

FILED
San Francisco County Superior Court

AUG 10 2018

CLERK OF THE COURT

BY: Regina Alameda
Deputy Clerk

1 Melvin B. Pearlston (SBN 54291)
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9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN FRANCISCO**

11 ERIKA MCCARTNEY, in the public interest,

12 Plaintiff,

13 v.

14 FREELAND FOODS, INC., a California
15 corporation; and DOES 1 through 500,
16 inclusive,

17 Defendants.
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CIVIL ACTION NO. CGC-17-557063

~~PROPOSED~~ **STIPULATED
CONSENT JUDGMENT**

[Cal. Health and Safety Code Sec.
25249.6, *et seq.*]

1 **1. INTRODUCTION**

2 **1.1** This Action arises out of the alleged violations of California's Safe Drinking Water
3 and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5 *et seq.*
4 (also known as and hereinafter referred to as "Proposition 65") regarding the following products
5 (hereinafter the "Covered Products"): (a) Go Raw Super Raw Chocolate (UPC 59888 00051); (b)
6 Go Raw Mint Raw Chocolate (UPC 59888 00057); (c) Go Raw Orange Raw Chocolate (UPC
7 59888 00058.) Plaintiff alleges the Covered Products expose consumers in California to cadmium
8 (hereinafter the "Listed Chemical.")

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

15 **1.3** Freeland Foods, Inc., is a California corporation, and is referred to hereinafter as
16 "FREELAND FOODS."

17 **1.4** FREELAND FOODS manufactures, distributes and sells the Covered Products.

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

20 **1.6** On or about November 23, 2016, pursuant to California Health and Safety Code
21 Section 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violation of Proposition 65
22 ("Notice of Violation") on the California Attorney General, all District Attorneys, and all City
23 Attorneys with populations exceeding 750,000, and FREELAND FOODS. A true and correct
24 copy of the Notice 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 against FREELAND FOODS with regard to
27 the Covered Products or the alleged violations, MCCARTNEY filed a complaint (the
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1 "Complaint") in the San Francisco Superior Court, Case No. CGC-17-557063, for injunctive relief
2 and civil penalties. The Complaint is based on the allegations in the Notice of Violation.

3 1.8 The Notice of Violation alleges that FREELAND FOODS manufactured,
4 distributed, and/or sold in California the Covered Products, which contain the Listed Chemical
5 under Proposition 65 as causing birth defects or other reproductive harm, and exposed consumers
6 thereto. Further, the Notice of Violation alleges that use of the Covered Products expose persons
7 in California to the Listed Chemical without first providing clear and reasonable warnings, in
8 violation of California Health and Safety Code Section 25249.6. FREELAND FOODS generally
9 denies all material and factual allegations of the Notice of Violation, and specifically denies that
10 the Plaintiff or California consumers have been harmed or damaged by its conduct.
11 MCCARTNEY and FREELAND FOODS each reserves all rights to allege additional facts,
12 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
26 Judgment is entered as a Judgment.

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1 **2. JURISDICTION AND VENUE**

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

6 **3. INJUNCTIVE RELIEF**

7 Beginning on the Effective Date, FREELAND FOODS shall be permanently enjoined from
8 Distributing into California any Covered Products. Relative to the above, "Distributing into
9 California" means to distribute to any person in California, or to distribute to any third party
10 outside California who FREELAND FOODS knows or has reason to know may redistribute into
11 California.

12 **4. REQUIRED MONETARY PAYMENTS**

13 4.1 Within ten (10) days of the Effective Date, FREELAND FOODS shall issue the
14 following payments and send them to counsel for MCCARTNEY, Robert B. Hancock, Pacific
15 Justice Center, 50 California Street, San Francisco, California 94111. The checks shall be payable
16 to the following persons and the payment shall be apportioned as follows:

17 4.2 \$40,000 as civil penalties pursuant to California Health and Safety Code Section
18 25249.7(b)(1). Of this amount, \$30,000 shall be payable to the Office of Environmental Health
19 and Hazard Assessment ("OEHHA"), \$7,500 shall be payable to MCCARTNEY, and \$2,500 shall
20 be payable to CancerCare, a qualified 501(c)(3) charitable organization, dedicated to providing
21 financial aid to cancer patients for treatment costs. MCCARTNEY hereby waives any statutory
22 entitlement to penalties in excess of \$7,500. These amounts shall be paid by separate checks.
23 MCCARTNEY's counsel shall promptly forward all checks to the payees indicated.

