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 ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ERIKA MCCARTNEY, in the public interest,

Plaintiff,

vs.

NUTS.COM, INC; and DOES 1 through 500,
inclusive,

Defendants.

Case No. RG16843355

ASSIGNED FOR ALL PURPOSES TO:
 HON. STEPHEN KAUS
 DEPARTMENT 19

~~PROPOSED~~ STIPULATED
 CONSENT JUDGMENT

Complaint Filed: December 21, 2016
 Trial Set For: August 16, 2019, 9:00 am

1 **1. INTRODUCTION**

2 **1.1** This Action arises out of alleged violations of California's Safe Drinking Water
3 and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5 *et seq.*
4 (also known as and hereinafter referred to as "Proposition 65") regarding Cacao powder
5 manufactured, imported, distributed, and/or sold by Defendant Nuts.com, Inc. (hereinafter the
6 "Covered Product") Plaintiff Erika McCartney alleges the Covered Product exposes consumers in
7 California to cadmium (hereinafter the "Listed Chemical.")

8 **1.2** Plaintiff Erika McCartney ("MCCARTNEY") is a California resident acting as a
9 private enforcer of Proposition 65. MCCARTNEY brings this Action in the public interest
10 pursuant to California Health and Safety Code Section 25249.6. MCCARTNEY asserts that she is
11 dedicated to, among other causes, helping safeguard the public from health hazards by reducing
12 the use and misuse of hazardous and toxic chemicals and substances, facilitating a safe
13 environment for consumers and employees, and encouraging corporate responsibility.

14 **1.3** Defendant Nuts.com, Inc. is a New Jersey corporation and is hereinafter referred to
15 as "NUTS.COM."

16 **1.4** NUTS.COM manufactures or imports the Covered Product and Distributes it into
17 California (as defined herein) and/or sells the Covered Product in California.

18 **1.5** MCCARTNEY and NUTS.COM are hereinafter sometimes referred to individually
19 as a "Party" or collectively as the "Parties."

20 **1.6** On or about July 29, 2016, pursuant to California Health and Safety Code Section
21 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of alleged Violation of Proposition 65
22 ("Notice of Violation") on NUTS.COM, the California Attorney General, all District Attorneys,
23 and all City Attorneys with populations exceeding 750,000. A true and correct copy of the Notice
24 of Violation is attached hereto as Exhibit A.

25 **1.7** After more than sixty (60) days passed since service of the Notice of Violation, and
26 no designated governmental agency filed a complaint or to the best of the Parties' knowledge is
27 otherwise diligently prosecuting a claim against NUTS.COM with regard to the alleged violations
28 therein, MCCARTNEY filed a complaint (the "Complaint") in the Alameda Superior Court, Case

1 No. RG16483355, for injunctive relief and civil penalties on December 21, 2016. The Complaint
2 is based on the allegations in the Notice of Violation.

3 **1.8** The Complaint and the Notice of Violation allege that NUTS.COM manufactured,
4 imported, distributed, and/or sold in California the Covered Products containing the Listed
5 Chemical without a Proposition 65 warning in alleged violation of California Health and Safety
6 Code Section 25249.6. Further, the Complaint and Notice of Violation allege that use of Covered
7 Products exposes persons in California to the Listed Chemical. NUTS.COM generally denies all
8 material and factual allegations in the Complaint and Notice of Violation, specifically denies that
9 MCCARTNEY or California consumers have been exposed to the Listed Chemical by the Covered
10 Product, and maintains that all of its products comply with all laws and are completely safe for
11 their intended use. MCCARTNEY and NUTS.COM each reserve 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 denied and disputed claims and avoid prolonged and costly litigation. The Parties enter
15 into this Consent Judgment pursuant to a full and final settlement of any and all claims between
16 the Parties. Nothing in this Consent Judgment, nor compliance with its terms, shall constitute or
17 be construed as an admission by any of the Parties, or by any of their respective officers, directors,
18 shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers,
19 franchisees, licensees, distributors, wholesalers, or retailers, of any fact, conclusion of law, issue
20 of law, violation of law, fault, wrongdoing, or liability, including without limitation, any admission
21 concerning any alleged violation of Proposition 65. Except as expressly set forth herein, nothing
22 in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense
23 the Parties may have in any other or future legal proceeding. Provided, however, nothing in this
24 Section shall affect the enforceability of this Consent Judgment.

