

1 Melvin B. Pearlston (SBN 54291)
Robert B. Hancock (SBN 179438)
2 PACIFIC JUSTICE CENTER
50 California Street, Suite 1500
3 San Francisco, California 94111
Tel: (415) 310-1940/Fax: (415) 354-3508
4 Email: rbh@lawyer.com

5 Attorneys for Plaintiff
ERIKA MCCARTNEY

6
7 Robert L. Falk (SBN 142007)
MORRISON & FOERSTER LLP
8 425 Market Street, 32nd Floor
San Francisco, California 94105
9 Tel: (415) 268-7000/Fax: (415) 268-7522
Email: Rfalk@mofa.com

10 Michelle W. Cohen (admitted *pro hac vice*)
11 PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
12 New York, NY 10036
Telephone: 212 336-2000
13 Email: mcohen@pbwt.com

14 Attorneys for Defendants
Artisan Confections Company and
15 The Hershey Company

16 **SUPERIOR COURT OF CALIFORNIA**

17 **COUNTY OF SAN FRANCISCO**

18
19 ERIKA MCCARTNEY, in the public interest,)

20 Plaintiff,)

21 v.)

22 ARTISAN CONFECTIONS COMPANY, a)
Delaware corporation, DAGOBA ORGANIC)
23 CHOCOLATES, LLC, an Oregon limited)
liability company; and DOES 1 through 500,)
24 inclusive,)

25 Defendants.)
26
27
28

CIVIL ACTION NO. CGC-15-544497

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

[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
3 Water and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5 et
4 seq. (also known as and hereinafter referred to as “Proposition 65”) regarding Dagoba Organic
5 Chocolate Cacao Powder (hereinafter, the “Covered Product”).

6 **1.2** Plaintiff ERIKA MCCARTNEY (“MCCARTNEY”) is a California resident acting
7 as a private enforcer of Proposition 65. MCCARTNEY brings this Action in the public interest
8 pursuant to California Health and Safety Code Section 25249.6. MCCARTNEY asserts that she
9 is dedicated to, among other causes, helping safeguard the public from health hazards by reducing
10 the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for
11 consumers and employees, and encouraging corporate responsibility.

12 **1.3** Defendants ARTISAN CONFECTIONS COMPANY (“ARTISAN”) and THE
13 HERSHEY COMPANY (“HERSHEY”) are Delaware corporations headquartered in
14 Pennsylvania. ARTISAN is a subsidiary of HERSHEY that holds intellectual property and
15 licenses the Dagoba brand name to HERSHEY for HERSHEY’s use with certain products
16 HERSHEY manufactures and distributes, including the Covered Product.

17 **1.5** MCCARTNEY, ARTISAN and HERSHEY are hereinafter sometimes referred to
18 individually as a “Party” or collectively as the “Parties.” □

19 **1.6** On or about December 17, 2014, pursuant to California Health and Safety Code
20 Section 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65
21 (“Notice of Violations”) on the California Attorney General, other public enforcers, ARTISAN
22 and an entity MCCARTNEY had then identified as Dagoba Organic Chocolates LLC.
23 MCCARTNEY has since served the California Attorney General, other public enforcers and
24 HERSHEY with a parallel Notice of Violations (hereinafter, collectively referred to as the
25 “Notices of Violations”).

26 **1.7** After more than sixty (60) days passed since service of the original Notice of
27 Violations, and with no designated governmental agency having filed a complaint,
28 MCCARTNEY filed the complaint in this action for injunctive relief and civil penalties based on

1 the allegations in the Notice of Violations. MCCARTNEY has since dismissed Dagoba Organic
2 Chocolates LLC from the action and filed a First Amended Complaint based on the Notices of
3 Violations, naming HERSHEY (hereinafter, the operative “Complaint”).

