

JUN 19 2019

CLERK OF THE COURT

BY: [Signature]
Deputy Clerk

1 James R. Wheaton (SBN 115230)
2 Lowell Chow (SBN 273856)
3 Nathaniel Kane (SBN 279394)
4 ENVIRONMENTAL LAW FOUNDATION
5 1222 Preservation Park Way, Suite 200
6 Oakland, CA 94612
7 (510) 208-4555
8 elfservice@envirolaw.org

9 April M. Strauss (SBN 163327)
10 LAW OFFICE OF APRIL STRAUSS
11 2500 Hospital Drive, Bldg. 3
12 Mountain View, CA 94040
13 (650) 281-7081
14 astrauss@sfaclp.com

15 Attorneys for Plaintiff
16 **ERIKA MCCARTNEY**

17
18 **SUPERIOR COURT OF CALIFORNIA**
19 **COUNTY OF SAN FRANCISCO**

20 ERIKA MCCARTNEY, in the public interest,)

21 Plaintiff,)

22 v.)

23 FOODS ALIVE, INC., FOODS ALIVE, L.P.;)
24 and DOES 1 through 500 inclusive,)

25 Defendants.)

CIVIL ACTION NO. CGC-16-555170

**[PROPOSED] STIPULATED
CONSENT JUDGMENT**

[Cal. Health and Safety Code Secs.
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 referred to as “Proposition 65”) regarding Defendants Foods Alive, Inc. and
5 Foods Alive, L.P.’s “Foods Alive Dominican Cacao Powder Raw” (hereinafter the “Covered
6 Product”). Plaintiff alleges that the Covered Product exposes consumers in California to
7 cadmium. Cadmium is hereinafter referred to as the “Listed Chemical.”

8 **1.2** Plaintiff ERIKA MCCARTNEY (“MCCARTNEY”) is a California resident acting
9 as private enforcer of Proposition 65. MCCARTNEY alleges that she brings this Action in the
10 public interest pursuant to California Health and Safety Code section 25249.5, *et seq.*, asserts that
11 she is dedicated to, among other causes, helping safeguard the public from health hazards by
12 reducing the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for
13 consumers and employees, and encouraging corporate responsibility.

14 **1.3** Defendants Foods Alive, Inc. and Foods Alive, L.P. are referred to collectively as
15 “FOODS ALIVE” or “Defendants”.

16 **1.4** MCCARTNEY and FOODS ALIVE are referred to individually as a “Party” or
17 collectively as the “Parties.”

18 **1.5** FOODS ALIVE manufactures, acquires, distributes and/or sells the Covered
19 Product.

20 **1.6** On or about August 3, 2016, pursuant to California Health and Safety Code section
21 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violation of Proposition 65 on the
22 California Attorney General, other public enforcers and FOODS ALIVE alleging that FOODS
23 ALIVE violated Proposition 65 by exposing persons in California to cadmium in connection with
24 their use of the Covered Product without first providing a Proposition 65 warning (the “Notice of
25 Violation”).

26 **1.7** After more than sixty (60) days passed since service of the Notice of Violation, and
27 no designated governmental agency having filed a complaint against FOODS ALIVE with regard
28 to the Covered Product or the alleged violations, MCCARTNEY filed a complaint (the

1 “Complaint”) for injunctive relief and civil penalties. The Complaint, dated November 3, 2016, is
2 based on the allegations in the Notice of Violation in connection with the Covered Product.

3 **1.8** FOODS ALIVE generally denies all material and factual allegations of the Notice
4 of Violation and the Complaint, and specifically denies that any Proposition 65 Notice is required
5 on the Covered Product, that any reasonable user of the Covered Product would be exposed to
6 chemicals in amounts or concentrations that would require a warning, and that Plaintiff or any
7 California consumer have been harmed or damaged by its conduct. FOODS ALIVE and
8 MCCARTNEY each reserve all rights to allege additional facts, claims, and affirmative defenses
9 if the Court does not approve this Consent Judgment.

10 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
11 resolve disputed claims and avoid prolonged and costly litigation. For purposes of the approval of
12 entry of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over the
13 subject matter of this Action and personal jurisdiction over the Parties, that venue is proper in this
14 Court, and that this Court has jurisdiction to enter this Consent Judgment pursuant to the terms set
15 forth herein.

