

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

4 Attorneys for Plaintiff
5
6
7
8
9

10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF ALAMEDA**

13 ERIKA MCCARTNEY, in the public interest,)
14 Plaintiff,)
15 v.)
16 BULLETPROOF DIGITAL, INC., a Delaware)
corporation; and DOES 1 through 500, inclusive,)
17 Defendants.)
18)
19)
20)

CIVIL ACTION NO. RG16825738
**[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
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 the following
5 product hereinafter collectively the “Covered Product”: Bulletproof Chocolate Powder.

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. MCCARTNEY asserts that she is
9 dedicated to, among other causes, helping safeguard the public from health hazards by reducing
10 the use and misuse of hazardous and toxic chemicals and substances, facilitating a safe
11 environment for consumers and employees, and encouraging corporate responsibility.

12 **1.3** Bulletproof 360, Inc., f/k/a Bulletproof Digital, Inc., is a Delaware corporation,
13 and is referred to hereinafter as “BULLETPROOF.”

14 **1.4** BULLETPROOF distributes and sells the Covered Product.

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

17 **1.6** On or about May 4, 2016, pursuant to California Health and Safety Code Section
18 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65 (“Notice
19 of Violations”) on the California Attorney General, other public enforcers, and BULLETPROOF.
20 A true and correct copy of the Notice of Violations is attached hereto as Exhibit A.

21 **1.7** After more than sixty (60) days passed since service of the Notice of Violations,
22 and no designated governmental agency filed a complaint against BULLETPROOF with regard
23 to the Covered Product or the alleged violations, MCCARTNEY filed a complaint (the
24 “Complaint”) for injunctive relief and civil penalties. The Complaint is based on the allegations
25 in the Notice of Violations.

26 **1.8** The Complaint and the Notice of Violations each allege that BULLETPROOF
27 manufactured, distributed, and/or sold in California the Covered Product, which contains
28 cadmium, a chemical listed under Proposition 65 as causing birth defects or other reproductive

1 harm, and exposed consumers thereto. Further, the Complaint and Notice of Violations allege
2 that use of the Covered Product exposes persons in California to cadmium without first providing
3 clear and reasonable warnings, in violation of California Health and Safety Code Section
4 25249.6. BULLETPROOF generally denies all material and factual allegations of the Notice of
5 Violation and the Complaint, and specifically denies that the Plaintiff or California consumers
6 have been harmed or damaged by its conduct. MCCARTNEY and BULLETPROOF each
7 reserves all rights to allege additional facts, claims, and affirmative defenses if the Court does not
8 approve this Consent Judgment.

9 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
10 resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent
11 Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any
12 of the Parties, or by any of their respective officers, directors, shareholders, employees, agents,
13 parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors,
14 wholesalers, or retailers, of any fact, conclusion of law, issue of law, violation of law, fault,
15 wrongdoing, or liability, including without limitation, any admission concerning any alleged
16 violation of Proposition 65. Except as expressly set forth herein, nothing in this Consent
17 Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties
18 may have in any other or future legal proceeding. Provided, however, nothing in this Section
19 shall affect the enforceability of this Consent Judgment.

20 **1.10** The “Effective Date” of this Consent Judgment shall be the date this Consent
21 Judgment is entered as a Judgment.

22 **2. JURISDICTION AND VENUE**

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

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

27 **3.1** Beginning on the Effective Date, BULLETPROOF shall be permanently enjoined
28 from offering for sale to a consumer in California, directly selling to a consumer in California, or

1 “Distributing into California” any of the Covered Product without a Proposition 65 compliant
2 warning, consistent with Section 3.3, below, without Court modification of this Consent
3 Judgment. “Distributing into California” or “Distribute into California” means to ship any of the
4 Covered Product to California for sale or to sell any of the Covered Product to a distributor that
5 BULLETPROOF knows or has reason to know will sell the Covered Product in California.