4 **1.8** The Complaint and the Notices of Violations allege that ARTISAN and
5 HERSHEY manufactured, distributed, and/or sold in California the Covered Product, which
6 contains cadmium, a chemical listed under Proposition 65 as a reproductive toxin, and thereby
7 exposed consumers at a level of cadmium requiring a Proposition 65 warning. Further, the
8 Complaint and Notices of Violations allege that use and consumption of the Covered Product
9 exposes persons in California to cadmium without first providing clear and reasonable warnings,
10 in violation of California Health and Safety Code Section 25249.6. ARTISAN and HERSHEY
11 generally deny all material and factual allegations of the Notice of Violations and the Complaint,
12 deny that ARTISAN is a person in the course of doing business under Proposition 65 with respect
13 to the Covered Product, and specifically deny that Proposition 65 warnings are required for the
14 Covered Product or that MCCARTNEY or California consumers have been harmed or damaged
15 by their conduct or products, including the Covered Product. ARTISAN and HERSHEY, on the
16 one hand, and MCCARTNEY, on the other, each reserve all rights to allege or pursue additional
17 facts, claims, and/or defenses, including jurisdictional defenses, if the Court does not approve this
18 Consent Judgment.

19 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
20 resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent
21 Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any
22 of the Parties, or by any of their respective officers, directors, shareholders, employees, agents,
23 subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors, wholesalers, or
24 retailers, of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or
25 liability, including without limitation, any admission concerning any alleged violation of
26 Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment shall
27 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
28 other or future legal proceeding. Provided, however, nothing in this Section shall affect the

1 enforceability of this Consent Judgment.

2 **1.10** The “Effective Date” of this Consent Judgment shall be the date on which notice
3 of the approval and entry of this Consent Judgment by the Court is received by HERSHEY.

4 **2. JURISDICTION AND VENUE**

5 For purposes of the approval and entry of this settlement only, the Parties stipulate that
6 this Court has jurisdiction over the subject matter of this Action and personal jurisdiction over the
7 Parties, that venue is proper in this Court, and that this Court has jurisdiction to enter this Consent
8 Judgment pursuant to the terms set forth herein.

9 **3. INJUNCTIVE RELIEF**

10 **3.1** Beginning on the Effective Date, HERSHEY shall be permanently enjoined from
11 offering for sale to a consumer in California, directly selling to a consumer in California, or
12 “Distributing into California” any Covered Product for which the amount of consumption by a
13 typical consumer contains more than 4.1 micrograms of cadmium per day.

14 Relative to the above, “Distributing into California” means to ship any of the Covered
15 Product to California for sale or to sell any of the Covered Product to a distributor, retailer, or
16 other customer that HERSHEY knows or has reason to know will sell or use the Covered Product
17 in California. In addition, compliance with the cadmium exposure level of 4.1 micrograms per
18 day shall be calculated using the following formula: micrograms of cadmium per gram of the
19 Covered Product multiplied by an average daily consumption amount of the Covered Product of 2
20 grams.

21 **3.2** Covered Product that has been packaged, distributed, shipped, sold, or otherwise
22 placed in the stream of commerce through and including the Effective Date of this Consent
23 Judgment are exempt from the provisions of Sections 3.1 and 3.3 and are included within the
24 releases provided in Sections 8.1 through 8.4. To be in compliance with the terms of this Consent
25 Judgment, ARTISAN and HERSHEY are not required to undertake any efforts or conduct to
26 remove such Covered Product from inventory or the stream of commerce. Within five (5)
27 business days of the Effective Date, HERSHEY shall provide MCCARTNEY’s counsel with the
28 last lot number and date code or best-by date for Covered Product put into inventory or the stream

1 of commerce prior to the Effective Date.

