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7 Attorneys for Plaintiff

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

12
13 ERIKA MCCARTNEY, in the public interest,)
14 Plaintiff,)
15 v.)
16 THEO CHOCOLATE, INC., a Washington)
17 corporation; and DOES 1 through 500, inclusive,)
18 Defendants.)

CIVIL ACTION NO. CGC-15-546493

**[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 the following product
5 (hereinafter collectively the “Covered Product”: Theo Roasted Cacao Nibs.
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7 **1.2** Plaintiff ERIKA MCCARTNEY (“MCCARTNEY”) is a California resident acting
8 as a private enforcer of Proposition 65. MCCARTNEY brings this Action in the public interest
9 pursuant to California Health and Safety Code Section 25249. MCCARTNEY asserts that she is
10 dedicated to, among other causes, helping safeguard the public from health hazards by reducing the
11 use and misuse of hazardous and toxic chemicals and substances, facilitating a safe environment for
12 consumers and employees, and encouraging corporate responsibility.
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14 **1.3** Defendant Theo Chocolate, Inc., is a Washington corporation, and is referred to
15 hereinafter as “THEO CHOCOLATE.” THEO CHOCOLATE asserts that, as the nation’s first
16 organic and Fair Trade cocoa product manufacturer, its founding principle is that cocoa products
17 should be produced in an entirely ethical, sustainable fashion, and THEO CHOCOLATE further
18 asserts that it implements a business model to achieve the company’s mission of environmental
19 sustainability, and support and protection of workers’ rights.
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21 **1.4** THEO CHOCOLATE manufactures, distributes and sells the Covered Product.

22 **1.5** MCCARTNEY and THEO CHOCOLATE are hereinafter sometimes referred to
23 individually as a “Party” or collectively as the “Parties.”

24 **1.6** On or about April 9, 2015, pursuant to California Health and Safety Code Section
25 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65 (“Notice of
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1 Violations”) on the California Attorney General, other public enforcers, and THEO CHOCOLATE.

2 A true and correct copy of the Notice of Violations 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 THEO CHOCOLATE with regard to
5 the Covered Product or the alleged violations, MCCARTNEY filed a complaint (the “Complaint”)
6 for injunctive relief and civil penalties. The Complaint is based on the allegations in the Notice of
7 Violations.

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9 **1.8** The Complaint and the Notice of Violations each allege that THEO CHOCOLATE
10 manufactured, distributed, and/or sold in California the Covered Product, which contains cadmium,
11 a chemical listed under Proposition 65 as causing birth defects or other reproductive harm, and
12 exposed consumers thereto. Further, the Complaint and Notice of Violations allege that use of the
13 Covered Product exposes persons in California to cadmium without first providing clear and
14 reasonable warnings, in violation of California Health and Safety Code Section 25249.6. THEO
15 CHOCOLATE generally denies all material and factual allegations of the Notice of Violation and
16 the Complaint, and specifically denies that the Plaintiff or California consumers have been harmed
17 or damaged by its conduct. THEO CHOCOLATE further asserts that the cadmium levels in the
18 Covered Product is naturally occurring as the result of natural geological and plant processes in the
19 areas where the cocoa plants, from which the cocoa beans are sourced, are grown. MCCARTNEY
20 and THEO CHOCOLATE each reserves all rights to allege additional facts, claims, and affirmative
21 defenses if the Court does not approve this Consent Judgment.
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24 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
25 resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent
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1 Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any of
2 the Parties, or by any of their respective officers, directors, shareholders, employees, agents, parent
3 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors,
4 wholesalers, or retailers, of any fact, conclusion of law, issue of law, violation of law, fault,
5 wrongdoing, or liability, including without limitation, any admission concerning any alleged
6 violation of Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment
7 shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in
8 any other or future legal proceeding. Provided, however, nothing in this Section shall affect the
9 enforceability of this Consent Judgment.
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11 **1.10** The “Effective Date” of this Consent Judgment shall be the date this Consent
12 Judgment is entered as a Judgment.
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14 **2. JURISDICTION AND VENUE**

15 The Parties stipulate that this Court has jurisdiction over the subject matter of this Action
16 and personal jurisdiction over the Parties, that venue is proper in this Court, and that this Court has
17 jurisdiction to enter this Consent Judgment pursuant to the terms set forth herein.

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

19 **3.1** Beginning on the Effective Date, THEO CHOCOLATE shall be permanently
20 enjoined from offering for sale to a consumer in California, directly selling to a consumer in
21 California, or “Distributing into California” any of the Covered Product without Court modification
22 of this Consent Judgment. “Distributing into California” or “Distribute into California” means to
23 ship any of the Covered Product to California for sale or to sell any of the Covered Product to a
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1 distributor that THEO CHOCOLATE knows or has reason to know will sell the Covered Product in
2 California.

