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5 Attorneys for Plaintiff  
**ERIKA MCCARTNEY**

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

|  |   |                                |
|--|---|--------------------------------|
| 12 ERIKA MCCARTNEY, in the public interest,    | ) | CIVIL ACTION NO. RG 16826645   |
|  | ) |                                |
| 13 Plaintiff,                                  | ) | <b>[PROPOSED] CONSENT</b>      |
|  | ) | <b>JUDGMENT</b>                |
| 14 v.  | ) |                                |
|  | ) | [Cal. Health & Safety Code     |
| 15 TRANSITION NUTRITION, INC., a California    | ) | Sec. 25249.6, <i>et seq.</i> ] |
| corporation; and Does 1 through 500 inclusive, | ) |                                |
| 16 Defendants.                                 | ) |                                |
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1. INTRODUCTION

1.1 This action arises out of the alleged violations of California’s Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5, *et seq.* (also known as and hereinafter referred to as “Proposition 65”) regarding the following product (hereinafter collectively the “Covered Product”): Divine Organics Cacao Powder. Cadmium is subject to Proposition 65 warning requirements because it is listed as known to the State of California to cause reproductive harm.

1.2 Plaintiff Erika McCartney (“MCCARTNEY”) is a California resident acting as a private enforcer of Proposition 65. MCCARTNEY has brought this enforcement action in the public interest against Transition Nutrition, Inc. (“TRANSITION NUTRITION” or “Defendant”) concerning cadmium in the Covered Product pursuant to California Health and Safety Code Section 25249.7(d). MCCARTNEY contends she is dedicated to, among other causes, helping safeguard the public from health hazards by reducing the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibilities.

1.3. TRANSITION NUTRITION has sold the Covered Product in California during the relevant period.

1.4 MCCARTNEY and TRANSITION NUTRITION are hereinafter sometimes referred to individually as “Party” or collectively as the “Parties.”

1.5 On or about February 29, 2016 and June 1, 2016, pursuant to California Health and Safety Code Section 25249.7(d)(1), MCCARTNEY served 60-Day Notices of Violations of Proposition 65 (“Notices of Violations”) on the California Attorney General, other public enforcers, and TRANSITION NUTRITION alleging violations of California Health and Safety

1 Code Section 25249.6 with respect to unwarned exposures of cadmium arising from the sale and  
2 use of the Covered Product in California. Defendant acknowledges it received the Notices of  
3 Violations.

4 1.6 After more than sixty (60) days passed since service of the Notices of Violations,  
5 and with no designated governmental agency having filed a complaint against TRANSITION  
6 NUTRITION with regard to the Covered Product or the alleged violations, MCCARTNEY filed  
7 the complaint in this matter (“Complaint”) in this Court.

8 1.7 TRANSITION NUTRITION generally denies all material and factual allegations  
9 contained in or arising from MCCARTNEY’s Notices of Violations, Complaint, and First  
10 Amended Complaint and asserts that it has various affirmative defenses to the claims asserted  
11 therein. TRANSITION NUTRITION further specifically denies that the Plaintiff or California  
12 consumers have been harmed or damaged by its conduct or the products it has sold or sells,  
13 including the Covered Product.

14 1.8 The Parties enter into this Consent Judgment (“Consent Judgment”) in order to  
15 settle, compromise, and resolve disputed claims and avoid prolonged and costly litigation. For  
16 purposes of the approval and entry of this Consent Judgment only, the Parties stipulate that this  
17 Court has jurisdiction over the subject matter of this action and personal jurisdiction over the  
18 Parties, that venue is proper in this Court, and that this Court has jurisdiction to enter this Consent  
19 Judgment pursuant to the terms set forth herein.

