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8 Attorneys for Plaintiff

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**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA**

ERIKA MCCARTNEY, in the public interest, )  
Plaintiff, )  
v. )  
VITACOST.COM, INC., a Delaware )  
corporation; and DOES 1 through 500, inclusive, )  
Defendants. )

CIVIL ACTION NO. RG16805080  
**[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 Vitacost Whole Food  
5 Certified Organic Cocoa Powder, and Vitacost Organic Cacao Nibs (hereinafter the “Covered  
6 Products.”)

7  
8             **1.2**     Plaintiff ERIKA MCCARTNEY (“MCCARTNEY”) is a California resident acting  
9 as a private enforcer of Proposition 65. MCCARTNEY brings this Action in the public interest  
10 pursuant to California Health and Safety Code Section 25249.6.

11             **1.3**     Defendant Vitacost.com, Inc., is a Delaware corporation, and is referred to  
12 hereinafter as “VITACOST.”

13             **1.4**     VITACOST distributes and sells the Covered Products.

14             **1.5**     MCCARTNEY and VITACOST are hereinafter sometimes referred to individually  
15 as a “Party” or collectively as the “Parties.”

16             **1.6**     On or about April 14, 2015, and November 13, 2015, pursuant to California Health  
17 and Safety Code Section 25249.7(d)(1), MCCARTNEY served 60-Day Notices of Violations of  
18 Proposition 65 (“Notices of Violations”) on the California Attorney General, other public  
19 enforcers, and VITACOST.  
20

21             **1.7**     After more than sixty (60) days passed since service of the Notice of Violations, and  
22 no designated governmental agency filed a complaint with regard to the Covered Products or the  
23 alleged violations, MCCARTNEY filed complaints in connection with the cocoa powder and cocoa  
24 nibs products in San Francisco Superior Court (*McCartney v. Vitacost.com, Inc.*, San Francisco  
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1 Sup. Ct. Case No. CGC-15-546492) and Alameda Superior Court (*McCartney v. Vitacost.com,*  
2 *Inc.*, Alameda County Sup. Ct. Case No. RG16805080), respectively (the “Complaints”) for  
3 injunctive relief and civil penalties. The Complaints are based on the allegations in the Notice of  
4 Violations. This Consent Judgment resolves and covers both cases.

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6 **1.8** The Complaints and the Notices of Violations each allege that VITACOST  
7 manufactured, distributed, and/or sold in California the Covered Products, which contain cadmium,  
8 a chemical listed under Proposition 65 as causing birth defects or other reproductive harm, and  
9 exposed consumers thereto. Further, the Complaints and Notices of Violations allege that use of  
10 the Covered Products expose persons in California to cadmium without first providing clear and  
11 reasonable warnings, in violation of California Health and Safety Code Section 25249.6.  
12 VITACOST generally denies all material and factual allegations of the Notices of Violations and  
13 the Complaints, and specifically denies that Plaintiff or California consumers have been harmed or  
14 damaged by its conduct, that the Covered Products are compliant with Proposition 65, and are safe  
15 for their intended uses. VITACOST further asserts that any cadmium levels in the Covered  
16 Products are naturally occurring as the result of natural geological and plant processes in the areas  
17 where the cocoa plants, from which the cocoa beans are sourced, are grown. VITACOST further  
18 alleges that the level of exposure to cadmium from use of the Covered Products, if any, falls below  
19 the maximum allowable dosage level established by law. MCCARTNEY and VITACOST each  
20 reserves all rights to allege additional facts, claims, and affirmative defenses if the Court does not  
21 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.  
13

## 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, VITACOST shall be permanently enjoined from  
20 offering for sale to a consumer in California, directly selling to a consumer in California, or  
21 “Distributing into California” any of the Covered Products without a Proposition 65 compliant  
22 warning, consistent with Section 3.2, below, without Court modification of this Consent Judgment.  
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24 “Distributing into California” or “Distribute into California” means to ship any of the Covered  
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1 Products to California for sale or to sell any of the Covered Products to a distributor that  
2 VITACOST knows or has reason to know will sell the Covered Products in California.

