SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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TEXT JUDGMENT

ERIKA MCCARTNEY VS. SUNFOOD CORPORATION, A CALIFORNIA CORPORATION ET AL

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ERIKA MCCARTNEY, in the public interest,

Plaintiff,

v.

SUNFOOD CORPORATION, a California Corporation; and DOES 1 through 500, inclusive,

Defendants.

CIVIL ACTION NO. CGC-17-557098

~~[PROPOSED]~~ **CONSENT JUDGMENT**

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

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 the following product (hereinafter collective the "Covered Product"): Sunfood Goji Berries.

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 Sunfood Corporation ("SUNFOOD" or "Defendant") concerning lead in the Covered Product 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 SUNFOOD has sold the Covered Product in California during the relevant period.

1.4 MCCARTNEY and SUNFOOD are hereinafter sometimes referred to individually as a "Party" or collectively as the "Parties."

1.5 On or about December 7, 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 SUNFOOD alleging violations of California Health and Safety Code Section 25249.6 with respect to unwarned exposures of lead arising from the sale and use of the Covered Product in California.

1.6 After more than sixty (60) days passed since service of the Notice of Violations, and with no designated governmental agency having filed a complaint against SUNFOOD with regard

to the Covered Product or the Alleged Violations, MCCARTNEY filed the complaint in this matter ("Complaint") in this Court.

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

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

1.9 Nothing in this Consent Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any of the Parties (or by any of SUNFOOD's respective officers, directors, shareholders, employees, agents, subsidiaries, divisions, affiliates, suppliers, or licensees) of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or liability, including without limitation, any admission concerning any alleged violation of Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any other or future legal proceeding. Provided, however, nothing in this Section shall affect the enforceability of this Settlement.

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

2. INJUNCTIVE RELIEF: WARNINGS

2.1 Beginning on the Effective Date, SUNFOOD shall be permanently enjoined from Distributing into California any Covered Product without a warning as set forth in paragraph 2.2 below. "Distributing into California" means to ship any of the Covered Products to California for sale or to sell any of the Covered Products to a distributor that SUNFOOD knows or has reason to know will sell the Covered Products in California.

2.2 Clear and Reasonable Proposition 65 Warnings. For a Covered Product that is subject to the Proposition 65 warning requirement based on sections 2.1 and above, prior to Distributing such Covered Product, the following warning ("Warning") shall be specified below, examples of which are attached hereto as Exhibit A and Exhibit B, respectively:

WARNING: This product contains a chemical known to the state of California to cause birth defects or other reproductive harm.

The parties agree that the form and substance of the warning depicted in Exhibits A and B attached hereto complies with the requirements of this paragraph.

The Warning shall either be affixed to or printed on (at the point of manufacture, prior to shipment to California, or prior to distribution within California) the outside packaging or container of each unit of the Covered Product or provided at the point of display of the Covered Product wherever it is offered for sale in California. The Warning shall be displayed with such conspicuousness, as compared with other words, statements, designs or devices on the outside packaging or at the point of display in California, as to render it likely to be read and understood

by an ordinary individual prior to purchase or use. If the Warning is displayed on the product container or labeling, the Warning shall be at least the same size as the largest of any other health or safety warnings on the product container or labeling, and the word "WARNING" shall be in all capital letters and in bold print. If presented at the point of display, the Warning shall be presented on a sign or shelf label in a font no smaller than the largest type size used for other information on the sign or on a shelf label for similar products.

The Parties agree that should the Office of Environmental Health and Hazard Assessment ("OEHHA") warning regulations change, that SUNFOOD may either conform with the OEHHA regulations, or conform with the terms provided in this Consent Judgment, and in so doing, will be in compliance with this Consent Judgment.

2.3 Defendant must, within ten days of the Effective Date, either eliminate its Proposition 65-centric website, or replace the website with language as included in Exhibit C attached hereto.

3. REQUIRED MONETARY PAYMENTS

3.1 Beginning on the first of the month following entry of the Effective Date of the Consent Judgment, SUNFOOD shall issue the following payments and send them to counsel for MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, Suite 1500, San Francisco, California 94111. The checks shall be payable to the following parties and the payment shall be apportioned as follows:

3.2 $55,000 as civil penalties pursuant to California Health and Safety Code Section 25249.7(b)(1). Of this amount, $41,250 shall be payable to the Office of Environmental Health and Hazard Assessment ("OEHHA"), $8,000 shall be payable to MCCARTNEY, and $5,750 shall be payable to Cancer*Care*, a qualified 501(c)(3) charitable organization, dedicated to providing financial aid to cancer patients for treatment costs. MCCARTNEY hereby waives any statutory

entitlement to penalties in excess of $8,000. These amounts shall be paid by separate checks, in eight equal monthly installments to begin the first of the month following entry of the Consent Judgment, in amounts of $5,156.25, $1,000, and $718.75, respectively. MCCARTNEY's counsel shall promptly forward all checks to the payees indicated.

3.3 $80,000 payable to Robert B. Hancock as reimbursement of MCCARTNEY's attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and Costs"), to be paid in eight equal monthly installments to begin the first of the month following entry of the consent judgment, in amounts of $10,000 per installment.

3.4 Any failure to remit any of the foregoing payments within 30 days after written notice by MCCARTNEY of SUNFOOD's failure to remit said payments, results in mutual rescission of the agreement, as though no resolution had been had. In that event, the parties stipulate to vacating the Consent Judgment, and will cooperate in securing an order for the same. In addition to the Provision of Notice contained in section 9 of this Consent Judgment, MCCARTNEY shall serve written notice via electronic mail to Grant Teeple (grant@teeplehall.com); Robert Deupree (rdeupree@sunfood.com); and Erica Peterson (epeterson@globaladgroup.us).

