

## SETTLEMENT AGREEMENT

### 1. RECITALS

#### 1.1 The Parties

This Settlement Agreement (“Settlement”) is entered into by and between Erika McCartney (“Ms. McCartney”) and Viva Labs, Inc. (“Viva Labs”). Ms. McCartney and Viva Labs shall hereinafter collectively be referred to as the “Parties.”

Ms. McCartney is a citizen of the State of California. Viva Labs is or has been a person in the course of doing business as the term is defined in California Health and Safety Code Section 25249.6 *et seq.* (“Proposition 65”).

#### 1.2 Allegations

Ms. McCartney alleges Viva Labs manufactured, distributed, supplied, and/or sold a certain product, specifically, “Viva Labs Organic Cacao Powder” (the “Covered Product”) for use by consumers, causing users in California to be exposed to cadmium (the “Listed Substance”) in amounts exceeding the maximum allowable dosage level (“MADL”) established by the California Office of Environmental Health Hazard Assessment (“OEHHA”) without providing “clear and reasonable warnings,” in violation of Proposition 65. Cadmium is subject to Proposition 65 warning requirements because it is listed as known to the State of California to cause reproductive harm.

On January 29, 2016, a sixty-day notice of violation, along with a Certificate of Merit, was provided by Ms. McCartney to Viva Labs and various public enforcement agencies regarding the alleged violation of Proposition 65. No public prosecutor commenced any action in the intervening 60-day period.

### **1.3 No Admissions**

Viva Labs denies all allegations in Ms. McCartney's 60-Day Notice and maintains that the Covered Product has been, and is, in compliance with all laws, and that Viva Labs has not violated Proposition 65. This Settlement shall not be construed as an admission of liability by Viva Labs but as a compromise of claims that are expressly contested and denied. However, nothing in this section shall affect the Parties' obligations, duties, and responsibilities under this Settlement.

### **1.4 Compromise**

The Parties enter into this Settlement in order to resolve the controversy described above and to avoid prolonged and costly litigation between them.

### **1.5 Effective Date**

The "Effective Date" shall be the date upon which this Settlement is signed by both Parties and delivered to the opposing Party.

## **2. INJUNCTIVE RELIEF**

### **2.1 Warning Obligations for Covered Product**

After the Effective Date, Viva Labs shall not manufacture, import, distribute or offer for use or sale in California any Covered Product, unless clear and reasonable warnings are given in a manner consistent with the method and language set forth in Section 2.2.

### **2.2 Manner of Providing Warning**

The Parties acknowledge that the Covered Product is sold online by Viva Labs, and through the online retailer Amazon.com, Inc. The Parties further agree that the placement and appearance of the warning language currently utilized by Amazon.com, Inc., appearing on the specimen attached hereto as Exhibit A, complies with the requirements of this paragraph. Viva

Labs agrees that for units of the Product sold online through its website to purchasers designating an address for delivery in the State of California, the following warning shall be provided online:

**WARNING:** Consuming this product can expose you to chemicals including cadmium, which is known to the State of California to cause birth defects or other reproductive harm. For more information, go to [www.P65warnings.ca.gov/food](http://www.P65warnings.ca.gov/food).

In lieu of the preceding warnings, Viva Labs may use any warning language that complies with Title 27, California Code of Regulations, section 25600 *et seq.*, as amended August 30, 2016 and subsequently thereafter.

The warning shall be provided by including either the warning or a clearly marked hyperlink using the word “WARNING” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase.

The Parties agree that for any third-party online retailer of the Covered Product: (a) who is a person in the course of doing business for purposes of Proposition 65, other than Amazon.com, Inc.; and (b) whom Viva Labs knows or has reason to know may redistribute the product to consumers in the state of California, Viva Labs shall transmit via e-mail and first-class mail, return receipt, written instruction in the form attached hereto as Exhibit B. Viva Labs shall, within ten days of a written request by Plaintiff’s counsel, provide Plaintiff’s counsel with the identity of all persons receiving the notification, and the date(s) transmitted and received.

The Parties agree that any units of the Covered Product containing cadmium concentration levels below the effective level set forth for Covered Products with greater than 95% cacao content of that certain consent judgment entered February 15, 2018 by the San Francisco Superior Court in *As You Sow v. Trader Joe’s Company, et al.*, Case No. CGC-17-548791 shall be exempt from the requirements of this section.

### **3. PAYMENTS**

#### **3.1 Civil Penalty Pursuant To Proposition 65**

Viva Labs shall pay a civil penalty of \$12,000, to be apportioned in accordance with Health and Safety Code section 25249.12(c)(l) and (d), with 75% paid to State of California Office of Environmental Health Hazard Assessment, and the remaining 25% paid to Ms. McCartney.

