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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ERIKA MCCARTNEY, in the public interest,)
Plaintiff,)
v.)
STARWEST BOTANICALS, INC., a California)
corporation; and DOES 1 through 500, inclusive,)
Defendants.)

CIVIL ACTION NO. CGC-14-543348
**[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 Defendant STARWEST
5 BOTANICALS, INC.’s sale and distribution into California of 4-ounce and one-pound sizes of its
6 Starwest Botanicals Organic Ginkgo Leaf Powder (“the Product”) without a clear and reasonable
7 warning apprising consumers the Product contains lead.

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

15
16 **1.3** Defendant STARWEST BOTANICALS, INC. (“STARWEST”) is a Florida
17 corporation.

18 **1.4** STARWEST distributes and sells the Product.

19 **1.5** MCCARTNEY and STARWEST are hereinafter sometimes referred to individually
20 as a “Party” or collectively as the “Parties.”

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22 **1.6** On or about September 22, 2014, pursuant to California Health and Safety Code
23 Section 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65
24 (“Notice of Violations”) in connection with the Product. This Notice was served on the California
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1 Attorney General, other public enforcers, and STARWEST. A true and correct copy of this Notice
2 of Violation is attached hereto as Exhibit A.

3 **1.7** After more than sixty (60) days passed since service of the Notice of Violations, and
4 no designated governmental agency filed a complaint against STARWEST with regard to the
5 Product. MCCARTNEY filed a complaint (the "Complaint") for injunctive relief and civil
6 penalties. The Complaint is based on the allegations in the aforementioned Notice of Violations.
7 A true and correct copy is attached hereto as Exhibit B.
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9 **1.8** The Complaint and the Notice of Violations each allege that STARWEST
10 manufactured, distributed, and/or sold in California the Product, which contains lead, a chemical
11 listed under Proposition 65 as causing cancer and birth defects or other reproductive harm, and
12 exposed consumers thereto. Further, the Complaint and Notices of Violations allege that use of the
13 Product exposes persons in California to lead without first providing clear and reasonable
14 warnings, in violation of California Health and Safety Code Section 25249.6. STARWEST
15 generally denies all material and factual allegations of the Notice of Violation and the Complaint,
16 and specifically denies that the Plaintiff or California consumers have been harmed or damaged by
17 its conduct. MCCARTNEY and STARWEST each reserves all rights to allege additional facts,
18 claims, and affirmative defenses if the Court does not approve this Consent Judgment.
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20 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
21 resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent
22 Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any of
23 the Parties, or by any of their respective officers, directors, shareholders, employees, agents, parent
24 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors,
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1 wholesalers, or retailers, of any fact, conclusion of law, issue of law, violation of law, fault,
2 wrongdoing, or liability, including without limitation, any admission concerning any alleged
3 violation of Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment
4 shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in
5 any other or future legal proceeding. Provided, however, nothing in this Section shall affect the
6 enforceability of this Consent Judgment.
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8 **1.10** The “Effective Date” of this Consent Judgment shall be the date this Consent
9 Judgment is entered as a Judgment.

10 **2. JURISDICTION AND VENUE**

11 The Parties stipulate that this Court has jurisdiction over the subject matter of this Action
12 and personal jurisdiction over the Parties, that venue is proper in this Court, and that this Court has
13 jurisdiction to enter this Consent Judgment pursuant to the terms set forth herein.
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15 **3. INJUNCTIVE RELIEF**

16 **3.1** Beginning on the Effective Date, STARWEST shall be permanently enjoined from
17 offering the Product for sale to a consumer in California, directly selling it to a consumer in
18 California, or Distributing it into California. “Distributing into California” or “Distribute into
19 California” means to sell to a person in California, ship the Product to California for sale, or to sell
20 any of the Product to a distributor that STARWEST knows or has reason to know will redistribute
21 into or sell the Product in California.
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23 **3.2** Beginning on the Effective Date, STARWEST shall be permanently enjoined from
24 providing any information supplemental to any Warning about Proposition 65 and/or California
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1 Health and Safety Code Section 25249.5, et seq. by way of its website or any weblink therefrom,
2 which contain the following statement or statements, or any insubstantial variation thereof:

3 (1) “Prop. 65 does not distinguish between chemicals that are absorbed from natural
4 phenomena – such as volcanic activity, chemicals resulting from worldwide soil, water, and air
5 pollution that are naturally absorbed by plants, local/regional problems like pesticide overspray or
6 chemical leaks – and those that are intentionally applied like synthetic fertilizers and pesticides or
7 chemicals introduced later in drying, processing or manufacturing.”

