



**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO**

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Case Number: CGC-17-562527

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TEXT JUDGMENT

ERIKA MCCARTNEY VS. SAVORY SPICE SHOP, INC. A COLORADO  
CORPORATION ET AL

001C06726720

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**FILED**  
San Francisco County Superior Court

MAR 14 2019

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Deputy Clerk

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Attorneys for Defendant  
SAVORY SPICE SHOP, LLC

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

ERIKA McCARTNEY

Plaintiff,

v.

SAVORY SPICE SHOP, INC., a Colorado  
corporation, and DOES 1-500,

Defendant.

Case No. CIV CGC-17-562527

**[PROPOSED] STIPULATED CONSENT  
JUDGMENT AND ORDER**

[Cal. Health and Safety Code Sec. 25259.6,  
*et seq.*]

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**1. INTRODUCTION**

1.1 This Action arises out of 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 Organic Raw Cacao Nibs, hereinafter the “Covered Product.”

1.2 Plaintiff ERIKA MCCARTNEY (“MCCARTNEY”) is a California resident acting as a private enforcer of Proposition 65. MCCARTNEY brings this Action in the public interest pursuant to California Health and Safety Code Section 25249.6. MCCARTNEY asserts that 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 responsibility.

1.3 Defendant SAVORY SPICE SHOP, LLC (erroneously sued as “SAVORY SPICE SHOP, INC.”), is a Colorado limited liability company, and is referred to hereinafter as “SAVORY SPICE SHOP.” SAVORY SPICE SHOP, INC. is a subsidiary of SAVORY SPICE SHOP.

1.4 SAVORY SPICE SHOP distributed and sold the Covered Product in California.

1.5 MCCARTNEY, SAVORY SPICE SHOP, and SAVORY SPICE SHOP, INC. are hereinafter sometimes referred to individually as a “Party” or collectively as the “Parties.”

1.6 On or about August 31, 2017, pursuant to California Health and Safety Code Section 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violation of Proposition 65 (“Notice of Violation”) on SAVORY SPICE SHOP, the California Attorney General, and other public enforcers. A true and correct copy of the Notice of Violation is attached hereto as Exhibit A.

1.7 On November 15, 2017, after more than sixty (60) days passed after service of the Notice of Violation, and no designated governmental agency filed a complaint or otherwise prosecuted a claim against SAVORY SPICE SHOP with regard to the Covered Product or the violations alleged in the Notice of Violation, MCCARTNEY filed the Complaint for Injunctive

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Relief and Civil Penalties (the "Complaint") in this action. The Complaint is based on the allegations in the Notice of Violation.

1.8 The Complaint and the Notice of Violations each allege, in pertinent part that SAVORY SPICE SHOP manufactured, distributed, and/or sold in California the Covered Product containing cadmium, a chemical listed under Proposition 65 as a carcinogen and reproductive toxin, and exposed consumers to cadmium at a level requiring a Proposition 65 warning. Further, the Complaint and Notice of Violation allege that the Covered Product was sold in California without first providing a clear and reasonable warning, in violation of California Health and Safety Code Section 25249.6. SAVORY SPICE SHOP generally denies all material and factual allegations of the Notice of Violation and the Complaint, and filed an answer asserting various affirmative defenses and specifically denying that the Plaintiff or California consumers have been harmed or damaged by its conduct in any manner whatsoever. SAVORY SPICE SHOP maintains that the Covered Product is completely safe for its intended use. SAVORY SPICE SHOP and MCCARTNEY each reserve all rights to allege additional facts, claims, and affirmative defenses if the Court does not approve this Consent Judgment.

1.9 The Parties enter into this Consent Judgment in order to settle, compromise and resolve disputed claims and avoid prolonged and costly litigation. 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 their respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors, wholesalers, or retailers, 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 Consent Judgment.

1.10 The "Effective Date" of this Consent Judgment shall be the date this Consent Judgment is entered as a Judgment by the Court.

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**2. JURISDICTION AND VENUE**

For purposes of this Consent Judgment 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.