3 **4. SETTLEMENT PAYMENT**

4 **4.1** THEO CHOCOLATE shall make a total payment of \$60,000, except as otherwise
5 provided in Section 4.4 below, within thirty days of the Effective Date, which shall be in full and
6 final satisfaction of any and all civil penalties, payment in lieu of civil penalties, and attorneys' fees
7 and costs.

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9 **4.2** The payment will be in the form of separate checks sent to counsel for
10 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,
11 California 94111. The checks shall be payable to the following parties and the payment shall be
12 apportioned as follows:

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14 **4.3** \$15,000 as civil penalties pursuant to California Health and Safety Code Section
15 25249.7(b)(1). Of this amount, \$11,250 shall be payable to the Office of Environmental Health
16 Hazard Assessment ("OEHHA"), and \$3,750 shall be payable to MCCARTNEY. (Cal. Health &
17 Safety Code § 25249.12(c)(1) & (d)). MCCARTNEY's counsel will forward the civil penalty
18 check to OEHHA.

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20 **4.4** \$45,000 payable to Robert B. Hancock as reimbursement of MCCARTNEY's
21 attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and Costs"), which
22 shall discharge all obligations by THEO CHOCOLATE to pay Plaintiff's attorneys' fees and
23 related expenses, incurred by Pacific Justice Center or other attorneys, in this matter except as set
24 forth in Sections 5 and 6 below. MCCARTNEY and her counsel shall be responsible on their own
25 to establish in the Motion for Court Approval that such Attorney's Fees and Costs are appropriate
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1 for the work done in this matter. MCCARTNEY and her counsel agree not to seek more than
2 \$45,000. THEO CHOCOLATE shall not oppose the amount of Attorney's Fees and Costs for
3 which MCCARTNEY seeks approval as long as the request does not exceed \$45,000.

4 **5. MODIFICATION OF CONSENT JUDGMENT**

5 5.1 This Consent Judgment may be modified only by: (i) Written agreement and
6 stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment
7 by the Court; or (ii) Upon entry of a modified Judgment by the Court pursuant to a motion by one
8 of the Parties after exhausting the meet and confer process set forth as follows. If either Party
9 requests or initiates a modification, then it shall meet and confer with the other Party in good faith
10 before filing a motion with the Court seeking to modify it. MCCARTNEY is entitled to
11 reimbursement of all reasonable attorneys' fees and costs regarding the Parties' meet and confer
12 efforts for any modification requested or initiated by THEO CHOCOLATE. Similarly, THEO
13 CHOCOLATE is entitled to reimbursement of all reasonable attorney's fees and costs regarding the
14 Parties' meet and confer efforts for any modification requested or initiated by MCCARTNEY. If,
15 despite their meet and confer efforts, the Parties are unable to reach agreement on any proposed
16 modification the party seeking the modification may file the appropriate motion and the prevailing
17 party on such motion shall be entitled recover its reasonable fees and costs associated with such
18 motion. One basis, but not the exclusive basis, for THEO CHOCOLATE to seek a modification of
19 this Consent Judgment is if Proposition 65 is changed, narrowed, limited, or otherwise rendered
20 inapplicable in whole or in part to the Covered Product or cadmium due to legislative change, a
21 change in the implementing regulations, court decisions, or other legal basis.
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1 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT**

2 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate this
3 Consent Judgment.

4 **6.2** Subject to Section 6.3, any Party may, by motion or application for an order to show
5 cause filed with this Court, enforce the terms and conditions contained in this Consent Judgment.
6 The prevailing party in any such motion or application may request that the Court award its
7 reasonable attorneys' fees and costs associated with such motion or application.

8 **6.3** Before filing a motion or application for an order to show cause, MCCARTNEY
9 shall provide THEO CHOCOLATE with 30 (thirty) days written notice of any alleged violations of
10 the terms and conditions contained in this Consent Judgment. As long as THEO CHOCOLATE
11 cures any such alleged violations within the 30 (thirty) day period (or if any such violation cannot
12 practicably be cured within 30 days, it expeditiously initiates a cure within 30 days and completes it
13 as soon as practicable), then THEO CHOCOLATE shall not be in violation of the Consent
14 Judgment.
15 Judgment.