20 1.9 Nothing in this Consent Judgment, nor compliance with its terms, shall constitute  
21 or be construed as an admission by any of the Parties (or by any of TRANSITION NUTRITION’s  
22 officers, directors, shareholders, employees, agents, subsidiaries, divisions, affiliates, suppliers, or  
23 licensees) of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or

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1 liability, including without limitation, any admission concerning any alleged violation of  
2 Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment shall  
3 prejudice, waive, or impair any right, remedy, argument, or defense the Parties have or may have  
4 in any other or future legal proceeding.

5 1.10 The "Effective Date" of this Consent Judgment shall be the date upon which this  
6 Consent Judgment, after having been fully executed by all of the Parties, has been approved and  
7 entered by the Court.

8 **2. INJUNCTIVE RELIEF: WARNINGS**

9 2.1 Beginning on the Effective Date, TRANSITION NUTRITION shall be  
10 permanently enjoined from Distributing into California any Covered Product without a warning as  
11 set forth in Paragraph 2.2 below. "Distributing into California" or "Distribute into California"  
12 means to ship any of the Covered Product to California for sale or to sell any of the Covered  
13 Product to a distributor that TRANSITION NUTRITION knows will redistribute or sell the  
14 Covered Product in or into California.

15 2.2 Clear and Reasonable Proposition 65 Warnings. For a Covered Product that is  
16 subject to the Proposition 65 warning requirement based on section 2.1 above, the following  
17 warning ("Warning") shall be provided as specified below.

18 **WARNING:** Consuming this product can expose you to chemicals including  
19 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).

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

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1 The Warning shall either be affixed to or printed on (at the point of manufacture, prior to  
2 the shipment to California, or prior to Distributing into California) the outside packaging or  
3 container of each unit of the Covered Product or provided at the point of display of the Covered  
4 Product wherever it is offered for sale in California. The Warning shall be displayed with such  
5 conspicuousness, as compared with other words, statements, designs or devices on the outside  
6 packaging or at the point of display in California, as to render it likely to be read and understood  
7 by any ordinary individual prior to purchase or use. If the Warning is displayed on the product  
8 container or labeling, the Warning shall be at least the same size as the largest of any other health  
9 or safety warnings on the product container or labeling, and the word "WARNING" shall be in  
10 capital letters and in bold print. If presented at the point of display, the Warning shall be presented  
11 on a sign or shelf label in a font no smaller than the largest type size used for other information on  
12 the sign or a shelf label for similar products.

13 The Parties agree that should the OEHHA warning regulations change, that TRANSITION  
14 NUTRITION may either conform with the OEHHA regulations, or conform with the terms  
15 provided in this Consent Judgment, and in so doing, will be in compliance with this Consent  
16 Judgment.

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

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1                                   **3.     REQUIRED MONETARY PAYMENTS**

2           3.1     TRANSITION NUTRITION shall issue the following payments and send them to  
3 counsel for MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San  
4 Francisco, California 94111. The checks shall be payable to the following parties and the payment  
5 shall be apportioned as follows:

6           3.2     \$20,000 as civil penalties pursuant to California Health and Safety Code Section  
7 25249.7(b)(1) to be paid ten (10) business days after entry of the Consent Judgment. Of this  
8 amount, \$15,000 shall be payable to OEHHA, \$3,500 shall be payable to MCCARTNEY, and  
9 \$1,500 shall be payable to CancerCare, a qualified 501(c)(3) charitable organization, dedicated to  
10 providing financial aid to cancer patients for treatment costs. MCCARTNEY hereby waives any  
11 statutory entitlement to penalties in excess of \$3,500. MCCARTNEY's counsel shall promptly  
12 forward all checks to the payees indicated.

13           3.3     \$71,250 payable to Robert B. Hancock as reimbursement of MCCARTNEY's  
14 attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and Costs") to be  
15 paid as follows: \$20,000 due ten (10) business days after entry of the Consent Judgment; the  
16 remaining \$51,250 to be paid over ten (10) months at \$5,125 per month, beginning the month after  
17 the other payments were made.

