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11 Attorneys for Defendant
12 NOW HEALTH GROUP, INC.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO

16 ERIKA MCCARTNEY, on behalf of the
17 general public,

18 Plaintiff,

19 v.

20 NOW HEALTH GROUP, INC., an Illinois
21 corporation; and DOES 1 through 500,
inclusive,

22 Defendants.

Case No.: CGC-14-541305

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

Health & Safety Code § 25249.6 et seq.

Action Filed: August 22, 2014

23
24 **1. INTRODUCTION**

25 **1.1** On August 22, 2014, Plaintiff Erika McCartney (“McCartney”), on behalf of the
26 general public, initiated this action by filing a complaint (“Complaint”) under California Health and
27 Safety Code §§ 25249.6 *et seq.* (“Proposition 65”) against NOW Health Group, Inc. (“NOW”). In
28 this action, McCartney alleges that NOW Organic Cocoa Powder (“Covered Product”) contains

1 cadmium, a substance listed under Proposition 65 as a reproductive toxicant and that the Covered
2 Product requires warnings under Proposition 65 for alleged exposures to cadmium. McCartney and
3 NOW are referred to individually as a “Party” or collectively as the “Parties.”

4 **1.2** NOW is a business entity that employs ten or more persons.

5 **1.3** The Complaint is based on allegations contained in McCartney’s June 11, 2014
6 Notice of Violation (“Notice”), which was served on the California Attorney General, other public
7 enforcers, and NOW. More than 60 days have passed since the Notice was mailed, and no
8 designated governmental entity has filed a complaint against NOW regarding the claims alleged in
9 the Notice.

10 **1.4** NOW denies McCartney’s claims and maintains that Covered Product has been and
11 remains in compliance with Proposition 65 and all other applicable laws. For the purpose of
12 avoiding prolonged and costly litigation, the Parties enter into this Proposed Stipulated Consent
13 Judgment (“Consent Judgment”) as a full settlement of the claims alleged in the Notice and the
14 Complaint. By executing and complying with this Consent Judgment, neither Party admits any
15 facts or conclusions of law as to any claims or defenses regarding Proposition 65 or any other law.
16 However, this Section 1.4 shall not diminish or otherwise affect the obligations of the Parties under
17 this Consent Judgment.

18 **1.5** The Effective Date of this Consent Judgment is the date on which it is entered as a
19 Judgment by this Court.

20 **2. JURISDICTION AND VENUE**

21 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
23 over NOW as to the acts alleged in the Complaint, that venue is proper in San Francisco County,
24 and that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of
25 all claims which were or could have been asserted in this action based on the facts alleged in the
26 Complaint. This Court shall retain jurisdiction to enforce, modify or interpret this Consent
27 Judgment.
28

1 **3. INJUNCTIVE RELIEF**

2 **3.1** Any Covered Product that NOW sells in California or distributes for sale in
3 California after the Effective Date must either: (1) qualify as a “Reformulated Covered Product”
4 under Section 3.3, as determined by the testing methodology in Section 3.4, or (2) meet the warning
5 requirements set out in Section 3.2.

6 **3.2 Clear and Reasonable Warnings**

7 **3.2.1 Warning Language**

8 If NOW provides a warning pursuant to Section 3.1, the warning shall state one of the
9 following:

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

12 or

13 [California Proposition 65] WARNING: This product contains [cadmium,] a substance
14 known to the State of California to cause birth defects or other reproductive harm.

14 The bracketed terms may be included at NOW’s option.

15 **3.2.2 Warning Method**

16 If NOW provides a warning pursuant to Section 3.1, the warning shall be securely affixed to
17 or printed upon the outside of the container or label of the Covered Product. The warning shall be
18 displayed with such conspicuousness, as compared with other words, statements, or design of the
19 label or outside of the container, as applicable, to render the warning likely to be read and
20 understood by an ordinary individual under customary conditions of purchase or use of the product.