16 **1.10** Nothing in this Consent Judgment, nor compliance with its terms, shall constitute
17 or be construed as an admission by any of the Parties, or by any of their respective officers,
18 directors, shareholders, employees, agents, attorneys, parent companies, subsidiaries, divisions,
19 affiliates, suppliers, franchisees, licensees, distributors, wholesalers, or retailers, of any fact,
20 conclusion of law, issue of law, violation of law, fault, wrongdoing, or liability, including without
21 limitation, any admission concerning any alleged violation of Proposition 65. Except as expressly
22 set forth herein, nothing in this Consent Judgment shall prejudice, waive, or impair any right,
23 remedy, argument, or defense the Parties may have in any other or future legal proceeding.

24 **1.11** The “Effective Date” of this Consent Judgment shall be the date this Consent
25 Judgment is entered as a Judgment.

26 **2. JURISDICTION AND VENUE**

27 **2.1** As of the Compliance date (defined below) and except as otherwise provided
28 herein, FOODS ALIVE shall be permanently enjoined from Distributing into California any

1 Covered Products without a warning as set forth in section 3. “Distributing into California” or
2 “Distribute into California” means to ship the Covered Product to California for sale or to sell the
3 Covered Product to a distributor that FOODS ALIVE knows will redistribute the Covered Product
4 in or into California.


5 The Parties agree that should OEHHA warning regulations change, FOODS ALIVE may
6 either conform with the OEHHA regulations or conform with the terms provided in this Consent
7 Judgment, and in so doing, will be in compliance with this Consent Judgment.

8 **3. INJUNCTIVE RELIEF AND WARNINGS**

9 **3.1** Beginning on the Effective Date, and except as provided in Section 3.2 below,
10 FOODS ALIVE shall be permanently enjoined from offering for sale to a consumer in California,
11 directly selling to a consumer in California, or Distributing into California the Covered Product,
12 unless the label of the Covered Product contains a Proposition 65 compliant warning, consistent
13 with Section 3.2, below.

14 **3.2 Clear and Reasonable Warnings**

15 (A) For the Covered Product that is subject to the warning requirement of Section 3.1,
16 FOODS ALIVE shall provide a Compliant Warning. The Parties agree the following
17 constitutes a clear and reasonable warning:

18  **WARNING:** Consuming this product can expose you to cadmium, which is known to the
19 State of California to cause cancer and birth defects or other reproductive harm. For more
20 information, go to www.P65Warnings.ca.gov/food.

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

1 letters. If printed on the label itself, the Warning shall be contained in the same section of the
2 labeling that states other safety warnings concerning the use of Covered Product, if any.

3 (C) Notwithstanding paragraphs (A) and (B) above, if modifications or amendments to
4 Proposition 65 or its regulations adopted after the Effective Date are inconsistent with, or provide
5 warnings specifications or options different from, the specifications in this Agreement, FOODS
6 ALIVE may modify the content and delivery methods of its warnings to conform to the clear and
7 reasonable warning provisions of Proposition 65 or its regulations as modified or amended, and
8 such warnings shall constitute Compliant Warnings under this Agreement.

9 (D) Within ten (10) days of entry of the Consent Judgment, FOODS ALIVE shall
10 eliminate its Proposition 65-centric website, or replace "Why are these substances found in these
11 foods?" Portion of the website with the following language:

12 Foods Alive does not intentionally add lead or cadmium to any products. Both lead and
13 cadmium are elements which exist in nature. They are found in varying degrees across the
14 globe. Both lead and cadmium are widely distributed in the environment and may be found
15 naturally in the earth, soil, and water, as a result of geologic deposits. Plants grown in soils
16 containing lead and cadmium can uptake the elements into parts of the plants.
17 Additionally, human-based activities, such as use of leaded gasoline can result in deposits
18 of the chemicals in soil.