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

2 **8.1** This Consent Judgment is a full, final, and binding resolution between
3 MCCARTNEY, on behalf of herself and in the public interest, and THEO CHOCOLATE, of any
4 and all direct or derivative violations (or claimed violations) of Proposition 65 or its implementing
5 regulations for failure to provide Proposition 65 warnings of exposure to cadmium from the
6 handling, use, or consumption of the Covered Product and fully resolves all claims that have been
7 or could have been asserted in this Action up to and including the Effective Date for alleged failure
8 to provide Proposition 65 warnings for the Covered Product regarding cadmium as alleged in the
9 Notice of Violations and in the Complaint. MCCARTNEY, on behalf of herself and in the public
10 interest, hereby forever releases and discharges, THEO CHOCOLATE and its past and present
11 officers, directors, owners, shareholders, employees, agents, attorneys, parent companies,
12 subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, customers, distributors,
13 wholesalers, private labelers, co-packers, retailers, and all other upstream and downstream entities
14 and persons in the distribution chain of any Covered Product, and the predecessors, successors and
15 assigns of any of them (collectively, "Released Parties"), from any and all claims and causes of
16 action and obligations to pay damages, restitution, fines, civil penalties, payment in lieu of civil
17 penalties and expenses (including but not limited to expert analysis fees, expert fees, attorney's fees
18 and costs) (collectively, "Claims") arising under, based on, or derivative of Proposition 65 or its
19 implementing regulations up through the Effective Date based on alleged exposure to cadmium
20 from the Covered Product and/or failure to warn about cadmium, as set forth in the Notice of
21 Violations and the Complaint.
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1 **8.2** Compliance with the terms of this Consent Judgment shall be deemed to constitute
2 compliance by any Released Party with Proposition 65 regarding alleged exposures to cadmium
3 from the Covered Product as set forth in the Notice of Violations and the Complaint.

4 **8.3** It is possible that other Claims not known to MCCARTNEY arising out of the facts
5 alleged in the Notice of Violations or the Complaint and relating to cadmium in the Covered
6 Product that were manufactured, sold or Distributed into California before the Effective Date will
7 develop or be discovered. MCCARTNEY, on behalf of herself only, acknowledges that the Claims
8 released herein include all known and unknown Claims and waives California Civil Code Section
9 1542 as to any such unknown Claims. California Civil Code Section 1542 reads as follows:
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11 **“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
12 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
13 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
14 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
OR HER SETTLEMENT WITH THE DEBTOR.”**

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

17 **8.4** MCCARTNEY, on one hand, and THEO CHOCOLATE, on the other hand, each
18 release and waive all Claims they may have against each other for any statements or actions made
19 or undertaken by them in connection with the Notice of Violations or the Complaint. However,
20 this shall not affect or limit any Party’s right to seek to enforce the terms of this Consent Judgment.
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22 **9. CONSTRUCTION AND SEVERABILITY**

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

3 **9.2** In the event that any of the provisions of this Consent Judgment is held by a court to
4 be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
5 affected.

6 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
7 construed in accordance with the laws of the State of California.
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9 **10. PROVISION OF NOTICE**

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

16 Melvin B. Pearlston
17 Robert B. Hancock
18 PACIFIC JUSTICE CENTER
19 50 California Street, Suite 1500
20 San Francisco, California 94111

21 **For Theo Chocolate, Inc.:**

22 Dennis Macray, Chief Operating Officer
23 Theo Chocolate, Inc.
24 3400 Phinney Avenue North
25 Seattle, WA 98103

26 Ann G. Grimaldi, Esq.
GRIMALDI LAW OFFICES
50 California Street, Suite 1500
San Francisco, California 94111

1 **11. COURT APPROVAL**

2 **11.1** Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall
3 notice a Motion for Court Approval. The Parties shall use their best efforts to support entry of this
4 Consent Judgment.

5 **11.2** If the California Attorney General objects to any term in this Consent Judgment, the
6 Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to
7 the hearing on the motion.

8 **11.3** If, despite the Parties' best efforts, the Court does not approve this Stipulated
9 Consent Judgment it shall be null and void and have no force or effect.

10 **12. EXECUTION AND COUNTERPARTS**

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

14 **13. ENTIRE AGREEMENT, AUTHORIZATION**

15 **13.1** This Consent Judgment contains the sole and entire agreement and understanding of
16 the Parties with respect to the entire subject matter herein, and any and all prior discussions,
17 negotiations, commitments and understandings related hereto. No representations, oral or
18 otherwise, express or implied, other than those contained herein have been made by any Party. No
19 other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist
20 or to bind any Party.

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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.

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 the Court to fully review this Consent Judgment and, being fully informed regarding the matters which are the subject of 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.

IT IS SO STIPULATED.

Dated: 2/23/17


Erika McCartney

Dated: 2/25/2017

THEO CHOCOLATE, INC.
Name: 
Title: COO

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ORDER AND 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: _____, 2017

Judge of the Superior Court