**3. INJUNCTIVE RELIEF, REFORMULATION, TESTING, AND WARNINGS**

3.1 Beginning on the Effective Date, SAVORY SPICE SHOP shall be permanently enjoined from offering for sale to a consumer in California any Covered Product that contains more than 4.1 micrograms of cadmium in an 18 gram serving size unless the Covered Product is accompanied by a Proposition 65 warning that complies with Section 3.4 below. "Distributing into California" or "Distribute into California" means to ship any of the Covered Product to California for sale or to sell any of the Covered Product to a distributor that SAVORY SPICE SHOP knows or has reason to know will sell the Covered Product in California; provided, however, that SAVORY SPICE SHOP may manufacture or package and sell Covered Product for which an 18 gram serving size contains more than 4.1 micrograms of cadmium per day without providing a Proposition 65 warning so long as such products are only offered for sale to consumers located outside of California and SAVORY SPICE SHOP does not distribute them into California.

After the Effective Date, SAVORY SPICE SHOP shall not publish on the label of the Covered Product or on its website any recipe that calls for the use of the Covered Product which would, by serving, result in an exposure to cadmium greater than 4.1 micrograms without providing a Proposition 65 warning.

3.2 All Covered Product that has been or will have been distributed, shipped, sold, or otherwise placed in the stream of commerce through and including the Effective Date of this Consent Judgment are exempt from the provisions of Sections 3.1, 3.3 and 3.4 and are included within the release in Sections 8.1 through 8.4. To be in compliance with the terms of this Consent Judgment, SAVORY SPICE SHOP is not required to undertake any efforts or conduct to remove such Covered Product from the stream of commerce or otherwise alter its labeling.

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3.3 For a period of three (3) years from the Effective Date, each batch or lot number of the Covered Product offered for sale to any consumer in California without a Proposition 65-compliant warning shall be tested for cadmium utilizing inductively coupled plasma-mass spectrometry. All tests shall be conducted at the expense of SAVORY SPICE SHOP. Upon Plaintiffs written request, SAVORY SPICE SHOP shall provide the verified results of all tests to counsel for MCCARTNEY, via regular U.S. Mail, within fifteen (15) days of receipt of such written request. For purposes of this Consent Judgment, daily cadmium exposure levels shall be measured in micrograms and shall be calculated using the following formula: Micrograms of cadmium per gram of product, multiplied by 18 grams per serving of the product, which equals micrograms of cadmium exposure per day.

3.4 For the Covered Product that is subject to the warning requirement of Section 3.1, SAVORY SPICE SHOP shall provide the following warning ("Warning") as specified below:

**[California Proposition 65] WARNING:** This product contains [cadmium,] [a] chemical[s] known to the State of California to cause cancer and birth defects or other reproductive harm.

The text in brackets in the warning above is optional.

The Warning shall be permanently 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. The Warning shall be displayed with such conspicuousness, as compared with other words, statements designs or devices on the outside packaging or labeling, as to render it likely to be read and understood by an ordinary individual prior to 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 printed on the labeling itself, the Warning shall be contained in the same section of the labeling that states other safety warnings concerning the use of the Covered Product.

Although SAVORY SPICE SHOP remains free to warn in any manner consistent with the requirements above, displaying the Warning on the outside packaging, labeling, or container of

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each unit of the Covered Product is deemed to be a clear and reasonable warning under this Consent Judgment.

**4. SETTLEMENT PAYMENT**

4.1 SAVORY SPICE SHOP 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:

4.2 \$10,500 as civil penalties pursuant to California Health and Safety Code Section 25249.7(b)(1). Of this amount, \$7,875 shall be payable to OEHHA, \$1,982 shall be payable to MCCARTNEY; and \$643 shall be payable to CancerCare, 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 \$1,982.

4.3 \$32,000 payable to Robert B. Hancock as reimbursement of MCCARTNEY's attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and Costs").

4.4 These amounts shall be paid by separate checks, in six installments to begin the first of the month following entry of the Consent Judgment as follows:

- Month one: \$7,100 to OEHHA
- Month two: \$775 to OEHHA, \$1,982 to MCCARTNEY, \$643 to CancerCare, \$4,300 to Robert B. Hancock
- Months three through six: \$6,925 to Robert B. Hancock.