9 (2) “Safe Harbor Levels are often about 1,000 times much lower than those set by the FDA,
10 EPA and WHO.”

11 (3) “For many chemicals, the Safe Harbor levels are so low they cannot be reliably
12 achieved in practice. In addition, because of the number of chemicals on both the Safe Harbor List
13 and the full Prop. 65 list, no natural product manufacturer can afford to routinely test for more than
14 even a very few of these chemicals.”

16 (4) “The federal safety standard set by the FDS for lead in dietary supplements is no more
17 than 10 ppm.”

18 (5) “When manufacturing herbal products, it is often impossible to meet Safe Harbor
19 levels. When Safe Harbor levels cannot be met Starwest applies the appropriate Prop. 65 warning
20 to its labels. However, it is quite possible to ensure herbs are well under the national standard.”

21 (6) “Our products meet or exceed all applicable Federal safety standards.”

22 (7) “We only sell products that conform to our standard safety amounts, which are lower
23 than FDA standard safety amounts by many times.”

24 Notwithstanding the foregoing, the following statements shall be permissible:
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1 (1) "Prop. 65 does not distinguish between chemicals resulting from external sources like
2 worldwide soil, water and air pollution, pesticide overspray or chemical leaks, which are then
3 absorbed by plants, and those that are intentionally applied like synthetic fertilizers and pesticides
4 or chemicals introduced later in drying, processing or manufacturing."

5 (2) "Safe Harbor Levels are much lower than those set by the FDA, EPA and WHO."

6 (3) "When manufacturing herbal products, it is often impossible to meet Safe Harbor
7 levels. When Safe Harbor levels cannot be met Starwest applied the appropriate Prop. 65 warning
8 to its labels."
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10 **4. SETTLEMENT PAYMENT**

11 **4.1** STARWEST shall make a total payment of \$232,000 within ten days of the
12 Effective Date, which shall be in full and final satisfaction of any and all civil penalties, and
13 attorneys' fees and costs.
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15 **4.2** The payment will be in the form of four separate checks sent to counsel for
16 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,
17 California 94111. The checks shall be payable to the following parties and the payment shall be
18 apportioned as follows: (a) \$100,000 as civil penalties pursuant to California Health and Safety
19 Code Section 25249.7(b)(1). Of this amount, (1) \$75,000 shall be payable to the Office of
20 Environmental Health Hazard Assessment ("OEHHA"); (2) \$20,000 shall be payable to
21 MCCARTNEY; and (3) \$5,000 shall be payable to the California Chapter of the March of Dimes.
22 MCCARTNEY hereby waives her statutory right to any penalties in excess of \$20,000.
23 MCCARTNEY's counsel will forward the remittances to all interested parties. (b) A single
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1 payment of of \$132,000, payable to Robert B. Hancock as reimbursement of MCCARTNEY's
2 attorneys' fees, costs, investigation and litigation expenses.

3 **5. MODIFICATION OF CONSENT JUDGMENT**

4 This Consent Judgment may be modified only by: (i) Written agreement and stipulation of
5 the Parties and upon having such stipulation entered as a modified Consent Judgment by the Court;
6 or (ii) Upon entry of a modified Judgment by the Court pursuant to a motion by one of the Parties.
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8 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT**

9 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate this
10 Consent Judgment.

11 **6.2** Any Party may, by motion or application for an order to show cause filed with this
12 Court, enforce the terms and conditions contained in this Consent Judgment. The prevailing party
13 in any such motion or application may request that the Court award its reasonable attorneys' fees
14 and costs associated with such motion or application.
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16 **7. APPLICATION OF CONSENT JUDGMENT**

17 This Consent Judgment shall apply to and be binding upon the Parties and their respective
18 officers, directors, successors and assigns, and it shall benefit the Parties and their respective
19 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,
20 affiliates, franchisees, licensees, customers, distributors, wholesalers, retailers, predecessors,
21 successors, and assigns.
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23 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