25 **1.10** The "Effective Date" of this Consent Judgment shall be the date this Consent Judgment is
26 entered as a Judgment by the court.

27 **2. JURISDICTION AND VENUE**
28

1 For purposes of this consent judgment only, the Parties stipulate that this Court has
2 jurisdiction over the subject matter of this Action and personal jurisdiction over the Parties, that
3 venue is proper in this Court, and that this Court has jurisdiction to enter this Consent Judgment
4 pursuant to the terms set forth herein as a full settlement and resolution of the allegations contained
5 in the Notice of Violation and Complaint.

6 **3. INJUNCTIVE RELIEF**

7 3.1 As of the "Compliance Date" (defined below) and except as otherwise provided in
8 Sections 3.3-3.7 with respect to "Reformulated Products," NUTS.COM shall be permanently
9 enjoined from Distributing into California any Covered Product without the warning set forth in
10 Paragraph 3.2. below. "Distributing into California" or "Distribute into California" means to ship
11 any of the Covered Product into California for sale or to sell any of the Covered Product to a
12 distributor or retailer that NUTS.COM knows or has reason to believe will redistribute or sell the
13 Covered Product in or into California.

14 3.2 Clear and Reasonable Proposition 65 Warning. For a Covered Product that is
15 subject to a Proposition 65 warning requirement based on Section 3.1 above, the following warning
16 ("Warning") shall be provided as specified below.

17 [California Proposition 65] **WARNING:** Consuming this Product can expose you to
18 cadmium, which is known to the State of California to cause cancer and birth defects or
19 other reproductive harm. For more information, go to www.P65Warnings.ca.gov/food

20 The language in brackets is optional. NUTS.COM may also provide a warning that
21 complies with this Section for a chemical listed pursuant to Proposition 65 contained in the Product
22 in place of cadmium.

23 3.2.1. For sales through distributors and Retailers, the Warning shall either be affixed to
24 or printed on (at the point of manufacture, prior to the shipment to California, or prior to
25 Distribution within California) the outside packaging, container, or label of each unit of the
26 Covered Product or provided at the point of display of the Covered Product wherever it is offered
27 for sale in California. Where the Warning is provided on the food product label, it must be set off
28 from other surrounding information and enclosed in a box. The Warning shall be displayed with
such conspicuousness, as compared with other words, statements, designs or devices on the outside

1 packaging or at the point of display in California, as to render it likely to be read and understood
2 by an ordinary individual prior to purchase or use. If the Warning is displayed on the product
3 packaging, container or labeling, the Warning shall be at least the same size as the largest of any
4 other health or safety warnings on the product packaging, container, or labeling, and the word
5 "WARNING" shall be in capital letters and in bold print. If presented at the point of display, the
6 Warning shall be presented on a sign or shelf label in a font no smaller than the largest type size
7 used for other information on the sign or a shelf label for similar products. If the Covered Product
8 label, packaging, container, or point of display includes consumer information in a language other
9 than English, the warning must also be provided in that language in addition to English.

10 3.2.2 For internet sales from the NUTS.COM website to customers who input a
11 California shipping address after the Compliance Date, NUTS.COM shall provide an internet
12 Warning using the language set forth in Section 3.2 prior to the customer's completion of the
13 purchase. The Warning that is given on the internet shall be in the same type size or larger than
14 the Covered Product description text and shall appear either: (a) on the same webpage on which
15 the Covered Product is displayed; (b) on the same web page as the order form for the Covered
16 Product; (c) on the same page as the price for the Covered Product; or (d) on one or more web
17 pages displayed to a purchaser during the checkout process. The warning may also be provided by
18 a clearly marked hyperlink labeled "[California Proposition 65] WARNING" on the product
19 display page prior to purchase of the Covered Product (language in brackets optional).

20 3.2.3 The Parties agree that should the OEHHA warning regulations governing the
21 content of warnings change, NUTS.COM may either conform with the revised OEHHA
22 regulations or conform with the terms provided in this Consent Judgment, and in doing so, will be
23 in compliance with this Consent Judgment and Proposition 65.