21 **3.3 Reformulated Covered Product**

22 A Reformulated Covered Product is one for which the maximum recommended daily
23 serving on the label contains no more than 4.1 micrograms of cadmium per day as determined using
24 the testing methodology in Section 3.4. For purposes of this Consent Judgment, the daily cadmium
25 exposure level shall be calculated using the following formula: micrograms of cadmium per 2.5
26 grams of product, multiplied by one serving per day, which equals micrograms of cadmium
27 exposure per day. The label of the Covered Product shall not recommend more than one serving of
28 the Covered Product per day.

1 After the Effective Date, NOW shall not publish on the label of the Covered Product or on
2 its website any recipe that calls for more than one serving of the Covered Product per serving of the
3 food or beverage produced by the recipe. For any recipe published by NOW after the Effective
4 Date that uses the Covered Product as an ingredient and which yields multiple servings of a food or
5 beverage, NOW shall state the number of servings produced by the recipe.

6 **3.4 Testing Methodology**

7 **3.4.1** Before NOW's first sale or distribution of the Covered Product after the
8 Effective Date, and at least once per year for a minimum of four years thereafter, NOW shall
9 arrange for cadmium testing of a minimum of three, and a maximum of ten, randomly selected
10 samples of the Covered Product. For purposes of determining if a warning, if any, is required
11 pursuant to Section 3.1, the arithmetic average of the cadmium detection results of the samples
12 tested hereunder will be controlling.

13 **3.4.2** All testing pursuant to this Consent Judgment shall be performed by a
14 laboratory using a method that complies with the performance and quality control factors
15 appropriate for the method used (including limit of detection, limit of quantification, accuracy, and
16 precision) and meets the following criteria: appropriate digestion method(s) employing high-purity
17 reagents, followed by Inductively Coupled Plasma-Mass Spectrometry (ICP-MS) achieving a limit
18 of quantification of less than or equal to 0.010 mg/kg, or any other testing method subsequently
19 agreed upon in writing by the Parties.

20 **3.4.3** The testing requirements of Section 3.4 do not apply to a Covered Product for
21 which NOW has provided the warning specified in Section 3.2 since the Effective Date or during
22 the preceding year, or if NOW no longer sells or distributes the Covered Product for sale in
23 California.

24 **3.4.4** Upon written request by McCartney, NOW shall provide to McCartney any
25 results of testing undertaken by NOW pursuant to this Section 3 within ten working days of receipt
26 by NOW of McCartney's request. NOW shall retain all test results and documentation for a period
27 of five years from the date of each test.
28

1 **4. SETTLEMENT PAYMENT**

2 **4.1 Payment by NOW.** In full satisfaction of all claims for civil penalties and
3 attorneys' fees and costs, NOW shall make a total payment of \$65,000 within ten business days of
4 receiving notice of the Court's entry of this Consent Judgment. The settlement payment from NOW
5 shall be paid in three separate checks delivered to counsel for McCartney at the address set forth in
6 Section 9. The funds paid by NOW shall be allocated between the following categories:

7 **4.1.1** \$17,500 shall be payable as civil penalties pursuant to Health & Safety Code
8 Section 25249.7(b)(1). Of this amount, \$13,125 shall be payable to the Office of Environmental
9 Health Hazard Assessment ("OEHHA") and \$4,375 shall be payable to Erika McCartney. Cal.
10 Health & Safety Code Section 25249.12(c)(1) & (d).

11 **4.1.2** \$47,500 as reimbursement of a portion of McCartney's reasonable attorneys'
12 fees and costs.

13 **4.2** Except as provided in this Consent Judgment, each Party shall be responsible for its
14 or her own attorneys' fees and costs.

15 **5. MODIFICATION OF CONSENT JUDGMENT**

16 **5.1** This Consent Judgment may be modified by written stipulation of the Parties and
17 upon entry by the Court of a modified consent judgment.