24 **8.1** This Consent Judgment is a full, final, and binding resolution between
25 MCCARTNEY, on behalf of herself and in the public interest, and STARWEST, of any and all
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1 direct or derivative violations (or claimed violations) of Proposition 65 or its implementing
2 regulations for failure to provide Proposition 65 warnings of exposure to cadmium from the
3 handling, use, or consumption of the Product and fully resolves all claims that have been or could
4 have been asserted in this Action up to and including the Effective Date for failure to provide
5 Proposition 65 warnings for the Product. MCCARTNEY, on behalf of herself and in the public
6 interest, hereby forever releases and discharges, STARWEST and its past and present officers,
7 directors, owners, shareholders, employees, agents, attorneys, parent companies, subsidiaries,
8 divisions, affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers, retailers,
9 and all other upstream and downstream entities and persons in the distribution chain for the
10 Product, and the predecessors, successors and assigns of any of them (collectively, "Released
11 Parties"), from any and all claims and causes of action and obligations to pay damages, restitution,
12 fines, civil penalties, payment in lieu of civil penalties and expenses (including but not limited to
13 expert analysis fees, expert fees, attorney's fees and costs) (collectively, "Claims") arising under,
14 based on, or derivative of Proposition 65 or its implementing regulations up through the Effective
15 Date based on exposure to cadmium from the Product and/or failure to warn about cadmium, as set
16 forth in the Notice of Violations and the Complaint.
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19 **8.2** Compliance with the terms of this Consent Judgment shall be deemed to constitute
20 compliance by any Released Party with Proposition 65 regarding alleged violations in connection
21 with Product as set forth in the Notice of Violations and the Complaint.
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23 **8.3** It is possible that other Claims not known to MCCARTNEY arising out of the facts
24 alleged in the Notice of Violations or the Complaint and relating to the Product that were
25 manufactured, sold or Distributed into California before the Effective Date will develop or be
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1 discovered. MCCARTNEY, on behalf of herself only, acknowledges that the Claims released
2 herein include all known and unknown Claims and waives California Civil Code Section 1542 as to
3 any such unknown Claims. California Civil Code Section 1542 reads as follows:

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

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

11 **8.4** MCCARTNEY, on one hand, and STARWEST, on the other hand, each release and
12 waive all Claims they may have against each other for any statements or actions made or
13 undertaken by them in connection with the Notice of Violations or the Complaint. However, this
14 shall not affect or limit any Party’s right to seek to enforce the terms of this Consent Judgment.

15 **9. CONSTRUCTION AND SEVERABILITY**

16 **9.1** The terms and conditions of this Consent Judgment have been reviewed by the
17 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to fully
18 discuss the terms and conditions with its counsel. In any subsequent interpretation or construction
19 of this Consent Judgment, the terms and conditions shall not be construed against any Party.

20 **9.2** In the event that any of the provisions of this Consent Judgment is held by a court to
21 be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
22 affected.
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24 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
25 construed in accordance with the laws of the State of California.
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1 **10. PROVISION OF NOTICE**

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

5 **For Erika McCartney:**

6 Melvin B. Pearlston
7 Robert B. Hancock
8 PACIFIC JUSTICE CENTER
9 50 California Street, Suite 1500
10 San Francisco, California 94111

11 **For Starwest Botanicals, Inc.:**

12 James R. Scadden, Esq.
13 CALL & JENSEN, APC
14 610 Newport Center Drive, Suite 700
15 Newport Beach, California 92660

16 **11. COURT APPROVAL**

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

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

23 **11.3** If, despite the Parties' best efforts, either the Court does not approve this Stipulated
24 Consent Judgment, or any concerns of the Attorney General cannot be resolved, it shall be null and
25 void and have no force or effect.
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1 **12. EXECUTION AND COUNTERPARTS**

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

5 **13. ENTIRE AGREEMENT, AUTHORIZATION**

6 **13.1** This Consent Judgment contains the sole and entire agreement and understanding of
7 the Parties with respect to the entire subject matter herein, and any and all prior discussions,
8 negotiations, commitments and understandings related hereto. No representations, oral or
9 otherwise, express or implied, other than those contained herein have been made by any Party. No
10 other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist
11 or to bind any Party.

12 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized
13 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly
14 provided herein, each Party shall bear its own fees and costs.

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

16 **14.1** This Consent Judgment has come before the Court upon the request of the Parties.
17 The parties request the Court to fully review this Consent Judgment and, being fully informed
18 regarding the matters which are the subject of this action, to:
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20 (a) Find that the terms and provisions of this Consent Judgment represent a good
21 faith settlement of all matters raised by the allegations of the Complaint, that the matter has been
22 diligently prosecuted, and that the public interest is served by such settlement; and
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(b) Make the findings pursuant to California Health and Safety Code Section 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

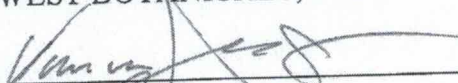
IT IS SO STIPULATED.

Dated: 11/11/10



Erika McCartney

Dated: 11/10/16

STARWEST BOTANICALS, INC.
Name: 

Title: PRESIDENT

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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: _____

Judge of the Superior Court