peg Carew Toledo*
Peg Carew Toledo
Attorneys for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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: 4/28/17



Judge of the Superior Court

HAROLD KAHN