24 4.3 \$85,000 payable to Robert B. Hancock as reimbursement of MCCARTNEY's
25 attorneys' fees, costs, investigation and litigation expenses. Plaintiff's counsel agrees to donate
26 \$10,000 of this sum to CancerCare.

1 4.4 Any failure to remit any of the foregoing payments results in mutual rescission of
2 the agreement, as though no resolution had been had. In that event, the Parties stipulate to vacating
3 the Consent Judgment, and will cooperate in securing an order for the same.

4 **5. MODIFICATION OF CONSENT JUDGMENT**

5 5.1 This Consent Judgment may be modified only by: (i) Written agreement and
6 stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment
7 by the Court; or (ii) Upon entry of a modified Judgment by the Court pursuant to a motion by one
8 of the Parties after exhausting the meet and confer process set forth as follows. If either Party
9 requests or initiates a modification, then it shall meet and confer with the other Party in good faith
10 before filing a motion with the Court seeking to modify it. MCCARTNEY is entitled to
11 reimbursement of all reasonable attorneys' fees and costs regarding the Parties' meet and confer
12 efforts for any modification requested or initiated by FREELAND FOODS. Similarly,
13 FREELAND FOODS is entitled to reimbursement of all reasonable attorney's fees and costs
14 regarding the Parties' meet and confer efforts for any modification requested or initiated by
15 MCCARTNEY. If, despite their meet and confer efforts, the Parties are unable to reach agreement
16 on any proposed modification the party seeking the modification may file the appropriate motion
17 and the prevailing party on such motion shall be entitled recover its reasonable fees and costs
18 associated with such motion. One basis, but not the exclusive basis, for FREELAND FOODS to
19 seek a modification of this Consent Judgment is if Proposition 65 is changed, narrowed, limited,
20 or otherwise rendered inapplicable in whole or in part to the Covered Products or the Listed
21 Chemical due to legislative change, a change in the implementing regulations, court decisions, or
22 other legal basis.

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

24 6.1 This Court shall retain jurisdiction of this matter to enforce, modify or terminate
25 this Consent Judgment.

26 6.2 Subject to Section 6.3, any Party may, by motion or application for an order to show
27 cause filed with this Court, enforce the terms and conditions contained in this Consent Judgment.
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1 The prevailing party in any such motion or application may request that the Court award its
2 reasonable attorneys' fees and costs associated with such motion or application.

3 **6.3** Before Filing a motion or application for an order to show cause, MCCARTNEY
4 shall provide FREELAND FOODS with 30 (thirty) days written notice of any alleged violations
5 of the terms and conditions contained in this Consent Judgment. As long as FREELAND FOODS
6 cures any such alleged violations within the 30-day period (or if any such violation cannot
7 practicably be cured within 30 days, it expeditiously initiates a cure within 30 days and completes
8 it as soon as practicable) and FREELAND FOODS provides proof to MCCARTNEY that the
9 alleged violation(s) was the result of good faith mistake or accident, then FREELAND FOODS
10 shall not be in violation of the Consent Judgment. FREELAND FOODS shall have the ability to
11 avail itself of the benefits of this Section two (2) times following the Effective Date.

12 **7. APPLICATION OF CONSENT JUDGMENT**

13 This Consent Judgment shall apply to and be binding upon the Parties and their respective
14 officers, directors, successors and assigns, and it shall benefit the Parties and their respective
15 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,
16 affiliates, franchisees, licensees, customers, distributors, wholesalers, retailers, predecessors,
17 successors, and assigns.

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

19 **8.1** This Consent Judgment is a full, final, and binding resolution between
20 MCCARTNEY, on behalf of herself and in the public interest, and FREELAND FOODS, of any
21 and all direct or derivative violations (or claimed violations) of Proposition 65 or its implementing
22 regulations for failure to provide Proposition 65 warnings of exposure to the Listed Chemical from
23 the handling, use, or consumption of the Covered Products and fully resolves all claims that have
24 been or could have been asserted in this Action up to and including the Effective Date for alleged
25 failure to provide Proposition 65 warnings for the Covered Products regarding the Listed Chemical
26 as alleged in the Notice of Violation and in the Complaint. MCCARTNEY, on behalf of herself
27 and in the public interest, hereby forever releases and discharges, FREELAND FOODS and its
28 past and present officers, directors, owners, shareholders, employees, agents, attorneys, parent

1 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, customers,
2 distributors, wholesalers, private labelers, co-packers, 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"), from any
5 and all claims and causes of action and obligations to pay damages, restitution, fines, civil
6 penalties, payment in lieu of civil penalties and expenses (including but not limited to expert
7 analysis fees, expert fees, attorney's fees and costs) (collectively, "Claims") arising under, based
8 on, or derivative of Proposition 65 or its implementing regulations up through the Effective Date
9 based on alleged exposure to the Listed Chemicals from the Covered Products and/or failure to
10 warn about the Listed Chemical, as set forth in the Notice of Violation and the Complaint.