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

19 **6.1** This Consent Judgment is a full, final, and binding resolution between McCartney,
20 on behalf of herself and in the public interest, and NOW, of any alleged violation of Proposition 65
21 for failure to provide Proposition 65 warnings regarding alleged exposures to cadmium in the
22 Covered Product. McCartney, on behalf of herself, her agents, officers, representatives, attorneys,
23 successors, and/or assignees, and on behalf of the general public in the public interest, hereby
24 waives all rights to institute or participate in (directly or indirectly) any form of legal action and
25 releases and discharges: (a) NOW and each entity to which NOW has directly or indirectly
26 distributed or sold the Covered Product, including but not limited to, all retailers, distributors,
27 wholesalers, and customers; and (b) all past and current parents, subsidiaries, affiliates, directors,
28 officers, employees, shareholders, agents, attorneys, successors, and assignees of the entities

1 identified in (a), above (the released entities and individuals identified in (a) and (b), above, are
2 collectively referred to as “Releasees”), with respect to any and all claims, actions, causes of action,
3 suits, demands, liabilities, damages, penalties, fees (including but not limited to investigation fees,
4 attorneys’ fees, and expert fees), costs, and expenses (collectively, “Claims”) based on failure to
5 warn about alleged exposures to cadmium in the Covered Product.

6 **6.2** McCartney, on behalf of herself, her agents, representatives, attorneys, successors,
7 and/or assignees, and not on behalf of the general public, hereby releases and discharges the
8 Releasees from any and all known and unknown Claims for alleged violations of Proposition 65, or
9 for any other statutory or common law, arising from or relating to alleged exposures to cadmium in
10 the Covered Product. It is possible that other Claims not known to the Parties arising out of the
11 facts alleged in the Notice or the Complaint and relating to the Covered Product will develop or be
12 discovered. McCartney, on behalf of herself only, acknowledges that this Consent Judgment is
13 expressly intended to cover and include all such Claims, including all rights of action therefor.
14 McCartney has full knowledge of the contents of California Civil Code section 1542. McCartney,
15 on behalf of herself only, acknowledges that the Claims released in Sections 6.1 and 6.2 may
16 include unknown Claims, and nevertheless waives California Civil Code section 1542 as to any
17 such unknown Claims. California Civil Code section 1542 reads as follows:

18 “A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
19 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
20 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING
21 THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST
22 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
23 WITH THE DEBTOR.”

22 McCartney, on behalf of herself only, acknowledges and understands the significance and
23 consequences of this specific waiver of California Civil Code section 1542.

24 **6.3** Compliance with the terms of this Consent Judgment shall be deemed to constitute
25 compliance by any Releasee with Proposition 65 regarding alleged exposures to cadmium in the
26 Covered Product.

27 **6.4** McCartney, on one hand, and NOW, on the other hand, release and waive all Claims
28 they may have against each other for any statements or actions made or undertaken by them in

1 connection with the Notice or the Complaint. Provided however, nothing in this Section 6 shall
2 affect or limit any Party's right to enforce the terms of this Consent Judgment.

3 **7. ENFORCEMENT**

4 If McCartney alleges that a Covered Product fails to qualify as a Reformulated Covered
5 Product (and for which McCartney alleges that no warning has been provided), then McCartney
6 shall provide written notice to NOW ("Section 7 Notice") in a reasonably prompt manner of her test
7 results and the lot number(s) of the sample(s) tested. Within 30 days of receiving the Section 7
8 Notice from McCartney, NOW may contest the Section 7 Notice by providing McCartney with
9 testing information demonstrating NOW's compliance with the Consent Judgment. The Parties
10 shall attempt in good faith to resolve the matter informally. If such an attempt at an informal
11 resolution fails, McCartney may file her enforcement motion or application against NOW. In the
12 event that such a proceeding or motion to enforce this Consent Judgment is filed, the prevailing
13 Party may recover her or its costs and reasonable attorneys' fees incurred in such proceeding or
14 motion.