3 **3.2 Clear and Reasonable Warnings**

4 For the Covered Products, VITACOST shall provide the warning ("Warning") as specified  
5 below:

6  
7 **Notice to California Residents  
Proposition 65 WARNING**

8 **WARNING:** There are products in your order that contain  
9 chemicals known to the State of California to cause cancer  
10 and/or birth defects or other reproductive harm.

11 The parties agree that the foregoing warning, which appears on VITACOSTS's website  
12 prior to the consummation of any sale of either Covered Product for delivery to any address in  
13 California, constitutes a clear and reasonable warning.

14 **4. SETTLEMENT PAYMENT**

15 **4.1** VITACOST shall make a total payment of \$25,000, within ten business days of the  
16 Effective Date, which shall be in full and final satisfaction of any and all civil penalties, payment in  
17 lieu of civil penalties, and attorneys' fees and costs.

18 **4.2** The payment will be in the form of separate checks sent to counsel for  
19 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,  
20 California 94111. The checks shall be payable to the following parties and the payment shall be  
21 apportioned as follows:  
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23 **4.3** \$7,500 as civil penalties pursuant to California Health and Safety Code Section  
24 25249.7(b)(1). Of this amount, \$5,625 shall be payable to the Office of Environmental Health  
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1 Hazard Assessment ("OEHHA"), and \$1,875 shall be payable to the California Chapter of the  
2 March of Dimes. (Cal. Health & Safety Code § 25249.12(c)(1) & (d)). MCCARTNEY's counsel  
3 will forward all payments to their appropriate payees. MCCARTNEY hereby waives any  
4 entitlement to share in any civil penalties payable under this agreement.  
5

6 **4.4** \$17,500 payable to Robert B. Hancock as reimbursement of MCCARTNEY's  
7 attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and Costs.")  
8 MCCARTNEY and her counsel agree not to seek more than \$17,500. VITACOST shall not  
9 oppose the amount of Attorney's Fees and Costs for which MCCARTNEY seeks approval.

10 **5. MODIFICATION OF CONSENT JUDGMENT**

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

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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 this  
8 Consent Judgment.

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

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14 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

22 **8.1** This Consent Judgment is a full, final, and binding resolution between  
23 MCCARTNEY, on behalf of herself and in the public interest, and VITACOST, of any and all  
24 direct or derivative violations (or claimed violations) of Proposition 65 or its implementing  
25 regulations for failure to provide Proposition 65 warnings of exposure to cadmium from the  
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1 handling, use, or consumption of the Covered Products and fully resolves all claims that have been  
2 or could have been asserted in this Action up to and including the Effective Date for alleged failure  
3 to provide Proposition 65 warnings for the Covered Products regarding cadmium, as alleged in the  
4 Notice of Violations and in the Complaints. MCCARTNEY, on behalf of herself and in the public  
5 interest, hereby forever releases and discharges, VITACOST and its past and present officers,  
6 directors, owners, shareholders, employees, agents, attorneys, parent companies, subsidiaries,  
7 divisions, affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers, private  
8 labelers, co-packers, retailers, and all other upstream and downstream entities and persons in the  
9 distribution chain of any Covered Products, and the predecessors, successors and assigns of any of  
10 them (collectively, "Released Parties"), from any and all claims and causes of action and  
11 obligations to pay damages, restitution, fines, civil penalties, payment in lieu of civil penalties and  
12 expenses (including but not limited to expert analysis fees, expert fees, attorney's fees and costs)  
13 (collectively, "Claims") arising under, based on, or derivative of Proposition 65 or its implementing  
14 regulations up through the Effective Date based on alleged exposure to cadmium from the Covered  
15 Products and/or failure to warn about cadmium, as set forth in the Notices of Violations and the  
16 Complaints.  
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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 exposures to cadmium  
21 from the Covered Products as set forth in the Notices of Violations and the Complaints.  
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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 Notices of Violations or the Complaints and relating to cadmium in the Covered  
25 Products that were manufactured, sold or Distributed into California before the Effective Date will  
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1 develop or be discovered. MCCARTNEY, on behalf of herself, and her successors, assigns,  
2 legatees, attorneys, agents and personal representatives only, acknowledges that the Claims  
3 released herein include all known and unknown claims and waives California Civil Code Section  
4 1542 as to any such unknown claims. California Civil Code Section 1542 reads as follows:  
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6 **“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**  
7 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**  
8 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**  
9 **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS**  
10 **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 VITACOST, on the other hand, each release and  
14 waive all Claims they may have against each other for any statements or actions made or  
15 undertaken by them in connection with the Notices of Violations or the Complaints. However, this  
16 shall not affect or limit any Party’s right to seek to enforce the terms of this Consent Judgment.