11 **8.2** Compliance with the terms of this Consent Judgment shall be deemed to constitute
12 compliance by any Released Party with Proposition 65 regarding alleged exposures to the Listed
13 Chemical from the Covered Products as set forth in the Notice of Violation and the Complaint.

14 **8.3** It is possible that other Claims not known to MCCARTNEY arising out of the facts
15 alleged in the Notice of Violation or the Complaint and relating to the Listed Chemical in the
16 Covered Products that were manufactured, sold or Distributed into California before the Effective
17 Date will develop or be discovered. MCCARTNEY, on behalf of herself only, acknowledges that
18 the Claims released herein include all known and unknown Claims and waives California Civil
19 Code Section 1542 as to any such unknown Claims. California Civil Code Section 1542 reads as
20 follows:

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

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

1 8.4 MCCARTNEY, on one hand, and FREELAND FOODS, on the other hand, each
2 release and waive all Claims they may have against each other for any statements or actions made
3 or undertaken by them in connection with the Notice of Violation or the Complaint. However,
4 this shall not affect or limit any Party's right to seek to enforce the terms of this Consent Judgment.

5 **9. CONSTRUCTION AND SEVERABILITY**

6 9.1 The terms and conditions of this Consent Judgment have been reviewed by the
7 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to
8 fully discuss the terms and conditions with its counsel. In any subsequent interpretation or
9 construction of this Consent Judgment, the terms and conditions shall not be construed against any
10 Party.

11 9.2 In the event that any of the provisions of this Consent Judgment is held by a court
12 to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
13 affected.

14 9.3 The terms and conditions of this Consent Judgment shall be governed by and
15 construed in accordance with the laws of the State of California.

16 **10. PROVISION OF NOTICE**

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

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21 **For Erika McCartney:**

22 Melvin B. Pearlston
23 Robert B. Hancock
24 PACIFIC JUSTICE CENTER
25 50 California Street, Suite 1500
26 San Francisco, California 94111

27 **For Freeland Foods:**

28 Melissa A. Jones, Esq.
29 STOEL RIVES LLP
30 500 Capitol Mall, Ste. 1600
31 Sacramento, CA 95814

11. COURT APPROVAL

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

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

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

12. EXECUTION AND COUNTERPARTS

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

13. ENTIRE AGREEMENT, AUTHORIZATION

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

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

14. REQUEST FOR FINDINGS AND FOR APPROVAL

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

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 Complaint, that the matter has
3 been diligently prosecuted, and that the public interest is served by such settlement; and

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

6 14.2 Upon entry of the Consent Judgment, MCCARTNEY and FREELAND FOODS
7 waive their respective rights to a hearing or trial on the allegations of the Complaint.

8 **IT IS SO STIPULATED.**

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10 Dated: _____

11 Erika McCartney

12 Dated: 6/22/2018

13 FREELAND FOODS, INC.

14 Name: Boston Lee

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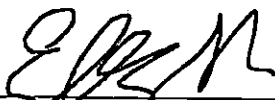
1 (a) Find that the terms and provisions of this Consent Judgment represent a
2 good faith settlement of all matters raised by the allegations of the Complaint, that the matter has
3 been diligently prosecuted, and that the public interest is served by such settlement; and

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

6 14.2 Upon entry of the Consent Judgment, MCCARTNEY and FREELAND FOODS
7 waive their respective rights to a hearing or trial on the allegations of the Complaint.

8 IT IS SO STIPULATED.

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10 Dated: 5/26/18


Erika McCartney

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12 Dated: _____

FREELAND FOODS, INC.

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14 Name: _____

15 Title: _____
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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: 8/10/18, 2018.

Richard B. Ulmer (Ulmer)
Judge of the Superior Court

RICHARD ULMER