24 3.3 The Parties agree that "Reformulated Products" are any units of Covered Products
25 containing cadmium concentration levels below the corresponding warning levels set forth in that
26 certain Consent Judgment entered February 15, 2018, by the San Francisco Superior Court in *As*
27 *You Sow v. Trader Joe's Company, et al.*, Case No. CGC-15-548791, ("*As You Sow*"), as follows:
28

- For Covered Products with up to 65% cacao content: .400 ppm or less, provided that as of February 15, 2025, the foregoing cadmium concentration level shall be deemed to have been reduced to .320 ppm, unless the *As You Sow* parties stipulate otherwise, as defined in the *As You Sow* Consent Judgment;
- For Covered Products with greater than 65% and up to 95% cacao content: .450 ppm or less, provided that as of February 15, 2025, the foregoing cadmium concentration level shall be deemed to have been reduced to 0.400 ppm, unless the *As You Sow* parties stipulate otherwise, as defined in the *As You Sow* Consent Judgment;
- For Covered Products with greater than 95% cacao content: .960 ppm or less, provided that as of February 15, 2025, the foregoing cadmium concentration level shall be deemed to have been reduced to 0.800 ppm, unless the *As You Sow* parties stipulate otherwise, as defined in the *As You Sow* Consent Judgment.

3.3.1 Reformulated Products Distributed into California and/or sold by NUTS.COM into California shall be exempt from the requirements of this Section 3, including the injunction in Subsection 3.1, and do not require a Proposition 65 warning for cadmium. Parties agree that NUTS.COM may only sell and/or Distribute into California Reformulated Products if NUTS.COM is in compliance with the provisions set forth in Sections 3.4-3.7. The initial "Compliance Date" herein for meeting permissible cadmium levels, or alternatively providing a Warning for such Covered Products Distributed or sold in California shall be thirty (30) days from the Effective Date. However, notwithstanding this Compliance Date, NUTS.COM must provide internet Warnings pursuant to Paragraph 3.2 within 7 days of the Effective Date unless such products are Reformulated Products.

3.4 Before selling or Distributing a Reformulated Product into California, NUTS.COM will test or arrange for the testing for cadmium of each Reformulated Product that it intends to distribute or sell in California. In establishing an initial data set for purposes of this Consent Judgment, NUTS.COM may rely on testing conducted prior to the Effective Date if such testing

documents cadmium levels in Covered Products either already in the stream of commerce, in process, or which are ready for distribution or sale.

3.4.1 NUTS.COM may use a testing laboratory with Environmental Laboratory Certification from the State of California, State Water Resources Control Board, Environmental Laboratory Accreditation Program; NSF International; American Association for Laboratory Accreditation for Chemical Testing; International Standards Organization/IEC via ANSI-ASQ; or an in-house laboratory or other facility experienced in testing for cadmium levels in foods that complies with the Production and Process Control System: Requirements for Laboratory Operations set forth in 21 C.F.R. Part 111, Subpart J, including but not limited to the requirements for written procedures, requirements for laboratory control processes, requirements for laboratory methods for testing and examination, record retention policies, and other laboratory requirements.

3.4.2 The cadmium concentrations in a Reformulated Product must be measured using inductively coupled plasma mass spectrometry ("ICP-MS") utilizing scientifically appropriate adherence to the protocols set forth in EPA Methods 6020, 6020a, isotope dilution. The laboratory must digest at least 1 gram of each sample, analyze each sample undiluted by ICP-MS, and use a level of detection corresponding to less than 0.01 ppm of cadmium in the finished product.

3.5 To fulfill its monitoring obligation under Section 3.4 and using a testing method described therein, NUTS.COM must test or cause to be tested three (3) samples of the final product which comprises each Reformulated Product, with samples randomly selected from three (3) different lots (or from the maximum number of lots that are available for testing if there are fewer than three (3) lots available). The testing required under this Section 3.5 will be repeated annually for two years following the compilation of the initial data set described in Section 3.4. Notwithstanding any language to the contrary herein, if at any time there is a material change in formula of a Covered Product that is reasonably likely to affect the cadmium levels in the Covered Product, that Reformulated Product shall be tested pursuant to Sections 3.4 and 3.5 for two years. All laboratory test data and certifications (if applicable) must be retained by NUTS.COM for a period of three years from the date of completed testing. However, NUTS.COM is not required to

1 test any Covered Products if they are providing a warning for those products that complies with
2 Section 3.2.

3 3.5.1 On and after the Effective Date, any single test result which exceeds 1.92 ppm of
4 cadmium as calculated under Sections 3.4 and 3.5 shall be deemed an outlier.