2 **3.3** For a period of three (3) years from the Effective Date, any batch or lot number of
3 the Covered Product offered for sale to any consumer in California shall be tested by HERSHEY
4 for cadmium concentration utilizing inductively coupled plasma-mass spectrometry capable of
5 detecting cadmium at a level of 50 parts per billion or less, provided, however, that HERSHEY
6 shall not be required to test in excess of four batches or lots of the Covered Product in any given
7 year. For purposes of this Section and Section 3.1 above, HERSHEY may utilize a compositing
8 procedure to combine multiple samples drawn from any batch or lot of Covered Product prior to
9 testing or may calculate an average of test results from all samples drawn from such batch or lot.

10 All tests shall be conducted at the expense of HERSHEY. HERSHEY shall provide the
11 verified results of all tests to counsel for MCCARTNEY, via regular U.S. Mail, within ten (10)
12 business days of receipt of such results. All test results shall be provided to counsel for
13 MCCARTNEY prior to the Covered Product being offered for sale to any consumer in California
14 and shall be kept confidential, except that MCCARTNEY may (1) with notification provided to
15 HERSHEY at least ten business days in advance, disclose such results to the California Attorney
16 General's office pursuant to Evidence Code Section 1040 *et seq.* or Health and Safety Code
17 Section 25249.7(d), or (2) submit such results to this Court under seal for *in camera* review
18 pursuant to Section 6.2 and 6.3 below.

19 **4. SETTLEMENT PAYMENT**

20 **4.1** HERSHEY shall make a total payment of \$85,000, except as otherwise provided
21 in Section 4.4 below, within ten days following the Effective Date, which shall be in full and final
22 satisfaction of any and all civil penalties, payment in lieu of civil penalties, and attorneys' fees
23 and costs.

24 **4.2** The payment will be in the form of separate checks sent to counsel for
25 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,
26 California 94111. The checks shall be payable to the following parties and the payment shall be
27 apportioned as follows:

28 **4.3** \$17,500 (seventeen thousand five hundred dollars) as civil penalties pursuant to

1 California Health and Safety Code Section 25249.7(b)(1). Of this amount, \$14,125 (fourteen
2 thousand one hundred twenty five dollars) shall be payable to the Office of Environmental Health
3 Hazard Assessment (“OEHHA”), and \$3,375 (three thousand three hundred seventy five dollars)
4 shall be payable to MCCARTNEY. (Cal. Health & Safety Code § 25249.12(c)(1) & (d)).

5 MCCARTNEY’s counsel will forward the civil penalty to OEHHA.

6 **4.4** \$67,500 (sixty seven thousand five hundred dollars) payable to Pacific Justice
7 Center as reimbursement of MCCARTNEY’s attorneys’ fees, costs, investigation and litigation
8 expenses ("Attorney's Fees and Costs"). MCCARTNEY and her counsel shall be responsible on
9 their own to establish in the Motion for Court Approval that such Attorney's Fees and Costs are
10 appropriate for the work done in this matter. MCCARTNEY and her counsel agree not to seek
11 more than \$67,500. ARTISAN and HERSHEY shall not oppose the amount of Attorney's Fees
12 and Costs for which McCartney seeks approval as long as the request does not exceed \$67,500.

13 **4.5** Any failure to remit payment on or before its due date shall be deemed a material
14 breach of this Agreement.

15 **5. MODIFICATION OF CONSENT JUDGMENT**

16 **5.1** This Consent Judgment may be modified only by: (i) Written agreement and
17 stipulation of the Parties and upon having such stipulation entered as a modified Consent
18 Judgment by the Court; or (ii) upon entry of a modified Judgment by the Court pursuant to a
19 motion by one of the Parties after exhausting the meet and confer process set forth as follows. If
20 either Party requests or initiates a modification, then it shall meet and confer with the other Party
21 in good faith before filing a motion with the Court seeking to modify it. MCCARTNEY is
22 entitled to reimbursement of all reasonable attorneys’ fees and costs regarding the Parties’ meet
23 and confer efforts for any modification requested or initiated by ARTISAN or HERSHEY to the
24 extent that such fees and costs are incurred as the result of ARTISAN or HERSHEY requesting a
25 continuation of the meet and confer process subsequent to an initial meeting. Similarly,
26 ARTISAN and HERSHEY are entitled to reimbursement of all reasonable attorney’s fees and
27 costs regarding the Parties’ meet and confer efforts for any modification requested or initiated by
28 MCCARTNEY to the extent that such fees and costs are incurred as the result of MCCARTNEY

