

FILED

Superior Court of California
County of San Francisco

OCT 10 2018

CLERK OF THE COURT

BY: *Pauline H. Brown*
Deputy Clerk

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10 **ERIKA MCCARTNEY**

11 SUPERIOR COURT OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO

13
14 ERIKA MCCARTNEY, in the public interest,)
15 Plaintiff,)
16 v.)
17 WINDY CITY ORGANICS, LLC, an Illinois)
18 limited liability company; and DOES 1 through)
19 500, inclusive,)
20 Defendants.)

CIVIL ACTION NO. CGC-16-554652

^{MR}
[PROPOSED] STIPULATED CONSENT
JUDGMENT

[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.* (also
4 known as and hereinafter referred to as "Proposition 65") regarding the following products
5 (hereinafter the "Covered Products"): (a) Windy City Organics Raw Guru Raw Organic Cacao
6 Powder; and (b) Sprout Living Epic Protein Powder, Chocolate Maca. Plaintiff alleges the former
7 exposes consumers in California to cadmium, and the latter to cadmium and lead. Cadmium and lead
8 are hereinafter referred to as the "Listed Chemicals."

9 **1.2** Plaintiff Erika McCartney ("MCCARTNEY") is a California resident acting as a
10 private enforcer of Proposition 65. MCCARTNEY brings this Action in the public interest pursuant
11 to California Health and Safety Code Section 25249. MCCARTNEY asserts that she is dedicated to,
12 among other causes, helping safeguard the public from health hazards by reducing the use and misuse
13 of hazardous and toxic chemicals and substances, facilitating a safe environment for consumers and
14 employees, and encouraging corporate responsibility.

15 **1.3** Windy City Organics, LLC, is an Illinois limited liability company, and is referred to
16 hereinafter as "WINDY CITY."

17 **1.4** WINDY CITY manufactures, distributes and/or has sold the Covered Products in
18 California during the relevant period.

19 **1.5** MCCARTNEY and WINDY CITY are hereinafter sometimes referred to individually
20 as a "Party" or collectively as the "Parties."

21 **1.6** On or about July 26, 2016, and January 4, 2017, pursuant to California Health and
22 Safety Code Section 25249.7(d)(1), MCCARTNEY served 60-Day Notices of Violations of
23 Proposition 65 ("Notice of Violations") on the California Attorney General, other public enforcers,
24 and WINDY CITY. True and correct copies of the Notices of Violations are attached hereto as
25 Exhibit A.

26 **1.7** After more than sixty (60) days passed since service of the Notice of Violations, and
27 no designated governmental agency filed a complaint against WINDY CITY with regard to the
28 Covered Product or the alleged violations, MCCARTNEY filed a complaint (the "Complaint") for

1 injunctive relief and civil penalties. The Complaint is based on the allegations in the Notice of
2 Violations in connection with Windy City Raw Guru Raw Organic Cacao Powder ("Cacao Powder").
3 Upon execution of this Consent Judgment by all parties, Plaintiff shall file a First Amended
4 Complaint ("FAC") to add allegations in connection with all Covered Products.

5 **1.8** WINDY CITY generally denies all material and factual allegations contained in or
6 arising from MCCARTNEY's Notice of Violations and the Complaint and asserts that it has various
7 affirmative defenses to the claims asserted therein. WINDY CITY further specifically denies that
8 the Plaintiff or California consumers have been harmed or damaged by its conduct or the products it
9 has sold or sells, including the Covered Product. WINDY CITY further asserts that the levels of the
10 Listed Chemicals in the Covered Products are naturally occurring as the result of natural geological
11 and plant processes. MCCARTNEY and WINDY CITY each reserves all rights to allege additional
12 facts, claims, and affirmative defenses if the Court does not approve this Consent Judgment.

13 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
14 resolve disputed claims and avoid prolonged and costly litigation. For purposes of the approval and
15 entry of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over the
16 subject matter of this Action and personal jurisdiction over the Parties, that venue is proper in this
17 Court, and that this Court has jurisdiction to enter this Consent Judgment pursuant to the terms set
18 forth herein.