5 3.5.2 At NUTS.COM's option, any single Outlier test result may be subject to validation
6 before it is deemed a final Outlier result for purposes of this Consent Judgment. The validation
7 process shall consist of two steps:

8 (a) First, NUTS.COM shall check its equipment, test processes, validation procedures,
9 laboratory contamination, operator error, and any other factors which could have produced an
10 erroneous result. If the result is determined erroneous due to testing error or failure to satisfy
11 quality assurance or quality control procedures, the result shall be discarded and not used for any
12 purpose under this Consent Judgment. The Covered Product shall then be re-tested as if such test
13 were the first test.

14 (b) Second, if a single Outlier test result is obtained and the steps in 3.5.2(a) have not
15 invalidated the result, then NUTS.COM may collect up to three (3) more samples from the same
16 lot or batch and have those samples tested in accordance with Section 3.4. The arithmetic mean of
17 the test results of all samples tested from the single lot or batch (including the original Outlier test
18 result) shall then be determined. That mean test result shall be deemed the final result and shall
19 constitute the applicable test result for purposes of this Consent Judgment. If this validated test
20 result is an Outlier as defined in Section 3.5.2, then the terms of Section 3.7 shall apply to that
21 Outlier test result.

22 3.6 As an alternative to Section 3.5, if NUTS.COM obtains the COVERED PRODUCT
23 from its suppliers and does not add to, remove from, or otherwise alter the COVERED PRODUCT
24 in any way, it may rely on compliance certifications from its suppliers for each batch received, and
25 shall not be required to perform its own testing to verify compliance levels with this Consent
26 Judgment. Such compliance certifications must include the date the testing was performed, the
27 name of the laboratory performing the test, the test method used by the laboratory, the detection
28 limit used by the laboratory, the lot numbers of the samples tested, and the analytical results of the

1 testing. NUTS.COM shall rely on the certification and shall not be required to perform its own
2 testing if the compliance certification indicates that the level of cadmium in the COVERED
3 PRODUCT complies with the cadmium levels in Section 3.3 of this Consent Judgment. The testing
4 laboratory used by NUTS.COM's suppliers shall comply with Sections 3.4.1-3.5.2. If NUTS.COM
5 chooses to rely on compliance certifications pursuant to this paragraph 3.6, NUTS.COM shall
6 obtain such compliance certifications required under this Section 3.6 for each batch received for
7 two (2) years following the Compliance Date or for two (2) years following a material change in
8 formula of a Covered Product that is reasonably likely to affect the cadmium levels in the Covered
9 Product, as applicable. NUTS.COM shall retain copies of the certifications for two years after the
10 date of issuance.

11 3.7 If there is an allegation that a Covered Product is in violation of Section 3.1-3.3,
12 MCCARTNEY may make a written request to NUTS.COM, delivered to the address of
13 NUTS.COM as set forth below, for data generated in compliance with Sections 3.4 through 3.6.
14 MCCARTNEY may make such a request no more than three (3) years after the date of completed
15 testing pursuant to Section 3.5 or two (2) years after the date of issuance of the final compliance
16 certificate pursuant to Section 3.6 or for (2) years following a material change in formula of a
17 Covered Product that is reasonably likely to affect the cadmium levels in the Covered Product, as
18 applicable. In response to such a request, NUTS.COM will provide to MCCARTNEY the date the
19 analysis was performed, the name of the laboratory conducting the test, the test method used by
20 the laboratory, the detection limit used by the laboratory, the lot numbers of the samples tested,
21 and the analytical results within thirty (30) days of MCCARTNEY'S written request.
22 MCCARTNEY shall keep all such information and data confidential. If NUTS.COM has relied on
23 a compliance certification pursuant to Paragraph 3.6, NUTS.COM will provide a copy of such
24 certification in response to a request by MCCARTNEY. NUTS.COM shall provide to
25 MCCARTNEY within 45 days of completing the initial testing of its Covered Products under
26 Section 3.4, and annually thereafter during the testing period set forth in Section 3.5, a list of all
27 such Products for which the test results obtained pursuant to Sections 3.4-3.5 indicate a Proposition
28 65 warning is required pursuant to Section 3.8. If NUTS.COM receives a compliance certification

1 pursuant to Section 3.6 and such compliance certification indicates that a warning is required
2 pursuant to Section 3.8, NUTS.COM shall provide a copy of each certification to MCCARTNEY
3 for two (2) years from the Compliance Date or for two (2) years following a material change in
4 formula of a Covered Product that is reasonably likely to affect the cadmium levels in the Covered
5 Product, as applicable. MCCARTNEY shall keep all information and data provided pursuant to
6 this Section confidential.

