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5 Attorneys for Plaintiff
ERIKA MCCARTNEY

FILED
San Francisco County Superior Court

JUL 27 2018

CLERK OF THE COURT
BY: *[Signature]* Deputy Clerk *[Initials]*

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ERIKA MCCARTNEY, in the public interest,)
)
Plaintiff,)
)
v.)
)
WHITMORE FAMILY ENTERPRISES, LLC, a)
Massachusetts limited liability company; TAZA)
16 CHOCOLATE, an entity; and DOES 1 through)
500, inclusive,)
)
Defendants.)

CIVIL ACTION NO. CGC-16-555059
Mr
[PROPOSED] CONSENT
JUDGMENT
[Cal. Health & Safety Code
Sec. 25249.6, et seq.]

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1. INTRODUCTION

1.1 This action arises out of the alleged violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5, *et seq.* (also known as and hereinafter referred to as "Proposition 65") regarding Taza Organic Roasted Cacao Nibs and all products that contain Taza Organic Roasted Cacao Nibs as an ingredient (collectively "Covered Products"). Cadmium is subject to Proposition 65 warning requirements because it is listed as known to the State of California to cause reproductive harm.

1.2 Plaintiff Erika McCartney ("MCCARTNEY") is a California resident acting as a private enforcer of Proposition 65. MCCARTNEY has brought this enforcement action in the public interest against Whitmore Family Enterprises, LLC d/b/a Taza Chocolate ("WHITMORE FAMILY ENTERPRISES" or "Defendant") concerning cadmium in the Covered Products pursuant to California Health and Safety Code Section 25249.7(d). MCCARTNEY contends she is dedicated to, among other causes, helping safeguard the public from health hazards by reducing the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibilities.

1.3. WHITMORE FAMILY ENTERPRISES has sold the Covered Products to California customers during the relevant period.

1.4 MCCARTNEY and WHITMORE FAMILY ENTERPRISES are hereinafter sometimes referred to individually as "Party" or collectively as the "Parties."

1.5 On or about August 12, 2016, pursuant to California Health and Safety Code Section 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65 ("Notice of Violations") on the California Attorney General, other public enforcers, and WHITMORE FAMILY ENTERPRISES alleging violations of California Health and Safety Code

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1 Section 25249.6 with respect to unwarned exposures of cadmium arising from the sale and use of
2 the Covered Products in California. Defendant acknowledges it received the Notice of Violations.

3 1.6 After more than sixty (60) days passed since service of the Notice of Violations,
4 and with no designated governmental agency having filed a complaint against WHITMORE
5 FAMILY ENTERPRISES with regard to the Covered Products or the Alleged Violations,
6 MCCARTNEY filed the complaint in this matter ("Complaint") in this Court.

7 1.7 WHITMORE FAMILY ENTERPRISES generally denies all material and factual
8 allegations contained in or arising from MCCARTNEY's Notice of Violations and Complaint and
9 asserts that it has various affirmative defenses to the claims asserted therein. WHITMORE
10 FAMILY ENTERPRISES further specifically denies that the Plaintiff or California consumers
11 have been harmed or damaged by its conduct or the products it has sold or sells, including the
12 Covered Products.

13 1.8 The Parties enter into this Consent Judgment ("Consent Judgment") in order to
14 settle, compromise, and resolve disputed claims and avoid prolonged and costly litigation. For
15 purposes of the approval and entry of this Consent Judgment only, the Parties stipulate that this
16 Court has jurisdiction over the subject matter of this Action and personal jurisdiction over the
17 Parties, that venue is proper in this Court, and that this Court has jurisdiction to enter this Consent
18 Judgment pursuant to the terms set forth herein.