19 **1.10** Nothing in this Consent Judgment, nor compliance with its terms, shall constitute or
20 be construed as an admission by any of the Parties, or by any of their respective officers, directors,
21 shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers,
22 franchisees, licensees, distributors, wholesalers, or retailers, of any fact, conclusion of law, issue of
23 law, violation of law, fault, wrongdoing, or liability, including without limitation, any admission
24 concerning any alleged violation of Proposition 65. Except as expressly set forth herein, nothing in
25 this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense the
26 Parties may have in any other or future legal proceeding.

27 **1.10** The "Effective Date" of this Consent Judgment shall be the date this Consent
28 Judgment is entered as a Judgment.

1 **2. INJUNCTIVE RELIEF, REFORMULATION, TESTING, AND WARNINGS**

2 **2.1** As of the Compliance Date (defined below) and except as otherwise provided herein,
3 WINDY CITY shall be permanently enjoined from Distributing into California any Covered Products
4 without a warning as set forth in this section. “Distributing into California” or “Distribute into
5 California” means to ship any of the Covered Product to California for sale or to sell any of the
6 Covered Product to a distributor that WINDY CITY knows will redistribute the Covered Product in
7 or into California. As soon as practicable following execution of this proposed Consent Judgment by
8 the Parties, Plaintiff shall apply *ex parte* to the Court for leave to file a First Amended Complaint, to
9 allege exposures to the Listed Chemicals in connection with Sprout Living Epic Protein Powder,
10 Chocolate Maca.

11 The Parties agree that should the OEHHA warning regulations change, that WINDY CITY
12 may either conform with the OEHHA regulations or conform with the terms provided in this Consent
13 Judgment, and in so doing, will be in compliance with this Consent Judgment.

14 **2.2** The Parties agree that any units of Cacao Powder containing cadmium concentration
15 levels below the corresponding effective levels set forth in a certain Consent Judgment entered
16 February 15, 2018, by the San Francisco Superior Court in *As You Sow v. Trader Joe’s Company, et*
17 *al.*, Case No. CGC-15-548791, (“AYS Settlement”) shall be exempt from the requirements of this
18 section 2, including the injunction in subsection 2.1. Unless otherwise specified herein, the Parties
19 further agree that the dates of performance for all obligations for any Settling Defendant (as defined)
20 in the AYS Settlement shall apply to the instant Consent Judgment as to the Cacao Powder, including,
21 without limitation, that the “Compliance Date” herein shall be February 15, 2019.

22 **2.2.1** For Cacao Powder manufactured and sold beginning February 15, 2019,
23 WINDY CITY shall provide the warning set forth in Section 2.2.2, unless otherwise exempted under
24 Section 2.4 below, if the cadmium level for the Cacao Powder is above 0.960 parts per million (ppm).
25 That level shall drop to 0.800 ppm in 2025 (the “Drop Down Level”), unless a different Drop Down
26 Level is established pursuant to the terms of the AYS Settlement, in which case WINDY CITY shall
27 provide warnings for the Cacao Powder if the cadmium level exceeds such different Drop Down
28 Level.

1 2.2.2 If a warning is required for the Cacao Powder as set forth above, WINDY
2 CITY shall provide the warning set forth below on the label of such product:

3 **[California Proposition 65] WARNING:** Consuming this product may expose you
4 to chemicals including [lead and] cadmium, which are known to the State of California
5 to cause [cancer and] birth defects or other reproductive harm. For further information
6 go to www.p65warnings.ca.gov

7 The bracketed language may, but is not required to, be included in the warning. The warning
8 statement shall be affixed to or printed on (at the point of manufacture, prior to the shipment to
9 California, or prior to Distribution within California) the outside packaging container of each unit of
10 the Covered Product or provided at the point of display of the Covered Product wherever it is offered
11 for sale in California. The warning shall be displayed with such conspicuousness, as compared with
12 other safety warnings or chemical/allergen disclosures, as to render it likely to be read and understood
13 by any 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 or
15 safety warnings on the product container or labeling, and the word "WARNING" shall be in capital
16 letters and in bold print. If presented at the point of display, the Warning shall be presented on a sign
17 or shelf label in a font no smaller than the largest type size used for other information on the sign or
18 a shelf label for similar products.