7 3.8 When calculating whether a Covered Product is a Reformulated Product,
8 NUTS.COM must compare the warning threshold value contained in Section 3.3 to the arithmetic
9 mean of at least three (3) samples tested in accordance with Section 3.4-3.5. However,
10 NUTS.COM may, at its option, calculate the arithmetic mean using up to ten (10) samples.
11 Notwithstanding the foregoing, NUTS.COM may not include an Outlier test result (as defined in
12 Section 3.5.1) in calculating the arithmetic mean, and if NUTS.COM elects to sell or Distribute a
13 Covered Product in California for which an Outlier test result is obtained and validated as provided
14 for in Section 3.5.2, then that specific product lot or batch from which the Outlier result was
15 derived shall be subject to the warning obligations of this Section 3. NUTS.COM shall have thirty
16 (30) days from the date the relevant test result mean is calculated to satisfy the applicable
17 obligations of this Section 3 for Covered Products manufactured, distributed or sold after that date.

18 **4. REQUIRED MONETARY PAYMENTS**

19 **4.1** Within ten (10) days of the date notice of entry of this Consent Judgment is served
20 on Defendant, plus any additional time as prescribed by California Code of Civil Procedure §1013,
21 in complete resolution of all claims for monetary relief of any kind in this matter, NUTS.COM
22 shall make the following settlement payments and send them to counsel for MCCARTNEY,
23 Environmental Law Foundation, 1222 Preservation Park Way, Suite 200. The checks shall be
24 payable to the following persons and the payment shall be apportioned as follows:

25 **4.2** NUTS.COM shall pay \$7000 in complete resolution of any claims for civil
26 penalties or payments in lieu of penalties pursuant to California Health and Safety Code Section
27 25249.7(b)(1). Of this amount, \$5250 shall be payable to the Office of Environmental Health
28 Hazard Assessment ("OEHHA"); \$1750 shall be payable to MCCARTNEY; MCCARTNEY

1 hereby waives any statutory entitlement to penalties in excess of \$1750. These amounts shall be
2 paid by separate checks within ten (10) days of the date notice of entry of this order is served on
3 NUTS.COM, plus any additional time as prescribed by California Code of Civil Procedure §1013
4 MCCARTNEY's counsel shall be solely responsible for promptly forwarding all checks received
5 hereunder to the payees indicated.

6 **4.3** NUTS.COM shall pay \$30,000 to Environmental Law Foundation in complete
7 resolution of any claim for, and as complete reimbursement of all of MCCARTNEY's attorneys'
8 fees, expenses, investigation and litigation fees, and any other expenses of any kind incurred by
9 MCCARTNEY in connection with the Notice of Violation and Complaint, and in obtaining court
10 approval of this Consent Judgment.

11 **5. MODIFICATION OF CONSENT JUDGMENT**

12 **5.1** This Consent Judgment may be modified only by: (i) Written agreement and
13 stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment
14 by the Court; or (ii) Upon entry of a modified Judgment by the Court pursuant to a motion by one
15 of the Parties after exhausting the meet and confer process set forth as follows. If either Party
16 requests or decides to initiate a modification of this Consent Judgment, then it shall meet and
17 confer with the other Party in good faith before filing a motion with the Court seeking to modify
18 it. MCCARTNEY is entitled to reimbursement of all reasonable attorneys' fees and costs regarding
19 the Parties' meet and confer efforts for any modification requested or initiated by NUTS.COM.
20 Similarly, NUTS.COM is entitled to reimbursement of all reasonable attorney's fees and costs
21 regarding the Parties' meet and confer efforts for any modification requested or initiated by
22 MCCARTNEY. If, despite their meet and confer efforts, the Parties are unable to reach agreement
23 on any proposed modification, the Party seeking the modification may file the appropriate motion
24 and the prevailing party on such motion shall be entitled to recover its reasonable fees and costs
25 associated with such motion. One basis, but not the exclusive basis, for NUTS.COM to seek a
26 modification of this Consent Judgment is if Proposition 65 is changed, narrowed, limited, or
27 otherwise rendered inapplicable in whole or in part to the Covered Product and/or the Listed
28

1 Chemical due to legislative change, a change in the implementing regulations, court decisions,
2 and/or any 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, either Party may, by motion or application for an order to
7 show cause filed with this Court, enforce the terms and conditions contained in this Consent
8 Judgment. The prevailing party in any such motion or application may request that the Court award
9 its reasonable attorneys' fees and costs associated with such motion or application. Only the Parties
10 hereto may enforce the terms of this Consent Judgment. Alleged violations of this Consent
11 Judgment may only be enforced hereunder.