19 1.9 Nothing in this Consent Judgment, nor compliance with its terms, shall constitute
20 or be construed as an admission by any of the Parties (or by any of WHITMORE FAMILY
21 ENTERPRISES' officers, directors, shareholders, members, employees, agents, subsidiaries,
22 divisions, affiliates, suppliers, or licensees) of any fact, conclusion of law, issue of law, violation
23 of law, fault, wrongdoing, or liability, including without limitation, any admission concerning any

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1 alleged violation of Proposition 65. Except as expressly set forth herein, nothing in this Consent
2 Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties
3 have or may have in any other or future legal proceeding.

4 1.10 The "Effective Date" of this Consent Judgment shall be the date upon which this
5 Consent Judgment, after having been fully executed by all of the Parties, has been approved and
6 entered by the Court.

7 2. **INDUCTIVE BELIEF WARNINGS**

8 2.1 Beginning on the Effective Date, WHITMORE FAMILY ENTERPRISES shall be
9 permanently enjoined from Distributing into California any Covered Products without a warning
10 as set forth in Paragraph 2.2 below. "Distributing into California" or "Distribute into California"
11 means to ship any of the Covered Products to California for sale or to sell any of the Covered
12 Products to a distributor that WHITMORE FAMILY ENTERPRISES knows will redistribute or
13 sell the Covered Products in or into California.

14 2.2 Clear and Reasonable Proposition 65 Warnings: For a Covered Product that is
15 subject to Proposition 65 warning requirement based on section 2.1 above, the following warning
16 ("Warning") shall be provided as specified below.

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

19 In lieu of the preceding warning, WHITMORE FAMILY ENTERPRISES may use any
20 warning language that complies with Title 27, California Code of Regulations, section 25600 *et*
21 *seq.*, as amended August 30, 2016 and subsequently thereafter.

22 The Warning shall either be affixed to or printed on (at the point of manufacture, prior to
23 the shipment to California, or prior to Distribution within California) the outside packaging or

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1 container of each unit of the Covered Product or provided at the point of display of the Covered
2 Product wherever it is offered for sale in California. The Warning shall be displayed with such
3 conspicuousness, as compared with other words, statements, designs or devices on the outside
4 packaging or at the point of display in California, as to render it likely to be read and understood
5 by any ordinary individual prior to purchase or use. If the Warning is displayed on the product
6 container or labeling, the Warning shall be at least the same size as the largest of any other health
7 or safety warnings on the product container or labeling, and the word "WARNING" shall be in
8 capital letters and in bold print. If presented at the point of display, the Warning shall be presented
9 on a sign or shelf label in a font no smaller than the largest type size used for other information on
10 the sign or a shelf label for similar products.

11 For a Covered Product that is subject to the Proposition 65 warning requirement based on
12 section 2.1 above, and sold online via the internet, on the website where such Covered Product is
13 sold, the following Warning shall be prominently displayed to the purchaser either on the product
14 display page or otherwise on a webpage prior to completing the purchase.

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

17 The Warning shall be displayed with such conspicuousness, as compared with other words,
18 statements, and designs on the webpage. The Warning shall be at least the same size as the largest
19 of any other health or safety warnings on the webpage, and the word "WARNING" shall be in
20 capital letters and in bold print.

21 The Parties agree that should the OEHHA warning regulations change, that WHITMORE
22 FAMILY ENTERPRISES may either conform with the OEHHA regulations, or conform with the

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1 terms provided in this Consent Judgment, and in so doing, will be in compliance with this Consent
2 Judgment and the requirements of Proposition 65.

3 The Parties agree that any Covered Products that meet the cadmium standards set forth in
4 Section 6.2.2 of that certain Consent Judgment entered February 15, 2018, by the San Francisco
5 Superior Court in *As You Sow v. Trader Joe's Company, et al.*, Case No. CGC-15-548791, shall
6 be exempt from the requirements of this section.