1 requesting a continuation of the meet and confer process subsequent to an initial meeting. If,
2 despite their meet and confer efforts, the Parties are unable to reach agreement on any proposed
3 modification, the Party or Parties seeking the modification may file the appropriate motion and
4 the prevailing party on such motion shall be entitled recover its reasonable fees and costs
5 associated with such motion.

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

7 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate
8 this Consent Judgment.

9 **6.2** Subject to Section 6.3, any Party may, by motion or application for an order to
10 show cause filed with this Court, enforce the terms and conditions contained in this Consent
11 Judgment. The prevailing party in any such motion or application may request that the Court
12 award its reasonable attorneys' fees and costs associated with such motion or application.

13 **6.3** Before filing a motion or application for an order to show cause, MCCARTNEY
14 shall provide ARTISAN and HERSHEY with 30 (thirty) days written notice of any alleged
15 violations of the terms and conditions contained in this Consent Judgment. As long as
16 HERSHEY cures any such alleged violations within the 30 (thirty) day period (or if any such
17 violation cannot practicably be cured within 30 days, it expeditiously initiates a cure within 30
18 days and complete it as soon as practicable), then ARTISAN and HERSHEY shall not be in
19 violation of the Consent Judgment. A cure to an alleged violation of this Consent Judgment shall
20 be deemed to have been made to the extent HERSHEY presents MCCARTNEY with test results
21 on the batch or lot of Covered Product at issue that demonstrates that it meets the requirements set
22 forth in Section 3.1 based on the testing methodologies authorized under Section 3.3.

23 **7. APPLICATION OF CONSENT JUDGMENT**

24 This Consent Judgment's obligations shall apply to and be binding upon HERSHEY and
25 its respective officers, directors, successors and assigns, and its terms shall benefit the Parties and
26 their respective officers, directors, shareholders, employees, agents, parent companies,
27 subsidiaries, divisions, affiliates, franchisees, licensors, licensees, customers (including "Co-
28 Brand" customers; excluding only "Private Labeler" customers), distributors, wholesalers,

1 retailers, predecessors, successors, and assigns. “Private Labelers” excluded from the benefits of
2 this Consent Judgment are companies who rebrand and offer the Covered Product under their
3 own brand, not under the DAGOBA brand. “Co-Brand” customers who shall benefit from this
4 Consent Judgment are companies who offer DAGOBA manufactured or distributed Covered
5 Product with their own brand and the DAGOBA brand both displayed on the product packaging.

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

7 **8.1** This Consent Judgment is a full, final, and binding resolution between
8 MCCARTNEY, on behalf of herself and in the public interest on the one hand, and ARTISAN
9 and HERSHEY on the other hand, of any and all direct or derivative violations (or claimed
10 violations) of Proposition 65 or its implementing regulations for failure to provide Proposition 65
11 warnings of exposure to cadmium from the handling, use, or consumption of the Covered
12 Product, and it fully resolves all claims that have been or could have been asserted up to and
13 including the Effective Date for the alleged failure to provide Proposition 65 warnings for the
14 Covered Product regarding cadmium as set forth in the Notices of Violations.