19 2.3 Beginning on the Effective Date, WINDY CITY shall be permanently enjoined from
20 offering for sale to a consumer in California, directly selling to a consumer in California, or
21 "Distributing into California" any of the Living Epic Protein Powder, Chocolate Maca ("Chocolate
22 Maca") product without a Proposition 65 compliant warning, consistent with Section 2.3.1 below,
23 unless otherwise exempted under Section 2.4 below, without Court modification of this Consent
24 Judgment. "Distributing into California" or "Distribute into California" means to ship any of the
25 Chocolate Maca product to California for sale or to sell any of the Chocolate Maca product to a
26 distributor that WINDY CITY knows or has reason to know will sell the Chocolate Maca products
27 in California.
28

1 **2.3.1 Clear and Reasonable Warnings**

2 For the Chocolate Maca products that are subject to the warning requirement of Section 2.3,
3 WINDY CITY shall provide one of the following warnings ("Warning") as specified below:
4

5 **[California Proposition 65] WARNING:** Consuming this product can expose you to
6 chemicals including lead [and cadmium], which are known to the State of California to cause [cancer
7 and] birth defects or other reproductive harm. For more information go to
8 www.P65Warnings.ca.gov/food.

9 OR:

10 **[California Proposition 65] WARNING:** This product contains chemicals, including lead
11 [and cadmium], known to the State of California to cause [cancer and] birth defects or other
12 reproductive harm.

13 The bracketed text may, but is not required to, be included. Further, WINDY CITY may identify
14 either lead, or cadmium, or both, in either of the above warnings. The warning shall be permanently
15 affixed to or printed on (at any point prior to distribution for sale to California consumers) the outside
16 packaging or container of each unit of the Chocolate Maca product. The Warning shall be displayed
17 with such conspicuousness, as compared with other words, statements designs or devices on the
18 outside packaging or labeling, as to render it likely to be read and understood by an ordinary
19 individual prior to use. If the Warning is displayed on the product container or labeling, the Warning
20 shall be no smaller than the largest of any other health or safety warnings on the product container or
21 labeling. If printed on the labeling itself, the Warning shall be contained in the same section of the
22 labeling that states other safety warnings concerning the use of the Chocolate Maca product.

23 Displaying the Warning on the outside packaging or container of each unit of the Chocolate
24 Maca product is deemed to be a clear and reasonable warning under, and to fully comply with, Health
25 & Safety Section 25249.6 and the implementing regulations at Title 27 California Code of
26 Regulations, as they may be hereinafter amended.

27 **2.4** All units of the Covered Product that have been or will have been distributed, shipped,
28 or sold, or otherwise placed in the stream of commerce through and including the February 14, 2019

1 (for Cacao Powder) or the Effective Date of this Consent Judgment (for Chocolate Maca products)
2 are exempt from the provisions of Sections 2.1 - 2.3 and are included within the release in Sections
3 7.1 through 7.4. To be in compliance with the terms of this Consent Judgment, WINDY CITY is
4 not required to undertake any efforts or conduct to remove such Covered Products from the stream
5 of commerce.

6 **3. SETTLEMENT PAYMENT**

7 **3.1** WINDY CITY shall issue the following payments and send them to counsel for
8 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,
9 California 94111. The checks shall be payable to the following parties and the payment shall be
10 apportioned as follows:

11 **3.1** \$10,500 as civil penalties pursuant to California Health and Safety Code Section
12 25249.7(b)(1). Of this amount, \$7,625 shall be payable to OEHHA, \$1,136 shall be payable to
13 MCCARTNEY, and \$639 shall be payable to CancerCare, a qualified 501(c)(3) charitable
14 organization, dedicated to providing financial aid to cancer patients for treatment costs.
15 MCCARTNEY hereby waives any statutory entitlement to penalties in excess of \$1,136.
16 MCCARTNEY's counsel shall promptly forward all checks to the payees indicated. These amounts
17 shall be paid by separate checks, in four (4) equal monthly installments to begin ten (10) business
18 days after entry of the Consent Judgment, in amounts of \$1,906.25, \$284, and \$159.75 per month.

19 **3.2** \$29,500 payable to Robert B. Hancock as reimbursement of MCCARTNEY's
20 attorneys' fees, costs, investigation, and litigation expenses ("Attorney's Fees and Costs") to be paid
21 as follows: \$7,375 due ten (10) business days after entry of the Consent Judgment; the remaining
22 \$22,125 to be paid over three (3) months at \$7,375 per month, beginning the month after the other
23 payment was made.