17 **9. CONSTRUCTION AND SEVERABILITY**

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

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

3           **10.    PROVISION OF NOTICE**

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

9           Melvin B. Pearlston  
10          Robert B. Hancock  
11          PACIFIC JUSTICE CENTER  
12          50 California Street, Suite 1500  
13          San Francisco, California 94111

14          **For Vitacost.com, Inc.:**

15          Gregory O'Hara, Esq.  
16          Lauren M. Michals, Esq.  
17          NIXON PEABODY LLP  
18          One Embarcadero Center, 18<sup>th</sup> Floor  
19          San Francisco, California 94111-1830

20          **11.    COURT APPROVAL**

21          **11.1**    Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall seek  
22 leave to file an amended complaint, and notice a Motion for Court Approval. The Parties shall use  
23 their best efforts to support entry of this Consent Judgment.  
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25          **11.2**    If the California Attorney General objects to any term in this Consent Judgment, the  
26 Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to  
the hearing on the motion.

1           **11.3**       Upon Court approval of this Consent Judgment, MCCARTNEY shall file a  
2 dismissal with prejudice as to all Defendants named in San Francisco Superior Court case number  
3 CGC-15-546492.

4           **11.4**       If, despite the Parties' best efforts, the Court does not approve this Stipulated  
5 Consent Judgment it shall be null and void and have no force or effect.  
6

7           **12.    EXECUTION AND COUNTERPARTS**

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

11           **13.    ENTIRE AGREEMENT, AUTHORIZATION**

12           **13.1**       This Consent Judgment contains the sole and entire agreement and understanding of  
13 the Parties with respect to the entire subject matter herein, and any and all prior discussions,  
14 negotiations, commitments and understandings related hereto. No representations, oral or  
15 otherwise, express or implied, other than those contained herein have been made by any Party. No  
16 other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist  
17 or to bind any Party.  
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19           **13.2**       Each signatory to this Consent Judgment certifies that he or she is fully authorized  
20 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly  
21 provided herein, each Party shall bear its or her own fees and costs.  
22

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

2 **14.1** This Consent Judgment has come before the Court upon the request of the Parties.  
3 The parties request the Court to fully review this Consent Judgment and, being fully informed  
4 regarding the matters which are the subject of this action, to:

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

8 (b) Make the findings pursuant to California Health and Safety Code Section  
9 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

10 **IT IS SO STIPULATED.**

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13 Dated: 6/14/17

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

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

Vitacost.com, Inc.  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

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

2 14.1 This Consent Judgment has come before the Court upon the request of the Parties.  
3 The parties request the Court to fully review this Consent Judgment and, being fully informed  
4 regarding the matters which are the subject of this action, to:  
5

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

9 (b) Make the findings pursuant to California Health and Safety Code Section  
10 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

11 **IT IS SO STIPULATED.**

12  
13 Dated: \_\_\_\_\_

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

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

Vitacost.com, Inc.

17 Name: \_\_\_\_\_  
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19 Title: \_\_\_\_\_  
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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