7 **3. REQUIRED MONETARY PAYMENTS**

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

12 3.2 \$10,500 as civil penalties pursuant to California Health and Safety Code Section
13 25249.7(b)(1) to be paid ten (10) business days after entry of the Consent Judgment. Of this
14 amount, \$7,875 shall be payable to OEHHA, \$1,838 shall be payable to MCCARTNEY, and \$787
15 shall be payable to CancerCare, a qualified 501(c)(3) charitable organization, dedicated to
16 providing financial aid to cancer patients for treatment costs. MCCARTNEY hereby waives any
17 statutory entitlement to penalties in excess of \$1,838. MCCARTNEY's counsel shall promptly
18 forward all checks to the payees indicated.

19 3.3 \$39,250 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
21 paid ten (10) business days after entry of the Consent Judgment.

22 3.4 Any failure to remit any of the foregoing payments results in mutual rescission of
23 the agreement, as though no resolution had been had. In that event, the Parties stipulate to vacating

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1 the Consent Judgment, and will cooperate in securing an order for the same. However, no failure
2 to remit shall be deemed effective until five (5) business days following notification of Defendant's
3 counsel of any alleged failure to remit. Plaintiff's counsel agrees to provide written notice via
4 email of any alleged failure to remit, and Defendant shall be afforded five (5) business days to cure
5 the alleged failure.

6 **4. MODIFICATION**

7 4.1 This Consent Judgment may be modified only by written agreement and stipulation
8 of the Parties and upon the Court's approval.

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

10 5.1 The Court shall retain jurisdiction to oversee, enforce and/or modify the terms of
11 this Consent Judgment.

12 5.2 Any Party may, by means of filing an application for an order to show cause,
13 enforce the terms and conditions contained in this Consent Judgment. The prevailing party in any
14 such action or application may request that the Court award its reasonable attorneys' fees and costs
15 associated with such action or application.

16 **6. APPLICATION OF CONSENT JUDGMENT**

17 6.1 This Consent Judgment shall apply to and be binding upon the Parties and their
18 respective privies, successors, and assigns, and it shall be deemed to inure the benefit of the Parties
19 and their respective privies, successors, and assigns.

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

21 7.1 This Consent Judgment is a full, final, and binding resolution between
22 MCCARTNEY, on behalf of herself and in the public interest on the one hand, and WHITMORE
23 FAMILY ENTERPRISES and its past and present officers, directors, owners, members,

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1 shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers,
2 franchisees, licensees, customers, distributors, wholesalers, retailers, and all other upstream and
3 downstream entities and persons in the distribution chain of any Covered Products, and the
4 predecessors, successors and assigns of any of them (collectively, "Released Parties"), on the other
5 hand, of any and all direct or derivative violations (or claimed violations) of Proposition 65 or its
6 implementing regulations for failure to provide Proposition 65 warnings of exposure to cadmium
7 from the handling, use, or consumption of the Covered Products, and it fully resolves all claims
8 that have been or could have been asserted up to and including the Effective Date for the alleged
9 failure to provide Proposition 65 warnings for the Covered Products regarding cadmium as set
10 forth in the Notice of Violations and Complaint.

11 7.2 MCCARTNEY on her own behalf (and not in her role as a representative of the
12 public interest) further hereby releases and discharges WHITMORE FAMILY ENTERPRISES
13 and the Released Parties from any and all claims and causes of action and obligations to pay
14 damages, restitution, fines, civil penalties, payment in lieu of civil penalties and expenses
15 (including but not limited to expert analysis fees, expert fees, attorneys' fees and costs)
16 (collectively, "Claims") based on exposure to cadmium from the Covered Products and/or failure
17 to warn about cadmium in the Covered Products to the extent that the Covered Products were sold
18 by WHITMORE FAMILY ENTERPRISES prior to the Effective Date.

19 7.3 Unless modified pursuant to Section 4 above, compliance with the terms of Section
20 2.1 and 2.2 of this Consent Judgment shall be deemed to constitute compliance with Proposition 65
21 regarding the Covered Products.