12 **6.3** Before filing a motion or application for an order to show cause for an alleged
13 violation or violations of Section 3 of this Consent Judgment, MCCARTNEY shall provide
14 NUTS.COM with thirty (30) days written notice of any alleged violations of the terms and
15 conditions contained in Section 3 of this Consent Judgment. As long as NUTS.COM cures any
16 such alleged violations within the 30-day period (or if any such violation cannot practicably be
17 cured within 30 days, it expeditiously initiates a cure within 30 days and completes it as soon as
18 practicable thereafter) and NUTS.COM provides proof to MCCARTNEY that the alleged
19 violation(s) was or were the result of good faith mistake or accident, then NUTS.COM shall not
20 be in violation of the Consent Judgment and shall have no monetary liability of any kind for such
21 alleged violation. NUTS.COM shall have the ability to avail itself of the benefits of this Section
22 two (2) times following the Compliance Date.

23 **7. APPLICATION OF CONSENT JUDGMENT**

24 This Consent Judgment shall apply to and be binding upon the Parties and their respective
25 officers, directors, successors and assigns, and it shall benefit the Parties and their respective
26 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,
27 affiliates, franchisees, licensors, licensees, customers, distributors, wholesalers, retailers,
28 predecessors, successors, and assigns of any of them.

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

2 **8.1** This Consent Judgment is a full, final, and binding resolution between
3 MCCARTNEY, on behalf of herself and in the public interest pursuant to Health and Safety Code
4 Section 25249.7(d), and NUTS.COM, of any and all direct or derivative violations (or claimed
5 violations) of Proposition 65 or its implementing regulations for alleged failure to provide
6 Proposition 65 warnings for exposure to the Listed Chemical (cadmium) from the handling, use,
7 or consumption of the Covered Product and fully resolves all claims that have been or could have
8 been asserted in this Action up to and including the Compliance Date for alleged failure to provide
9 Proposition 65 warnings for the Covered Product regarding the Listed Chemical as alleged in the
10 Notice of Violation and Complaint. MCCARTNEY, on behalf of herself and in the public interest,
11 hereby forever releases and discharges NUTS.COM and its past and present officers, directors,
12 owners, shareholders, employees, agents, attorneys, parent companies, subsidiaries, divisions,
13 affiliates, suppliers, franchisees, licensors, licensees, customers, distributors, wholesalers, private
14 labelers, co-packers, retailers, and all other upstream and downstream entities and persons in the
15 distribution chain of any Covered Product, and the predecessors, successors and assigns of any of
16 them (collectively, "Released Parties"), from any and all claims and causes of action and
17 obligations to pay damages, restitution, fines, civil penalties, payment in lieu of civil penalties and
18 expenses of any other kind (including but not limited to expert analysis fees, expert fees, and
19 attorney's fees and expenses) (collectively, "Claims") arising under, based on, and/or derivative
20 of Proposition 65 or its implementing regulations up through the Compliance Date based on
21 alleged exposure to the Listed Chemical and/or failure to warn about the Listed Chemical in
22 Covered Products, as set forth in the Notice of Violation and Complaint.

23 **8.2** NUTS.COM's compliance with the terms of this Consent Judgment shall be
24 deemed to constitute compliance by any Released Party with Proposition 65 regarding alleged
25 exposures to the Listed Chemical from Covered Products as set forth in the Notice of Violation
26 and Complaint.

27 **8.3** It is possible that other Claims not known to MCCARTNEY arising out of the facts
28 alleged in the Notice of Violation or the Complaint and relating to Covered Products that were

1 manufactured, imported, sold or Distributed into California by NUTS.COM before the
2 Compliance Date will develop or be discovered. MCCARTNEY, on behalf of herself, and each of
3 her successors, assigns, legatees, heirs, attorneys and personal representatives only, acknowledges
4 that any such Claims released herein as to the Released Parties include all known and unknown
5 Claims related to Covered Products, and waives California Civil Code Section 1542 as to any such
6 unknown Claims. California Civil Code Section 1542 reads as follows:

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

12 MCCARTNEY, on behalf of herself only, acknowledges and understands the significance and
13 consequences of this specific waiver of California Civil Code Section 1542, and expressly waives
14 and relinquishes any and all rights and benefits that she may have under, or which may be conferred
15 on her by the provisions of Section 1542 of the California Civil Code as well as under any other
16 state or federal statute or common law principle of similar effect, to the fullest extent that she may
17 lawfully waive such rights or benefits pertaining to the released matters. In furtherance of such
18 intention, the release hereby given shall be and remain in effect as a full and complete release
19 notwithstanding the discovery or existence of any such additional or different claims or facts
20 arising out of the released matters which, if known to her, must have materially affected her
21 settlement with NUTS.COM.