The civil penalty shall be made by (1) check or money order made payable to “Office of Environmental Health Hazard Assessment” in the amount of \$9,000; and (2) a check or money order made payable to “Erika McCartney” in the amount of \$3,000. Viva Labs shall remit the payments within ten business days of the Effective Date, via regular or certified U.S. Mail to:

Pacific Justice Center  
ATTN: Robert B. Hancock, Esq.  
50 California Street, Suite 1500  
San Francisco, CA 94111

#### **3.2 Payment of Attorneys’ Fees And Expenses**

Viva Labs shall pay Ms. McCartney’s attorney’s fees and expenses incurred in pursuing the instant action, in the amount of \$33,000. The payments shall be made by check or money order made payable to “Robert B. Hancock.” Viva Labs shall remit the payments in nine installments of \$3,666.66 not later than the first business day of June 2018 through February 2019, via regular or certified U.S. Mail to:

Pacific Justice Center  
ATTN: Robert B. Hancock, Esq.  
50 California Street, Suite 1500  
San Francisco, CA 94111

Any failure to remit any of the foregoing payments shall be deemed to be a material breach of this Settlement, and the parties agree that in that event the Settlement shall be rescinded

in full, and the Parties restored to their respective positions as though the Settlement had never existed.

#### **4. RELEASES**

##### **4.1 Ms. McCartney's Release Of Viva Labs**

Ms. McCartney, acting in her individual capacity, her past and current agents, representatives, attorneys, successors, and/or assignees, in consideration of the promises and monetary payments contained herein, hereby discharge, waive, and release Viva Labs and its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, and agents (collectively, "Releasees"), and all entities to whom they directly or indirectly distribute or sell the Covered Product, including but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, the "Downstream Releasees") from all claims under Proposition 65 or any other statutory or common law regarding the failure to warn about exposures to cadmium arising in connection with the Covered Product manufactured, distributed, or sold by Viva Labs on or before the Effective Date. Compliance with the terms of this Settlement by Viva Labs constitutes compliance with Proposition 65 by Viva Labs, Releasees, and Downstream Releasees for purposes of exposures to cadmium from the Covered Products manufactured, distributed, or sold by Viva Labs after the Effective Date..

##### **4.2 Viva Labs' Release Of Ms. McCartney**

Viva Labs, by this Settlement, waives all rights to institute any form of legal action against Ms. McCartney, her past and current agents, representatives, attorneys, experts, successors, and/or assignees, for actions or statements made or undertaken, whether in the course of investigating claims or seeking enforcement of Proposition 65 against Viva Labs in this

matter.

#### **4.3 Waiver Of Unknown Claims**

The Parties acknowledges that they are familiar with Section 1542 of California Civil Code which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Each of the Parties waives and relinquishes any right or benefit it has or may have under Section 1542 of the California Civil Code or any similar provision under the statutory or non-statutory law of any other jurisdiction to the full extent that it may lawfully waive all such rights and benefits pertaining to the claims in this Settlement. The Parties acknowledge that each may subsequently discover facts in addition to, or different from, those that it believes to be true with respect to the claims released herein. The Parties agree that this Settlement and the releases contained herein shall be and remain effective in all respects notwithstanding the discovery of such additional or different facts.

#### **5. MODIFICATION**

This Settlement may be modified only by written agreement of the Parties and with prior notice to the California Attorney General's Office.

#### **6. NOTICE**

All notices required pursuant to this Settlement and correspondence shall be sent by first class mail or by overnight delivery service to the following:

For Ms. McCartney:  
Pacific Justice Center  
ATTN: Robert B. Hancock, Esq.  
50 California Street, Suite 1500  
San Francisco, CA 94111

For Viva Labs:

Peg Carew Toledo  
Peg Carew Toledo, Law Corporation  
3001 Douglas Blvd., Suite 340  
Roseville, CA 95661

**7. SEVERABILITY**

Should any non-material part or provision of this Settlement for any reason be declared by a Court to be invalid, void, unenforceable, or against law or public policy, the remaining portions and provisions shall continue in full force and effect.

**8. GOVERNING LAW**

The terms of this Settlement shall be governed by the laws of the State of California.

**9. INTEGRATION**

This Settlement constitutes the entire agreement between the parties with respect to the subject matter hereof and may not be amended or modified except in writing executed by both Parties.

**10. COUNTERPARTS**

This Settlement may be executed in counterparts, each of which shall be deemed an original, and all of which, when taken together, shall constitute the same document. Execution and delivery of this Settlement by e-mail, facsimile, or other electronic means shall constitute legal and binding execution and delivery. Any photocopy of the executed Settlement shall have the same force and effect as the originals.

**9. AUTHORIZATION**

The undersigned are authorized to execute this Settlement on behalf of their respective

Party. Each Party has read, understood, and agrees to all of the terms and conditions of this Settlement. Each Party warrants to the other that it is free to enter into this Settlement and not subject to any conflicting obligation which will or might prevent or interfere with the execution or performance of this Settlement by said Party.

**AGREED:** Viva Labs, Inc.

Date: 05 / 18 / 2018

By: 

Its: Husayn Remtulla, CEO

**AGREED:**

Date: \_\_\_\_\_

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



Party. Each Party has read, understood, and agrees to all of the terms and conditions of this Settlement. Each Party warrants to the other that it is free to enter into this Settlement and not subject to any conflicting obligation which will or might prevent or interfere with the execution or performance of this Settlement by said Party.

**AGREED:** Viva Labs, Inc.

Date: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

**AGREED:**

Date: 5/13/18

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