6 **3.2** All units of the Covered Product that have been or will have been distributed,
7 shipped, or sold, or otherwise placed in the stream of commerce through and including the
8 Effective Date of this Consent Judgment are exempt from the provisions of Sections 3.1 and 3.3
9 and are included within the release in Sections 8.1 through 8.4. To be in compliance with the
10 terms of this Consent Judgment, BULLETPROOF is not required to undertake any efforts or
11 conduct to remove such Covered Product from the stream of commerce.

12 **3.3 Clear and Reasonable Warnings**

13 For the Covered Product that is subject to the warning requirement of Section 3.1, within
14 60 days of the Effective Date, BULLETPROOF shall provide the following warning (“Warning”)
15 as specified below:

16 **WARNING:** This product contains a chemical known to the state of California to cause
17 birth defects or other reproductive harm.

18 The warning shall be prominently placed with such conspicuousness as compared with
19 other words, statements, designs, or devices as to render it likely to be read and understood by an
20 ordinary individual under customary conditions before purchase or use. Each warning shall be
21 provided in a manner such that the consumer or user is reasonably likely to understand to which
22 specific Product the warning applies, so as to minimize the risk of consumer confusion.

23 In the event that the Office of Environmental Health Hazard Assessment promulgates one
24 or more regulations requiring or permitting warning text and/or methods of transmission different
25 than those set forth above, BULLETPROOF shall be entitled to use, at its discretion, such other
26 warning text and/or method of transmission without being deemed in breach of this Agreement.

27 **(a) Retail Store Sales**

28 **(i) Product Labeling.** The Warning shall be permanently affixed to

1 or printed on (at the point of manufacture, prior to shipment to California, or prior
2 to distribution into California) the outside packaging or container of each unit of
3 the Covered Product. The Warning shall be displayed with such conspicuousness,
4 as compared with other words, statements designs or devices on the outside
5 packaging or labeling, as to render it likely to be read and understood by an
6 ordinary individual prior to use. If the Warning is displayed on the product
7 container or labeling, the Warning shall be at least the same size as the largest of
8 any other health or safety warnings on the product container or labeling. If printed
9 on the labeling itself, the Warning shall be contained in the same section of the
10 labeling that states other safety warnings concerning the use of the Covered
11 Product.

12 (ii) **Point of Sale Warnings.** Alternatively, BULLETPROOF may
13 provide warning signs, shelf tags, or shelf signs with instructions to post the
14 warnings in close proximity to the point of display of the Product. Such
15 instruction sent to BULLETPROOF customers shall be sent by certified mail,
16 return receipt requested.

17 (b) **Mail Order Catalog Warning.** In the event that BULLETPROOF
18 sells Product via mail order catalog directly to consumers located in California after the
19 Effective Date that is not a Reformulated Product, BULLETPROOF shall provide a
20 warning for such Product sold via mail order catalog to such California residents. A
21 warning that is given in a mail order catalog shall be in the same type size or larger than
22 the Product description text within the catalog. Where it is impracticable to provide the
23 warning on the same page and in the same location as the display and/or description of the
24 Product, BULLETPROOF may utilize a designated symbol to cross reference the
25 applicable warning and shall define the term “designated symbol” with the following
26 language on the inside of the front cover of the catalog or on the same page as any order
27 form for the Product:

28 **WARNING:** Certain products identified with this symbol ▼ and offered

1 for sale in this catalog contain a chemical known to the State of California to cause
2 cancer, birth defects or other reproductive harm.

3 The designated symbol must appear on the same page and in close
4 proximity to the display and/or description of the Product. On each page where the
5 designated symbol appears, BULLETPROOF must provide a header or footer
6 directing the consumer to the warning language and definition of the designated
7 symbol.

8 **(c) Internet Sales Warning.** In the event that BULLETPROOF sells
9 Product via the internet directly to consumers located in California after the Effective Date
10 that is not a Reformulated Product, BULLETPROOF shall provide a warning for such
11 Product sold via the internet to such California residents. A warning that is given on the
12 internet shall be in the same type size or larger than the Product description text and shall
13 be given in conjunction with the direct sale of the Product. The warning shall appear
14 either: (a) on the same web page on which the Product is displayed; (b) on the same web
15 page as the order form for the Product; (c) on the same page as the price for the Product;
16 or (d) on one or more web pages displayed to a purchaser during the checkout process.