15 **8.2** MCCARTNEY, on behalf of herself only and not on behalf of the public interest,
16 hereby forever releases and discharges, ARTISAN and HERSHEY and their past and present
17 officers, directors, owners, shareholders, employees, agents, attorneys, parent companies ,
18 subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, customers (including “Co-
19 Brand” customers; excluding only “Private Labeler” customers), distributors, wholesalers,
20 retailers, and all other upstream and downstream entities and persons in the distribution chain of
21 any Covered Product, and the predecessors, successors and assigns of any of them (collectively,
22 “Released Parties”), from any and all claims and causes of action and obligations to pay damages,
23 restitution, fines, civil penalties, payment in lieu of civil penalties and expenses (including but not
24 limited to expert analysis fees, expert fees, attorney’s fees and costs) (collectively, “Claims”)
25 arising under, based on, or derivative of Proposition 65 or its implementing regulations up
26 through the Effective Date.

27 **8.3** Compliance with the terms of this Consent Judgment shall be deemed to constitute
28 compliance by any Released Party with Proposition 65 regarding alleged exposures to cadmium

1 from the Covered Product as set forth in the Notices of Violations and the Complaint.

2 **8.4** It is possible that other Claims not known to MCCARTNEY arising out of the
3 facts alleged in the Notices of Violations or the Complaint will develop or be discovered.
4 MCCARTNEY, on behalf of herself only and not in the public interest, acknowledges that the
5 Claims released herein include all known and unknown Claims and waives California Civil Code
6 Section 1542 as to any such unknown Claims. California Civil Code Section 1542 reads as
7 follows:

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

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

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

18 **9. CONSTRUCTION AND SEVERABILITY**

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

24 **9.2** In the event that any of the provisions of this Consent Judgment is held by a court
25 to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
26 affected.

27 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
28 construed in accordance with the laws of the State of California.

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)
4 certified mail, (b) overnight courier, or (c) personal delivery to the following:

5 **For 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 ARTISAN and HERSHEY:**

12 General Counsel
13 THE HERSHEY COMPANY
14 100 Crystal A Drive
15 Hershey, Pennsylvania 17033

16 With copies to:

17 Robert L. Falk
18 MORRISON & FOERSTER LLP
19 425 Market Street, 32nd Floor
20 San Francisco, California 94105

21 and

22 Michelle W. Cohen
23 PATTERSON BELKNAP WEBB & TYLER LLP
24 1133 Avenue of the Americas
25 New York, NY 10036

26 **11. COURT APPROVAL**

27 **11.1** Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall
28 notice a Motion for Court Approval. Except as provided in Section 4.4 above, 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 and subject to Section 4.4 above, the Court does
not approve this stipulated Consent Judgment, it shall be null and void and have no force or

1 effect.

2 **12. EXECUTION AND COUNTERPARTS**

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

6 **13. ENTIRE AGREEMENT, AUTHORIZATION**

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

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

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

17 **14.1** This Consent Judgment has come before the Court upon the request of the Parties.
18 The Parties request the Court to fully review this Consent Judgment and, being fully informed
19 regarding the matters which are the subject of this action, to:

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

23 (b) Make the findings pursuant to California Health and Safety Code Section
24 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

25 **IT IS SO STIPULATED.**

26 Dated: 11/5/15



Erika McCartney

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: 11/12/2015

Name: Adrian D. Mebane

THE HERSHEY COMPANY

Adrian D. Mebane (Signature)

Title: VP, Deputy General Counsel
and Assistant Secretary

Dated: 11/12/2015

Name: KATHLEEN S. PURCELL

ARTISAN CONFECTIONS COMPANY

Kathleen S. Purcell (Signature)

Title: Assistant Secretary

APPROVED AS TO FORM:

Date d: 11/5, 2015

PACIFIC JUSTICE CENTER

By: Robert B. Hancock

Robert B. Hancock
Attorneys for Plaintiff
ERIKA MCCARTNEY

Date d: 11/17/15, 2015

MORRISON & FOERSTER, LLP

By: Robert L. Falk

Robert Falk
Attorneys for Defendants
ARTISAN CONFECTIONS COMPANY and
THE HERSHEY COMPANY

ORDER AND JUDGMENT

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

IT IS SO ORDERED, ADJUDGED AND DECREED.

Date d: _____

Judge of the Superior Court