**5. MODIFICATION OF CONSENT JUDGMENT**

5.1 This Consent Judgment may be modified only by: (i) written agreement and stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment by the Court; or (ii) upon entry of a modified Judgment by the Court pursuant to a motion by one of the Parties after exhausting the meet and confer process set forth as follows. If either Party requests or initiates a modification of this Consent Judgment, then it shall meet and confer with the other Party in good faith before filing a motion with the Court seeking to modify it. MCCARTNEY is entitled to reimbursement of all reasonable attorneys' fees and costs

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2 regarding the Parties' meet and confer efforts for any modification requested or initiated by  
3 SAVORY SPICE SHOP. Similarly, SAVORY SPICE SHOP is entitled to reimbursement of all  
4 reasonable attorney's fees and costs regarding the Parties meet and confer efforts for any  
5 modification requested or initiated by MCCARTNEY. If, despite their meet and confer efforts,  
6 the Parties are unable to reach agreement on any proposed modification, the party seeking the  
7 modification may file the appropriate motion and the prevailing party on such motion shall be  
8 entitled to recover its reasonable fees and costs associated with such motion. One basis, but not  
9 the exclusive basis, for SAVORY SPICE SHOP to seek a modification of this Consent Judgment  
10 is if Proposition 65 is changed, narrowed, limited, or otherwise rendered inapplicable in whole or  
11 in part to the Covered Product or cadmium due to legislative change, a change in the  
12 implementing regulations, court decisions, or other legal basis.

13 In the event that MCCARTNEY or the Attorney General's Office enters into an  
14 agreement or consent judgment with any other person or entity that received a 60-Day Notice of  
15 Violation of Proposition 65 alleging cadmium in cacao nibs, where such agreement or consent  
16 judgment establishes a serving size of less than 18 grams for purposes of determining whether the  
17 4.1 microgram Proposition 65 cadmium MADL is exceeded, or at such time, if ever, that the  
18 California Office of Health Hazard Assessment or the FDA establishes a serving size for cacao  
19 nibs that is less than 18 grams, then that allowable level shall be deemed incorporated into this  
20 Consent Judgment, and SAVORY SPICE SHOP shall be permitted to distribute, sell or offer to  
21 sell to California consumers any cacao nibs that it sells without a Proposition 65 Warning so long  
22 as such products do not exceed the 4.1 microgram cadmium MADL based on the revised serving  
23 size incorporated herein. Should MCCARTNEY in the future enter into any such agreement or  
24 consent judgment it shall notify SAVORY SPICE SHOP of such within 30 days after such  
25 agreement has been fully executed. Should a Court of Appeal hold that cacao nibs with specified  
26 levels of cadmium sold without a warning do not violate Proposition 65, then that level shall be  
27 deemed incorporated into this Consent Judgment, and SAVORY SPICE SHOP shall be permitted  
28 to distribute, sell or offer to sell to California consumers any cacao nibs that it sells without a  
Proposition 65 Warning so long as such products comply with the allowable level for cadmium.

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

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

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

**7. APPLICATION OF CONSENT JUDGMENT**

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

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

8.1 This Consent Judgment is a full, final, and binding resolution between MCCARTNEY, on behalf of herself and in the public interest, and SAVORY SPICE SHOP, 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 cadmium from the handling, use, or consumption of the Covered Product and fully resolves all claims that have been or could have been asserted in this Action up to and including the Effective Date for alleged failure to provide Proposition 65 warnings for the Covered Product regarding cadmium. MCCARTNEY, on behalf of herself and in the public interest, hereby forever releases and discharges, SAVORY SPICE SHOP and its past and present officers, directors, owners, shareholders, employees, agents, attorneys, 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, successors and assigns of any of them (collectively, "Released Parties"),

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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, attorney's fees and costs) (collectively, "Claims") arising under, based on, or derivative of Proposition 65 or its implementing regulations up through the Effective Date based on alleged or actual exposure to cadmium from the Covered Product and/or failure to warn about cadmium in the Covered Product, as set forth in the Notice of Violation and the Complaint.

8.2 Compliance with the terms of this Consent Judgment shall be deemed to constitute compliance by any Released Party with Proposition 65 regarding alleged exposures to cadmium from the Covered Product as set forth in the Notice of Violation and the Complaint.

8.3 It is possible that other claims or alleged violations relating to Covered Products or other cacao based products distributed or sold by SAVORY SPICE SHOP through the Effective Date not known to MCCARTNEY will develop or be discovered. MCCARTNEY, on behalf of herself, and each of her successors, assigns, legatees, heirs, attorneys, and personal representatives only, acknowledges that any such claims concerning such products distributed or sold by SAVORY SPICE SHOP through the Effective Date are released herein as to the Released Parties including 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 KNOW 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, on behalf of herself only, acknowledges and understands the significance and consequences of this specific waiver of California Civil Code section 1542.

8.4 MCCARTNEY, on one hand, and SAVORY SPICE SHOP, 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 or the Complaint.

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However, this shall not affect or limit any Party's right to seek to enforce the terms of this Consent Judgment.