17 **3.4 Sell-Through Period**

18 Notwithstanding anything else in this Settlement Agreement, the Products that were
19 manufactured prior to sixty (60) days after the Effective Date shall be subject to the release of
20 liability pursuant to Section 8 of this Settlement Agreement, without regard to when such
21 Products were, or are in the future, distributed or sold to customers. As a result, the obligations of
22 BULLETPROOF, or any of its parents, subsidiaries, affiliates, or downstream retailers as set forth
23 in this Settlement Agreement, including but not limited to Section 3, do not apply to these
24 products manufactured prior to sixty (60) days after the Effective Date.

25 **4. SETTLEMENT PAYMENT**

26 **4.1** BULLETPROOF shall make a total payment of \$65,000, except as otherwise
27 provided in Section 4.4 below, within ninety days of the Effective Date, which shall be in full and
28 final satisfaction of any and all civil penalties, payment in lieu of civil penalties, and attorneys'

1 fees and costs.

2 **4.2** The payment will be in the form of separate checks sent to counsel for
3 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,
4 California 94111. The checks shall be payable to the following parties and the payment shall be
5 apportioned as follows:

6 **4.3** \$20,000 as civil penalties pursuant to California Health and Safety Code Section
7 25249.7(b)(1), which shall be paid within 30 days of the Effective Date. Of this amount, \$15,000
8 shall be payable to the Office of Environmental Health Hazard Assessment (“OEHHA”), \$4,000
9 shall be payable to MCCARTNEY, and \$1,000 shall be payable to the California Chapter of the
10 March of Dimes. MCCARTNEY hereby waives any statutory entitlement to penalties in excess
11 of \$4,000. (Cal. Health & Safety Code § 25249.12(c)(1) & (d)). MCCARTNEY’s counsel will
12 forward all penalty amounts to their respective payees.

13 **4.4** \$45,000 payable to Robert B. Hancock as reimbursement of MCCARTNEY’s
14 attorneys’ fees, costs, investigation and litigation expenses (“Attorney's Fees and Costs”), which
15 shall be paid in two (2) separate payments of \$22,500. The first such payment shall be made not
16 later than 60 days following the Effective Date, and the second not later than 90 days following
17 the Effective Date.

18 **5. MODIFICATION OF CONSENT JUDGMENT**

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

1 MCCARTNEY. If, despite their meet and confer efforts, the Parties are unable to reach
2 agreement on any proposed modification the party seeking the modification may file the
3 appropriate motion and the prevailing party on such motion shall be entitled recover its
4 reasonable fees and costs associated with such motion. One basis, but not the exclusive basis, for
5 BULLETPROOF to seek a modification of this Consent Judgment is if Proposition 65 is changed,
6 narrowed, limited, or otherwise rendered inapplicable in whole or in part to the Covered Product
7 or cadmium due to legislative change, a change in the implementing regulations, court decisions,
8 or other legal basis.

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

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

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

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.

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

23 **8.1** This Consent Judgment is a full, final, and binding resolution between
24 MCCARTNEY, on behalf of herself and in the public interest, and BULLETPROOF, of any and
25 all direct or derivative violations (or claimed violations) of Proposition 65 or its implementing
26 regulations for failure to provide Proposition 65 warnings of exposure to cadmium from the
27 handling, use, or consumption of the Covered Product and fully resolves all claims that have been
28 or could have been asserted in this Action up to and including the Effective Date for failure to

1 provide Proposition 65 warnings for the Covered Product regarding cadmium. MCCARTNEY,
2 on behalf of herself and in the public interest, hereby forever releases and discharges,
3 BULLETPROOF and its past and present officers, directors, owners, shareholders, employees,
4 agents, attorneys, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees,
5 licensees, customers, distributors, wholesalers, retailers, and all other upstream and downstream
6 entities and persons in the distribution chain of any Covered Product, and the predecessors,
7 successors and assigns of any of them (collectively, “Released Parties”), from any and all claims
8 and causes of action and obligations to pay damages, restitution, fines, civil penalties, payment in
9 lieu of civil penalties and expenses (including but not limited to expert analysis fees, expert fees,
10 attorney’s fees and costs) (collectively, “Claims”) arising under, based on, or derivative of
11 Proposition 65 or its implementing regulations up through the Effective Date based on exposure
12 to cadmium from the Covered Product and/or failure to warn about cadmium, as set forth in the
13 Notice of Violations and the Complaint.