19 **4. REQUIRED MONETARY PAYMENTS**

20 **4.1** Defendant shall pay \$9,500 within ten (10) days of the Effective Date, which shall
21 be a full and final satisfaction of all civil penalties pursuant to California Health and Safety Code
22 section 25249.7(b)(1). Of this amount, one check shall be payable to the Office of Environmental
23 Health Hazard Assessment ("OEHHA"), in the sum of \$7,125.00, a second check shall be payable
24 to MCCARTNEY in the sum of \$1,781.00, and a third check shall be payable to CancerCare, a
25 qualified charitable organization in the sum of \$594.00. (Cal. Health & Safety Code section
26 25249.12(c)(1) and (d)). MCCARTNEY waives any statutory right to share in the penalties
27 awarded to any further extent. The payment will be in the form of three separate checks sent to
28

1 counsel for MCCARTNEY, James Wheaton, Environmental Law Foundation, 1222 Preservation
2 Park Way, Suite 200, Oakland, California 94612.

3 **4.2** Defendant shall pay \$24,000 as reimbursement of MCCARTNEY's attorneys' fees,
4 costs, investigation and litigation expenses ("Attorneys' Fees and Costs") to be paid in four equal
5 monthly installments to begin the first of the month following entry of the Consent Judgment, in
6 amounts of \$6,000 per installment.

7 **4.3** Any failure by FOODS ALIVE to remit any of the foregoing payments results in a
8 mutual recession of the agreement, as though no resolution had been had (if the payment is not
9 made within 14 days after mailed and emailed notice to cure the lack of payment). In that event,
10 the parties stipulate to vacating the Consent Judgment, and will cooperate in securing an order for
11 the same.

12 **5. MODIFICATION OF CONSENT JUDGMENT**

13 **5.1** This Consent Judgment may be modified only by: (i) Written agreement and
14 stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment
15 by the Court; or (ii) upon entry of a modified Judgment by the Court pursuant to a motion by one
16 of the Parties after exhausting the meet and confer process set forth as follows. If either Party
17 requests or initiates a modification, then it shall meet and confer with the other Party in good faith
18 before filing a motion with the Court seeking to modify it. MCCARTNEY is entitled to
19 reimbursement of all reasonable attorneys' fees and costs regarding the Parties' meet and confer
20 efforts for any modification requested or initiated by FOODS ALIVE. Similarly, FOODS ALIVE
21 is entitled to reimbursement of all reasonable attorneys' fees and costs regarding the Parties' meet
22 and confer efforts for any modification requested or initiated by MCCARTNEY. If, despite their
23 meet and confer efforts, the Parties are unable to reach agreement on any proposed modification
24 the party seeking the modification may file the appropriate motion and the prevailing party on such
25 motion shall be entitled to recover its reasonable fees and costs associated with such motion. One
26 basis, but not the exclusive basis, for FOODS ALIVE to seek a modification of this Consent
27 Judgment is if Proposition 65 is changed, narrowed, limited, or otherwise rendered inapplicable in
28

1 whole or in part to the Covered Product or cadmium due to legislative change, a change in the
2 implementing regulations, court decisions or other legal basis.

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

4 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate
5 this Consent Judgment.

6 **6.2** Subject to Section 6.3, any Party may, by motion or application for an order to show
7 cause filed with this Court, enforce the terms and conditions contained in this Consent Judgment.
8 The prevailing party in any such motion or application may request that the Court award its
9 reasonable attorneys' fees and costs associated with such motion or application.

10 **6.3** Before filing a motion or application for an order to show cause, MCCARTNEY
11 shall provide FOODS ALIVE with thirty (30) days' written notice of any alleged violations of the
12 terms and conditions contained in this Consent Judgment. As long as FOODS ALIVE cures any
13 such alleged violations within the 30-day period (or if any such violation cannot practicably be
14 cured within 30 days, it expeditiously initiates a cure within 30 days and completes it as soon as
15 practicable) and FOODS ALIVE provides proof to MCCARTNEY that the alleged violation(s)
16 were the result of good faith mistake or accident, then FOODS ALIVE shall not be in violation of
17 the Consent Judgment. FOODS ALIVE shall have the ability to avail itself of the benefits of this
18 Section two (2) times following the Effective Date.