22 **8.4** MCCARTNEY, on behalf of herself only, on the one hand, and NUTS.COM, on the other
23 hand, each release and waive all Claims they may have against each other for any statements or
24 actions made or undertaken by them in connection with the Notice of Violation or the Complaint.
25 However, this shall not affect or limit any Party's right to seek to enforce the terms of this Consent
26 Judgment.

27 **9. CONSTRUCTION AND SEVERABILITY**

28 **9.1** The terms and conditions of this Consent Judgment have been reviewed by the
respective counsel for the Parties prior to its signing, and each Party has had an opportunity to

1 fully discuss the terms and conditions with its counsel. In any subsequent interpretation or
2 construction of this Consent Judgment, the terms and conditions shall not be construed against any
3 Party.

4 **9.2** In the event that any of the provisions of this Consent Judgment are held by a court
5 to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
6 affected.

7 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
8 construed in accordance with the laws of the State of California.

9 **10. PROVISION OF NOTICE**

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

13
14 **For Erika McCartney:**

15 Environmental Law Foundation
16 1222 Preservation Park Way, Suite 200
17 Oakland, CA 94612

18 **For NUTS.COM:**

19 Jeff Braverman
20 NUTS.COM
21 125 Moen Street
22 Cranford, New Jersey 07016

23 **With Copy to:**

24 Carol Brophy
25 Danielle Vallone
26 Steptoe & Johnson LLP
27 1 Market Plaza
28 Spear Tower, Suite 3900
 San Francisco, CA 94105

11. COURT APPROVAL

1 **11.1** Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall
2 prepare and file a notice of Motion for Court Approval and supporting papers. The Parties shall
3 use their best efforts to support entry of this Consent Judgment.

4 **11.2** If the California Attorney General objects to any term in this Consent Judgment,
5 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
6 prior to the hearing on the motion.

7 **11.3** If, despite the Parties' best efforts, the Court does not approve this Stipulated
8 Consent Judgment it shall be null and void and have no force or effect and cannot be used in any
9 proceeding for any purpose.

10 **12. 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 on this Consent Judgment shall be
13 construed as valid and the same as an original signature.

14 **13. ENTIRE AGREEMENT, AUTHORIZATION**

15 **13.1** This Consent Judgment contains the sole and entire agreement and understanding
16 of 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
18 otherwise, express or implied, other than those contained herein have been made by any Party with
19 respect to the subject matter herein. No other agreements, oral or otherwise, unless specifically
20 referred to herein, shall be deemed to exist or to bind any Party with respect to the subject matter
21 herein.

22 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized
23 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly
24 provided herein, each Party shall bear its own attorney's fees and costs.

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

26 **14.1** This Consent Judgment has come before the Court upon the request of the Parties.
27 The Parties request that the Court fully review this Consent Judgment and, being fully informed
28 regarding the matters which are the subject of this Action:

1 (a) Find that the terms and provisions of this Consent Judgment represent a
2 good faith settlement of all matters raised by the allegations of the Notice of Violation and
3 Complaint, that the matter has been diligently prosecuted, and that the public interest is served by
4 such settlement; and

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

7 **14.2** Upon entry of the Consent Judgment, MCCARTNEY and NUTS.COM waive their
8 respective rights to a hearing or trial on the allegations of the Complaint, or to appeal from this
9 judgment.

10 **IT IS SO STIPULATED.**

11
12 Dated: 5/30/19


Erika McCartney

13
14 Dated: _____

NUTS.COM, INC.