14 **8.2** Compliance with the terms of this Consent Judgment shall be deemed to constitute
15 compliance by any Released Party with Proposition 65 regarding alleged exposures to cadmium
16 from the Covered Product as set forth in the Notice of Violations and the Complaint.

17 **8.3** It is possible that other Claims not known to the Parties arising out of the facts
18 alleged in the Notice of Violations or the Complaint and relating to cadmium in the Covered
19 Product that were manufactured, sold or Distributed into California before the Effective Date will
20 develop or be discovered. MCCARTNEY on behalf of herself only, on one hand, and
21 BULLETPROOF, on the other hand, acknowledge that this Agreement is expressly intended to
22 cover and include all such claims up through the Effective Date, including all rights of action
23 therefor. The Parties acknowledge that the Claims released in section 8.1 and 8.2 above may
24 include unknown claims, and nevertheless waive California Civil Code Section 1542 as to any
25 such unknown Claims. California Civil Code Section 1542 reads as follows:

26 **“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH**
27 **THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS**
28 **OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,**
WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY

1 **AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.”**

2 MCCARTNEY and BULLETPROOF each acknowledge and understand the significance
3 and consequences of this specific waiver of California Civil Code section 1542.

4 **8.4** MCCARTNEY, on one hand, and BULLETPROOF, on the other hand, each
5 release and waive all Claims they may have against each other for any statements or actions made
6 or undertaken by them in connection with the Notice of Violations or the Complaint. However,
7 this shall not affect or limit any Party’s right to seek to enforce the terms of this Consent
8 Judgment.

9 **9. CONSTRUCTION AND SEVERABILITY**

10 **9.1** The terms and conditions of this Consent Judgment have been reviewed by the
11 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to
12 fully discuss the terms and conditions with its counsel. In any subsequent interpretation or
13 construction of this Consent Judgment, the terms and conditions shall not be construed against
14 any Party.

15 **9.2** In the event that any of the provisions of this Consent Judgment is held by a court
16 to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
17 affected.

18 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
19 construed in accordance with the laws of the State of California.

20 **10. PROVISION OF NOTICE**

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

24 **For Erika McCartney:**

25 Melvin B. Pearlston
26 Robert B. Hancock
27 PACIFIC JUSTICE CENTER
28 50 California Street, Suite 1500
 San Francisco, California 94111

1 **For Bulletproof 360, Inc.:**

2 George Gigounas, Esq.
3 DLA PIPER LLP
4 555 Mission Street, Suite 2400
5 San Francisco, California 94105-2933

6 **11. COURT APPROVAL**

7 **11.1** Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall
8 notice a Motion for Court Approval. The Parties shall use their best efforts to support entry of
9 this Consent Judgment.

10 **11.2** If the California Attorney General objects to any term in this Consent Judgment,
11 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
12 prior to the hearing on the motion.

13 **11.3** If, despite the Parties' best efforts, the Court does not approve this Stipulated
14 Consent Judgment it shall be null and void and have no force or effect.

15 **12. EXECUTION AND COUNTERPARTS**

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

19 **13. ENTIRE AGREEMENT, AUTHORIZATION**

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

26 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized
27 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly
28 provided herein, each Party shall bear its own fees and costs.

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
6 good faith settlement of all matters raised by the allegations of the Complaint, that the matter has
7 been 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.**

11
12 Dated: 3/7/17



Erika McCartney

13
14
15 Dated: 3/28/17

BULLETPROOF 360, INC.
By 

Its: VP of Finance and Administration

26
27
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

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