19 **7. APPLICATION OF CONSENT JUDGMENT**

20 **7.1** This Consent Judgment shall apply to and be binding upon and benefit the Parties
21 and their respective officers, directors, successors, and assigns, including but not limited to their
22 Party Affiliates, and it shall benefit the Parties and their respective officers, directors, shareholders,
23 employees, agents, attorneys, parent companies, subsidiaries, divisions, affiliates, suppliers,
24 franchisees, licenses, customers, distributors, wholesalers, retailers, predecessors, successors, and
25 assigns, including but not limited to the Downstream Releasees.

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

27 **8.1** This Consent Judgment is a full, final, and binding resolution between
28 MCCARTNEY, on behalf of herself and in the public interest, and FOODS ALIVE, of any and all

1 direct or derivative violations (or claimed violations) of Proposition 65 or its implementing
2 regulations for failure to provide Proposition 65 warnings of exposure from the handling or use of
3 the Covered Product and fully resolves all claims that have been or could have been asserted in
4 this Action by any person up to and including the Effective Date for failure to provide Proposition
5 65 warnings for the Covered Product. MCCARTNEY, on behalf of herself and in the public
6 interest, hereby forever releases and discharges FOODS ALIVE and its past and present officers,
7 directors, owners, shareholders, employees, agents, attorneys, parent companies, subsidiaries,
8 divisions, affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers,
9 retailers, and all other upstream and downstream entities and persons in the distribution chain of
10 any Covered Product, and the predecessors, successors and assigns of any of them (collectively,
11 "Released Parties"), from any and all claims and causes of action and obligations to pay damages,
12 restitution, fines, civil penalties, payment in lieu of civil penalties and expenses (including but not
13 limited to expert analysis fees, expert fees, attorneys' fees and costs) (collectively, "Claims")
14 arising under, based on, or derivative of Proposition 65 or its implementing regulations up through
15 the Effective Date relating to actual or potential exposure to chemicals known by the State of
16 California to cause cancer, birth defects or other reproductive harm, from the Covered Product
17 and/or failure to warn about cadmium, as set forth in the Notices of Violation and the Complaint.

18 **8.2** Compliance with the terms of this Consent Judgment shall be deemed to constitute
19 compliance by any Released Party with Proposition 65 regarding alleged exposures from the
20 Covered Product as described above or set forth in the Notice of Violations and the Complaint.

21 **8.3** It is possible that other Claims not known to MCCARTNEY arising out of the facts
22 alleged in the Notice of Violations or the Complaint and relating to the Covered Product that were
23 manufactured, sold or distributed into California before the Effective Date will develop or be
24 discovered. MCCARTNEY, on behalf of herself only, acknowledges that the Claims released
25 herein include all known and unknown Claims and waives California Civil Code section 1542 as
26 to any such unknown Claims. California Civil Code section 1542 reads as follows:

27 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
28 **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT**
TO EXIST IN HIS OR HER FAVOR AT THE TIME OF

1 **EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM**
2 **OR HER MUST HAVE MATERIALLY AFFECTED HIS OR**
3 **HER SETTLEMENT WITH THE DEBTOR.**

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

6 **8.4** MCCARTNEY, on one hand, and FOODS ALIVE, on the other hand, each release
7 and waive all Claims they may have against each other for any statements or actions made or
8 undertaken by them in connection with the Notice of Violations or the Complaint. However, this
9 shall not affect or limit any Party's right to seek to enforce the terms of this Consent Judgment.

10 **9. CONSTRUCTION AND SEVERABILITY**

11 **9.1** The terms and conditions of this Consent Judgment have been reviewed by the
12 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to
13 fully discuss the terms and conditions with its counsel. In any subsequent interpretation or
14 construction of this Consent Judgment, the terms and conditions shall not be construed against any
15 Party.

16 **9.2** In the event that any of the provisions of this Consent Judgment are held by a court
17 to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
18 affected.

19 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
20 construed in accordance with the laws of the State of California.