15
16 Name: _____

17 Title: _____
18
19
20
21
22
23
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28

1 (a) Find that the terms and provisions of this Consent Judgment represent a
2 good faith settlement of all matters raised by the allegations of the Notice of Violation and
3 Complaint, that the matter has been diligently prosecuted, and that the public interest is served by
4 such settlement; and

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

7 **14.2** Upon entry of the Consent Judgment, MCCARTNEY and NUTS.COM waive their
8 respective rights to a hearing or trial on the allegations of the Complaint, or to appeal from this
9 judgment.

10 **IT IS SO STIPULATED.**

11
12 Dated: _____

Erika McCartney

13
14 Dated: 5/31/19 _____

NUTS.COM, INC.

15
16 Name: 

17 Title: CEO

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: 3-4 2020, ~~2019~~.



Judge of the Superior Court

Exhibit A

Melvin B. Pearlston
Senior Counsel



Of Counsel
Robert B. Hancock

July 29, 2016

**60-DAY NOTICE OF VIOLATIONS OF
CALIFORNIA HEALTH & SAFETY CODE SECTION 25249.5 ET. SEQ.
(PROPOSITION 65)**

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

I represent Erika McCartney in this matter. Ms. McCartney has identified violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), which is codified at California Health & Safety Code §25249.5 *et. seq.*, with respect to the products identified below. These violations have occurred and continue to occur because the alleged Violator identified below failed to provide required clear and reasonable warnings with the identified products. This letter serves as a notice of these violations to the alleged Violator and the appropriate public enforcement agencies. Pursuant to Section 25249.7(d) of the statute, Ms. McCartney intends to file a private enforcement action in the public interest 60 days after effective service of the is notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

General Information about Proposition 65. A copy of a summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is an attachment with the copy of this letter served to the alleged Violator identified below.

Alleged Violator. The name of the company covered by this notice that violated Proposition 65 (hereinafter "the Violator") is:

Newark Nut Company

Consumer Products and Listed Chemical. The products that are the subject of this notice and the chemical in those products identified as exceeding allowable levels are:

Nuts.com Organic Cacao Powder – Cadmium

On May 1, 1997, the State of California officially listed cadmium as a chemical known to cause developmental toxicity, and male reproductive toxicity.

It should be noted that Ms. McCartney may continue to investigate other products that may reveal further violations and result in subsequent notices of violations.

Route of Exposure. The consumer exposures that are the subject of this notice result from the purchase, acquisition, and recommended use of these products. Consequently, the primary route of exposure to these chemicals has been and continues to be through ingestion.

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least July 29, 2015, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either

removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons using these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, Ms. McCartney is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) recall any products already sold, or undertake best efforts to ensure that the requisite health hazard warnings are provided to those who have received such products; (2) reformulate the identified products so as to eliminate further exposures to the identified chemicals, or provide appropriate warnings on the labels of these products; and (3) pay an appropriate civil penalty. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, as well as expensive and time-consuming litigation. It should be noted that counsel cannot (1) finalize any settlement until after the 60-day notice period has expired; or (2) speak for the California Attorney General or any District or City Attorney who has received this notice. Therefore, while reaching an agreement may satisfy the claims alleged herein, such agreement may not be satisfactory to public prosecutors.

Ms. McCartney has retained me as legal counsel in connection with this matter. Her address is 1341 58th Ave. #11, Oakland, California, 94621. Her telephone number is 707.502.8635. **Please direct all communications regarding this Notice of Violations to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,



Robert B. Hancock

Attachments

Certificate of Merit
Certificate of Service
OEHHA Summary (to Violators only)
Additional Supporting Information for Certificate of Merit (to AG only)

CERTIFICATE OF MERIT

Re: Notice of Proposition 65 Violations

Robert B. Hancock declares:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.

2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposures to the listed chemicals that are the subject of the action.

4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and that the information did not prove that the alleged Violator will be able to establish any of the affirmative defenses set forth in the statute.

5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: July 29, 2016



Robert B. Hancock

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG16843355

Case name: MCCARTNEY v. NUTS.COM, INC

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy **Stipulated Consent Judgment** filed on March 11, 2020 was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 12, 2020.

Chad Finke, Executive Officer/Clerk of the Superior Court

By: 
Angelica Mendola
Deputy Clerk

James R. Wheaton
Environmental Law Foundation
1222 Preservation Park Way, Suite 200
Oakland, CA 94612

April Strauss
Law Offices of April Strauss
2500 Hospital Drive, Suite 3
Mountain View, CA 94040

Carol Brophy
Steptoe & Johnson, LLP
1 Market Street
Steuart Tower, 1800
San Francisco, CA 94105