24 **3.3** Any failure to remit any of the foregoing payments results in a mutual rescission of
25 the agreement, as though no resolution had been had. In that event, the parties stipulate to vacating
26 the Consent Judgment, and will cooperate in securing an order for the same.

1 **4. MODIFICATION OF CONSENT JUDGMENT**

2 **4.1** 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 requests
6 or initiates a modification, then it shall meet and confer with the other Party in good faith before
7 filing a motion with the Court seeking to modify it. MCCARTNEY is entitled to reimbursement of
8 all reasonable attorneys' fees and costs regarding the Parties' meet and confer efforts for any
9 modification requested or initiated by WINDY CITY. Similarly, WINDY CITY is entitled to
10 reimbursement of all reasonable attorney's fees and costs regarding the Parties' meet and confer
11 efforts for any modification requested or initiated by MCCARTNEY. If, despite their meet and
12 confer efforts, the Parties are unable to reach agreement on any proposed modification the party
13 seeking the modification may file the appropriate motion and the prevailing party on such motion
14 shall be entitled recover its reasonable fees and costs associated with such motion. One basis, but
15 not the exclusive basis, for WINDY CITY to seek a modification of this Consent Judgment is if
16 Proposition 65 is changed, narrowed, limited, or otherwise rendered inapplicable in whole or in part
17 to the Covered Products or either Listed Chemical due to legislative change, a change in the
18 implementing regulations, court decisions, or other legal basis.

19 **5. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT**

20 **5.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate this
21 Consent Judgment.

22 **5.2** Subject to Section 5.3, any Party may, by motion or application for an order to show
23 cause filed with this Court, enforce the terms and conditions contained in this Consent Judgment.
24 The prevailing party in any such motion or application may request that the Court award its
25 reasonable attorneys' fees and costs associated with such motion or application.

26 **5.3** Before filing a motion or application for an order to show cause, MCCARTNEY shall
27 provide WINDY CITY with 30 (thirty) days written notice of any alleged violations of the terms and
28 conditions contained in this Consent Judgment. As long as WINDY CITY cures any such alleged

1 violations within the 30 (thirty) day period (or if any such violation cannot practicably be cured within
2 30 days, it expeditiously initiates a cure within 30 days and completes it as soon as practicable), then
3 WINDY CITY shall not be in violation of the Consent Judgment.

4 **6. APPLICATION OF CONSENT JUDGMENT**

5 This Consent Judgment shall apply to and be binding upon the Parties and their respective
6 officers, directors, successors and assigns, and it shall benefit the Parties and their respective officers,
7 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates,
8 franchisees, licensees, customers, distributors, wholesalers, retailers, predecessors, successors, and
9 assigns.

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

11 7.1 This Consent Judgment is a full, final, and binding resolution between
12 MCCARTNEY, on behalf of herself and in the public interest, and WINDY CITY (including
13 Released Parties as that term is defined below), of any and all direct or derivative violations (or
14 claimed violations) of Proposition 65 or its implementing regulations for failure to provide
15 Proposition 65 warnings of exposure to the Listed Chemicals from the handling, use, or consumption
16 of the Covered Products and fully resolves all claims that have been or could have been asserted in
17 this Action up to and including the Effective Date for alleged failure to provide Proposition 65
18 warnings for the Covered Products regarding the Listed Chemicals as alleged in the Notices of
19 Violations and in the First Amended Complaint. MCCARTNEY, on behalf of herself and in the
20 public interest, hereby forever releases and discharges, WINDY CITY and its past and present
21 officers, directors, owners, shareholders, employees, agents, attorneys, parent companies,
22 subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, customers, distributors,
23 wholesalers, private labelers, co-packers, retailers, and all other upstream and downstream entities
24 and persons in the distribution chain of any Covered Products, and the predecessors, successors and
25 assigns of any of them (collectively, "Released Parties"), from any and all claims and causes of action
26 and obligations to pay damages, restitution, fines, civil penalties, payment in lieu of civil penalties
27 and expenses (including but not limited to expert analysis fees, expert fees, attorney's fees and costs)
28 (collectively, "Claims") arising under, based on, or derivative of Proposition 65 or its implementing

1 regulations up through the Effective Date based on alleged exposure to the Listed Chemicals from
2 the Covered Products and/or failure to warn about the Listed Chemicals, as set forth in the Notice of
3 Violations and the First Amended Complaint. Notwithstanding the foregoing, no release herein shall
4 extend to Luchi LLC, any related person or entity, or any of its or their upstream suppliers or
5 distributors, or its or their downstream distributors, wholesalers or retailers except that, as to the
6 Sprout Living Epic Protein Powder, Chocolate Maca product, the releases herein shall extend to
7 WINDY CITY and its direct and indirect customers of that product.