21 **10. PROVISION OF NOTICE**

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

25 **For Erika McCartney:**

26 James Wheaton

27 ENVIRONMENTAL LAW FOUNDATION

28 1222 Preservation Park Way, Suite 200

 Oakland, California 94612

1
2 **For FOODS ALIVE:**

3 Michael Hambly

4 The Food Lawyers—Salmas Law Group

5 1880 Century Park E. Ste. 611

6 Los Angeles, California 90067

7 **11. COURT APPROVAL**

8 **11.1** Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall
9 notice a Motion for Court Approval. The Parties shall use their best efforts to support entry of this
10 Consent Judgment.

11 **11.2** If the California Attorney General objects to any term in this Consent Judgment,
12 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
13 prior to the hearing on the motion.

14 **11.3** If, despite the Parties' best efforts, the Court does not approve this Stipulated
15 Consent Judgment, it shall be null and void and have no force or effect.

16 **12. EXECUTION AND COUNTERPARTS**

17 **12.1** This Stipulated Consent Judgment may be executed in counterparts, which taken
18 together shall be deemed one document. A facsimile or electronic signature shall be construed as
19 valid as the original signature.

20 **13. ENTIRE AGREEMENT, AUTHORIZATION**

21 **13.1** This Consent Judgment contains the sole and entire agreement and understanding
22 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,
23 negotiations, commitments and understandings related hereto. No representations, oral or
24 otherwise, express or implied, other than those contained herein have been made by any Party. No
25 other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist
26 or to bind any Party.

1 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized
2 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly
3 provided in this Consent Judgment, each Party shall bear its own fees and costs.

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

5 **14.1** This Consent Judgment has come before the Court upon the request of the Parties.
6 The Parties request the Court to fully review this Consent Judgment and, being fully informed
7 regarding the matters which are the subject of this action, to:

8 (a) Find that the terms and provisions of this Consent Judgment represent a good faith
9 settlement of all matters raised by the allegations of the Complaint, that the matter has been
10 diligently prosecuted, and that the public interest is served by such settlement; and

11 (b) Make the findings pursuant to California Health and Safety Code section
12 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

13 **IT IS SO STIPULATED.**

14
15 Dated: 4/22/2019



Erika McCartney

16
17
18 Dated: _____

FOODS ALIVE, INC.

19
20 By: _____
Matt Alvord

21
22 Its: _____
Vice President

23
24 Dated: _____

FOODS ALIVE, L.P.

25
26 By: _____
Matt Alvord

27
28 Its: _____
General Partner

1 13.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized
2 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly
3 provided in this Consent Judgment, each Party shall bear its own fees and costs.

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

5 14.1 This Consent Judgment has come before the Court upon the request of the Parties.
6 The Parties request the Court to fully review this Consent Judgment and, being fully informed
7 regarding the matters which are the subject of this action, to:

8 (a) Find that the terms and provisions of this Consent Judgment represent a good faith
9 settlement of all matters raised by the allegations of the Complaint, that the matter has been
10 diligently prosecuted, and that the public interest is served by such settlement; and

11 (b) Make the findings pursuant to California Health and Safety Code section
12 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

13 **IT IS SO STIPULATED.**

14
15 Dated: _____

Erika McCartney

16
17
18 Dated: 5/01/2019

FOODS ALIVE, INC.

19
20 By: Matt Alvord
Matt Alvord

21
22 Its: VP
Vice President

23
24 Dated: 5/01/2019

FOODS ALIVE, L.P.

25
26 By: Matt Alvord
Matt Alvord

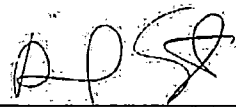
27
28 Its: GP
General Partner

1 APPROVED AS TO FORM:

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

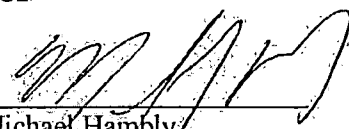
Dated: 4/22/19

ENVIRONMENTAL LAW FOUNDATION
LAW OFFICE OF APRIL STRAUSS

By: 
April M. Strauss
Attorneys for Plaintiff
Erika McCartney

Dated: May 3, 2019

THE FOOD LAWYERS—SALMAS LAW
GROUP

By: 
Michael Hambly
Attorneys for Defendants
Foods Alive, Inc. and Foods Alive, L.P.

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: June 19, 2019


Judge of the Superior Court

ETHAN P. SCHULMAN