4. MODIFICATION

This Consent Judgment may be modified only by written agreement and stipulation of the Parties and upon having such stipulation reported to the Office of the California Attorney General at least twenty-one days in advance of its submission to the Court for approval.

5. OVERSIGHT AND ENFORCEMENT OF TERMS

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

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

6. APPLICATION OF CONSENT JUDGMENT

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

7. BINDING EFFECT, CLAIMS COVERED AND RELEASED

7.1 This Consent Judgment is a full, final, and binding resolution between MCCARTNEY, on behalf of herself and in the public interest on the one hand, and SUNFOOD on the other hand, of any and all direct or derivative violations (or claimed violations) of Proposition 65 or its implementing regulations for failure to provide Proposition 65 warnings of exposure to lead from the handling use, or consumption of the Covered Product, and it fully resolves all claims that have been or could have been asserted up to and including the Effective Date for the alleged failure to provide Proposition 65 warnings for the Covered Product regarding lead as set forth in the Notices of Violations and Complaint.

7.2 MCCARTNEY on her own behalf (and not in her role as a representative of the public interest) further hereby releases and discharges SUNFOOD and its past and present officers, directors, owners, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers, retailers, and all other upstream and downstream entities and persons in the distribution chain of any Covered

Product, and the predecessors, successor and assigns of any of them (collectively, "Released Parties"), from any and all claims and causes of action and obligations to pay damages, restitution, fines, civil penalties, payment in lieu of civil penalties and expenses (including but not limited to expert analysis fees, expert fees, attorneys' fees and costs) (collectively, "Claims") based on exposure to lead from the Covered Product and/or failure to warn about lead in the Covered Product to the extent that the Covered Product was sold prior to the Effective Date.

7.3 Unless modified pursuant to Section 4 above, compliance with the terms of Section 2.1 of this Consent Judgment shall be deemed to constitute compliance with Proposition 65 regarding the Covered Product.

7.4 It is possible that other Claims not known to MCCARTNEY arising out of the facts alleged in the Notice of Violations or the Complaint will develop or be discovered. MCCARTNEY acknowledges on behalf of herself (and not in the role as representative of the public interest) that the Claims released herein include all known and unknown Claims and waives California Civil Code Section 1542 as to any such unknown Claims. California Civil Code Section 1542 reads as follows:

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

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

7.5 MCCARTNEY, on the one hand, and SUNFOOD, on the other hand, each release and waive all Claims they may have against each other for any statements or actions made or

undertaken by them in connection with the Notice of Violation and Complaint or the allegations contained therein. However, this shall not affect or limit any Party's right to seek to enforce the terms of this Settlement and Consent Judgment. In addition, going forward, the parties shall not cause any aspect of the Action, the Notice of Violations, the Complaint, or the terms of this Settlement not otherwise available in the public record to be reported to the public or any media or news reporting outlet. Any statement to the public or any media or news reporting outlet shall be limited to what is available in the public record and documents publicly filed. Regardless of the form or formality of a communication or statement to the media or other person or entity, neither any Party nor their counsel shall disparage the other. Notwithstanding these obligations, the Parties may make such disclosures regarding the Action and terms of this Settlement as necessary to auditors or as otherwise required by state or federal law.

8. CONSTRUCTION AND SEVERABILITY

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

8.2 In the event that any of the provisions of this Settlement is held by a court to be unenforceable, the validity of the remaining enforceable provision shall not be adversely affected.

8.3 The terms and conditions of this Settlement shall be governed by and construed in accordance with the laws of the State of California.

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9. PROVISION OF NOTICE

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

For Erika McCartney
PACIFIC JUSTICE CENTER
Robert B. Hancock
50 California Street, Suite 1500
San Francisco, California 94111

For Sunfood Corporation
TEEPLE HALL, LLP
Grant Teeple
9255 Towne Centre Drive, Suite 500
San Diego, California 92121

10. COURT APPROVAL

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

10.2 If the California Attorney General objects to any term in this Settlement, 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 for Court Approval.

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

11. EXECUTION AND COUNTERPARTS

This Consent Judgment and Settlement 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.

12. ENTIRE AGREEMENT, AUTHORIZATION

12.1 This Settlement 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, or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any party.

12.2 Each signatory to this Settlement certifies that he or she is fully authorized by the party he or she represents to enter into this Settlement. Except as explicitly provided herein, each party shall bear its own fees and costs.

13. REQUEST FOR FINDINGS AND APPROVAL

13.1 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 to this action, to:

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

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

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IT IS SO STIPULATED:

Dated: 4/9/2018

Erika McCartney

Dated:

SUNFOOD CORPORATION
By:

APPROVED AS TO FORM:

PACIFIC JUSTICE CENTER

Dated: 5/7/18

By:
Robert B. Hancock
Attorneys for Plaintiff

Dated:

TEEPLE HALL, LLP

By:
Grant G. Teeple
Attorney for Defendant

[PROPOSED] CONSENT JUDGMENT
McCartney v. Seafood Corporation, Civil Action No. CGC-17-557098

IT IS SO STIPULATED:

Dated: _____

Erika McCartney

Dated: _____

SUNFOOD CORPORATION
By: _____
President

APPROVED AS TO FORM:

PACIFIC JUSTICE CENTER

Dated: _____

By: _____
Robert B. Hancock
Attorneys for Plaintiff

Dated: May 9, 2018

TEEPLE HALL, LLP

By: _____
Gina G. Teeple
Attorney for Defendant

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: 7/12/18

Judge of the Superior Court

HAROLD KAHN