**9. CONSTRUCTION AND SEVERABILITY**

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

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

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

**10. 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 mail; (b) certified mail; (c) overnight courier; or (d) personal delivery:

For MCCARTNEY:

Melvin B. Pearlston (SBN 54291)  
Elizabeth Sonnichsen (SBN 321131; liz@rbhancocklaw.com)  
PACIFIC JUSTICE CENTER  
50 California Street, Suite 1500  
San Francisco, California 94111  
Telephone: (415) 310-1940

For SAVORY SPICE SHOP:

Janet C. Johnston (jjohnston@savoryspiceshop.com)  
President/Founder  
Savory Spice  
1805 E. 58th Ave., Unit C  
Denver, CO 80216  
Telephone: (720) 399-5343

With Copy to:

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2 Julia Graeser (SBN 294277; [jgraeser@bargcoffin.com](mailto:jgraeser@bargcoffin.com))  
3 Barg, Coffin, Lewis, and Trapp LLP  
4 600 Montgomery St., Suite 525  
5 San Francisco, CA 94111  
6 Telephone: (415) 228-5481

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14 **11. COURT APPROVAL**

15 11.1 Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall file  
16 a Motion for Court Approval. The Parties shall use their best efforts to support entry of this  
17 Consent Judgment.

18 11.2 If the California Attorney General objects to any term in this Consent Judgment,  
19 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible  
20 prior to the hearing on the motion.

21 11.3 If, despite the Parties best efforts, the Court does not approve this Stipulated  
22 Consent Judgment, it shall be null and void and have no force or effect.

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28 **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  
with respect to the subject matter herein. No other agreements, oral or otherwise, unless  
specifically referred to herein, shall be deemed to exist or to bind any Party with respect to the  
subject matter herein.

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.

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**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 that the Court fully review this Consent Judgment and, being fully informed regarding the matters which are the subject of this action:

(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 Notice of Violation and Complaint; that the matter has been diligently prosecuted; and that the public interest is served by such settlement; and

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

**IT IS SO STIPULATED:**

Dated: 1/3/19

  
Erika McCartney

Dated: \_\_\_\_\_

SAVORY SPICE SHOP, LLC

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Dated: \_\_\_\_\_

SAVORY SPICE SHOP, INC.

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**APPROVED AS TO FORM**

Dated: Jan. 3, 2018

PACIFIC JUSTICE CENTER

By:   
Elizabeth Sonnichsen

Attorneys for Plaintiff ERIKA MCCARTNEY

Dated: \_\_\_\_\_, 2018

BARG COFFIN LEWIS & TRAPP, LLP

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**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 that the Court fully review this Consent Judgment and, being fully informed regarding the matters which are the subject of this action:

(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 Notice of Violation and Complaint; that the matter has been diligently prosecuted; and that the public interest is served by such settlement; and

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

**IT IS SO STIPULATED:**

Dated: \_\_\_\_\_

\_\_\_\_\_  
Erika McCartney

Dated: 1-3-2019

\_\_\_\_\_  
SAVORY SPICE SHOP, LLC

Name: [Signature]

Title: Controlling Member

Dated: 1-3-2019

\_\_\_\_\_  
SAVORY SPICE SHOP, INC.

Name: [Signature]

Title: Controlling Owner

**APPROVED AS TO FORM**

Dated: \_\_\_\_\_, 2018

PACIFIC JUSTICE CENTER

By: \_\_\_\_\_  
Elizabeth Sonnichsen

Attorneys for Plaintiff ERIKA MCCARTNEY

Dated: \_\_\_\_\_, 2018

BARG COFFIN LEWIS & TRAPP, LLP

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By: *Julia Grass*  
Julia R. Grass

Attorneys for Defendants Savory Spice Shop, LLC  
and Savory Spice Shop, Inc.

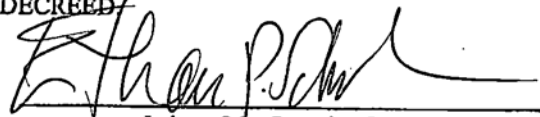
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~~ORDER AND JUDGMENT~~

Based on the Parties Stipulation, and good cause appearing therefor, this Consent Judgment is approved in accordance with Health and Safety Code Section 25249.7(f)(4) and judgment is hereby entered according to its terms.

IT IS SO ORDERED ADJUDGED AND DECREED

Dated: March 14, 2018

  
\_\_\_\_\_  
Judge of the Superior Court

ETHAN P. SCHULMAN