8 7.2 Compliance with the terms of this Consent Judgment shall be deemed to constitute
9 compliance by any Released Party with Proposition 65 regarding alleged exposures to the Listed
10 Chemicals from the Covered Products as set forth in the Notices of Violations and the First Amended
11 Complaint.

12 7.3 It is possible that other Claims not known to MCCARTNEY arising out of the facts
13 alleged in the Notice of Violations or the First Amended Complaint and relating to the Listed
14 Chemicals in the Covered Products that were manufactured, sold or Distributed into California before
15 the Effective Date will develop or be discovered. MCCARTNEY, on behalf of herself only,
16 acknowledges that the Claims released herein include all known and unknown Claims and waives
17 California Civil Code Section 1542 as to any such unknown Claims. California Civil Code Section
18 1542 reads as follows:

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

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

26 7.4 MCCARTNEY, on one hand, and WINDY CITY, on the other hand, each release and
27 waive all Claims they may have against each other for any statements or actions made or undertaken
28

1 by them in connection with the Notice of Violations or the First Amended Complaint. However, this
2 shall not affect or limit any Party's right to seek to enforce the terms of this Consent Judgment.

3 **8. CONSTRUCTION AND SEVERABILITY**

4 **8.1** The terms and conditions of this Consent Judgment have been reviewed by the respective
5 counsel for the Parties prior to its signing, and each Party has had an opportunity to fully discuss the
6 terms and conditions with its counsel. In any subsequent interpretation or construction of this
7 Consent Judgment, the terms and conditions shall not be construed against any Party.

8 **8.2** In the event that any of the provisions of this Consent Judgment is held by a court to
9 be unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

10 **8.3** The terms and conditions of this Consent Judgment shall be governed by and
11 construed in accordance with the laws of the State of California.

12 **9. PROVISION OF NOTICE**

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

16
17 **For Erika McCartney:**

18 Melvin B. Pearlston
19 Robert B. Hancock
20 PACIFIC JUSTICE CENTER
21 50 California Street, Suite 1500
22 San Francisco, California 94111

23 **For WINDY CITY:**

24 Ann G. Grimaldi, Esq.
25 GRIMALDI LAW OFFICES
26 535 Mission St., 14th Floor
27 San Francisco, California 94105
28

1 **10. COURT APPROVAL**

2 **10.1** Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall notice
3 a Motion for Court Approval. The Parties shall use their commercially reasonable efforts to support
4 entry of this Consent Judgment.

5 **10.2** If the California Attorney General objects to any term in this Consent Judgment, the
6 Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to
7 the hearing on the motion.

8 **10.3** If, despite the Parties' best efforts, the Court does not approve this Stipulated Consent
9 Judgment it shall be null and void and have no force or effect.

10 **11. EXECUTION AND COUNTERPARTS**

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

14 **12. ENTIRE AGREEMENT, AUTHORIZATION**

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

21 **12.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized by
22 the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly provided
23 herein, each Party shall bear its own fees and costs.

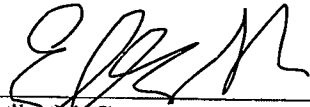
24 **13. REQUEST FOR FINDINGS AND FOR APPROVAL**

25 **13.1** This Consent Judgment has come before the Court upon the request of the Parties.
26 The parties request the Court to fully review this Consent Judgment and, being fully informed
27 regarding the matters which are the subject of this action, to:
28

1 (a) Find that the terms and provisions of this Consent Judgment represent a good
2 faith settlement of all matters raised by the allegations of the First Amended Complaint, that the
3 matter has been diligently prosecuted, and that the public interest is served by such settlement; and
4 (b) Make the findings pursuant to California Health and Safety Code Section
5 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

6 **IT IS SO STIPULATED.**

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8 Dated: 8/3/18



Erika McCartney

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11 Dated: 8/3/2018

WINDY CITY ORGANICS, LLC.

Name: 

Title: Member

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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: 10/10, 2018.



Judge of the Superior Court
HAROLD KAHN