15 **8. GOVERNING LAW**

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

18 **9. PROVISION OF NOTICE**

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

22 **FOR ERIKA MCCARTNEY:**

23 PACIFIC JUSTICE CENTER
24 Robert B. Hancock
25 50 California Street, Suite 1500
26 San Francisco, California 94111
27 Tel.: 415.310.1940
28 Fax: 415.354.3508
rbh@lawyer.com

1 **FOR NOW Health Group, Inc.:**

2 Trenton H. Norris
3 Sarah Esmaili
4 Three Embarcadero Center, 10th Floor
5 San Francisco, CA 94111-4024
6 Tel.: 415.471.3100
7 Fax: 415.471.3400
8 trent.norris@aporter.com
9 sarah.esmaili@aporter.com

10 **10. COURT APPROVAL**

11 If this Consent Judgment is not approved by the Court, it shall be void and have no force or
12 effect. If this Consent Judgment is approved by the Court, McCartney shall comply with California
13 Health and Safety Code section 25249.7(f) and with Title II of the California Code Regulations,
14 Section 3003.

15 **11. EXECUTION AND COUNTERPARTS**

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

19 **12. DRAFTING**

20 The terms of this Consent Judgment have been reviewed by the respective counsel for the
21 each Party prior to signing, and each Party has had an opportunity to fully discuss the terms with
22 counsel. The Parties agree that, in any subsequent interpretation and construction of this Consent
23 Judgment entered thereon, the terms and provisions shall not be construed against any Party.

24 **13. ENTIRE AGREEMENT, AUTHORIZATION**

25 **13.1** This Consent Judgment contains the sole and entire agreement and understanding of
26 the Parties with respect to the entire subject matter herein, and any and all prior discussions,
27 negotiations, commitments and understandings related hereto. No representations, oral or
28 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.

1 13.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized to
2 stipulate to this Consent Judgment.

3 **IT IS SO STIPULATED:**

4 Dated: Sept. 16th, 2015

ERIKA McCARTNEY

5
6 By: 
PLAINTIFF ERIKA McCARTNEY

7
8 Dated: _____, 2015

NOW HEALTH GROUP, INC.


9
10 By: _____

11 Print name: Jim Emme, CEO

12 **APPROVED AS TO FORM:**

13 Dated: 9/18, 2015

PACIFIC JUSTICE CENTER

14
15 By: 
Robert B. Hancock
Attorneys for Plaintiff
ERIKA McCARTNEY

16
17
18 Dated: _____, 2015

ARNOLD & PORTER LLP

19
20 By: _____

Trenton H. Norris
Sarah Esmaili
Attorneys for Defendant
NOW HEALTH GROUP, INC.

21
22
23 **ORDER AND JUDGMENT**

24 Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is
25 approved and Judgment is hereby entered according to its terms.

26
27 Dated: _____, 2015

28 _____
JUDGE OF THE SUPERIOR COURT

1 13.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized to
2 stipulate to this Consent Judgment.

3 **IT IS SO STIPULATED:**

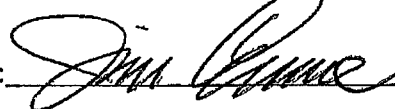
4 Dated: _____, 2015

ERIKA McCARTNEY

5
6 By: _____
PLAINTIFF ERIKA McCARTNEY

7
8 Dated: 21 SEPT 2015 2015

NOW HEALTH GROUP, INC.

9
10 By:  _____
11 Print name: Jim Emme, CEO

12 **APPROVED AS TO FORM:**


13 Dated: _____, 2015

PACIFIC JUSTICE CENTER

14
15 By: _____
Robert B. Hancock
Attorneys for Plaintiff
ERIKA McCARTNEY

16
17
18 Dated: 9/21, 2015

ARNOLD & PORTER LLP

19
20 By:  _____
Trenton H. Norris
Sarah Esmaili
Attorneys for Defendant
NOW HEALTH GROUP, INC.

21
22
23 **ORDER AND JUDGMENT**

24 Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is
25 approved and Judgment is hereby entered according to its terms.

26
27 Dated: _____, 2015

28 _____
JUDGE OF THE SUPERIOR COURT