22 7.4 It is possible that other Claims not known to MCCARTNEY arising out of the facts
23 alleged in the Notice of Violations or the Complaint will develop or be discovered. MCCARTNEY

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1 acknowledges on behalf of herself (and not in the role as representative of the public interest) that
2 the Claims released herein include all known and unknown Claims and waives California Civil
3 Code Section 1542 as to any such unknown Claims. California Civil Code Section 1542 reads as
4 follows:

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

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

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

3 **8. CONSTRUCTION AND SEVERABILITY**

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

8 8.2 In the event that any provision of this Consent Judgment is held by a court to be
9 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 9.1 All notices required to be given to either Party to this Consent Judgment by the
14 other shall be in writing and sent to the following agents listed below by (a) first-class, registered,
15 (b) certified mail, (c) overnight courier, or (d) personal delivery to the following:

16 For Erica McCartney

17 PACIFIC JUSTICE CENTER

18 Robert B. Hancock

19 50 California Street, Suite 1500

20 San Francisco, California 94111

21 For Whitmore Family Enterprises, LLC

22 PEG CAREW TOLEDO, LAW CORPORATION
23

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1 Peg Carew Toledo
2 3001 Douglas Boulevard, Suite 340
3 Roseville, California 95661

4 **10. COURT APPROVAL**

5 10.1 The Parties shall use their reasonable best efforts to support the Court's approval
6 of the Consent Judgment and entry of the Consent Judgment.

7 10.2 If the California Attorney General objects to any term in this Consent Judgment,
8 the Parties shall use their best efforts to resolve the concern in a timely manner, and, if possible,
9 prior to the hearing on the Motion for Court Approval.

10 10.3 If, despite the Parties' best efforts, the Court does not approve this settlement and
11 enter a Consent Judgment thereon, the parties shall have the option of (a) proceeding to try and
12 resolve the matter amicably, or (b) determining that the settlement is null and void and of no force
13 or effect, in which event, all payment-related obligations set forth in Section 3 above shall be
14 deemed never to have existed and the parties may thereafter proceed of their own accord.

15 **11. EXECUTION AND COUNTERPARTS**

16 11.1 This Consent Judgment may be executed in counterparts, which, taken together,
17 shall be deemed one document. A facsimile or .pdf signature shall be construed as valid as the
18 original signature.

19 **12. ENTIRE AGREEMENT, AUTHORIZATION**

20 12.1 This Consent Judgment contains the sole and entire agreement and understanding
21 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,
22 negotiations, commitments, and understandings related hereto. No representations, oral or
23 otherwise, express or implied, other than those contained herein have been made by any party.

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~~PROCESSED~~ **CONSENT JUDGMENT**
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1 12.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized
2 by the party he or she represents to enter into this Consent Judgment. Except as explicitly provided
3 herein, each party shall bear its own fees and costs.

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

5 13.1 This Consent Judgment has come before the Court upon the request of the Parties.
6 The Parties request the Court fully review this Consent Judgment and, being fully informed
7 regarding the matters which are the subject to this action, to make the findings pursuant to
8 California Health and Safety Code Section 25249.7(f)(4), and approve the settlement and this
9 Consent Judgment.

10 **IT IS SO STIPULATED:**

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12 Dated: 5/16/18


Erika McCarty

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14 Dated: 05/19/2018

WHITMORE FAMILY ENTERPRISES, LLC

By: 
Its: Marianne

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19 APPROVED AS TO FORM:

PACIFIC JUSTICE CENTER

20 Dated: 5/21/18

By: 
Robert B. Hancock
Attorneys for Plaintiff

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~~(REDACTED)~~ CONSENT JUDGMENT
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Dated: May 21, 2018

PEG CAREW TOLEDO,
LAW CORPORATION

By: Peg Carew Toledo
Peg Carew Toledo
Attorney for Defendant

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~~RECEIVED~~ CONSENT JUDGMENT
McCartney v. Whitmore Family Enterprises, LLC et al. Civil Action No. CGC-16-555059

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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: 7/26, 2018.



Judge of the Superior Court

HAROLD KAHN