18           3.4     Any failure to remit any of the foregoing payments results in mutual rescission of the  
19 agreement, as though no resolution had been had. In that event, the Parties stipulate to vacating  
20 the Consent Judgment, and will cooperate in securing an order for same. However, no failure to  
21 remit shall be deemed effective until five (5) business days following notification of Defendant's  
22 counsel of any alleged failure to remit. Plaintiff's counsel agrees to provide written notice via e-  
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1 mail of any alleged failure to remit, and Defendant shall be afforded five (5) business days to cure  
2 the alleged failure.

3 **4. MODIFICATION**

4 This Consent Judgment may be modified only by written agreement and stipulation of the  
5 Parties and upon the Court's approval.

6 **5. OVERSIGHT AND ENFORCEMENT OF TERMS**

7 5.1 The Court shall retain jurisdiction to oversee, enforce and/or modify the terms of  
8 this Consent Judgment.

9 5.2 Any Party may, by means of filing an application for an order to show cause,  
10 enforce the terms and conditions contained in this Consent Judgment. The prevailing party in any  
11 such action or application may request that the Court award its reasonable attorneys' fees and costs  
12 associated with such action or application.

13 **6. APPLICATION OF CONSENT JUDGMENT**

14 This Consent Judgment shall apply to and be binding upon the Parties and their respective  
15 privies, successors, and assigns, and it shall be deemed to inure the benefit of the Parties and their  
16 respective privies, successors, and assigns.

17 **7. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

18 7.1 This Consent Judgment is a full, final, and binding resolution between  
19 MCCARTNEY, on behalf of herself and in the public interest on the one hand, and TRANSITION  
20 NUTRITION and its past and present officers, directors, owners, members, shareholders,  
21 employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees,  
22 licensees, customers, distributors, wholesalers, retailers, and all other upstream and downstream  
23 entities and persons in the distribution chain of any Covered Products, and the predecessors,

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1 successors and assigns of any of them (collectively, "Released Parties"), on the other hand, of any  
2 and all direct or derivative violations (or claimed violations) of Proposition 65 or its implementing  
3 regulations for failure to provide Proposition 65 warnings of exposure to cadmium from the  
4 handling, use, or consumption of the Covered Product, and it fully resolves all claims that have  
5 been or could have been asserted up to and including the Effective Date for the alleged failure to  
6 provide Proposition 65 warnings for the Covered Product regarding cadmium as set forth in the  
7 Notices of Violations, Complaint and First Amended Complaint.

8           7.2     MCCARTNEY on her own behalf (and not in her role as a representative of the  
9 public interest) further hereby releases and discharges TRANSITION NUTRITION and the  
10 Released Parties, from any and all claims and causes of action and obligations to pay damages,  
11 restitution, fines, civil penalties, payment in lieu of civil penalties and expenses (including but not  
12 limited to expert analysis fees, expert fees, attorneys' fees and costs) (collectively, "Claims") based  
13 on exposure to cadmium from the Covered Product and/or failure to warn about cadmium in the  
14 Covered Product to the extent that the Covered Product was sold by TRANSITION NUTRITION  
15 prior to the Effective Date.

16           7.3     Unless modified pursuant to Section 4 above, compliance with the terms of Section  
17 2.1 and 2.2 of this Consent Judgment shall be deemed to constitute compliance with Proposition 65  
18 regarding the Covered Product.

19           7.4     It is possible that other Claims not known to MCCARTNEY arising out of the facts  
20 alleged in the Notices of Violations, the Complaint or the First Amended Complaint will develop  
21 or be discovered. MCCARTNEY acknowledges on behalf of herself (and not in the role as  
22 representative of the public interest) that the Claims released herein include all known and  
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1 unknown Claims and waives California Civil Code Section 1542 as to any such unknown Claims.

2 California Civil Code Section 1542 reads as follows:

3 **“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**  
4 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**  
5 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN**  
6 **BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER**  
7 **SETTLEMENT WITH THE DEBTOR.”**

8 MCCARTNEY acknowledges and understands the significance and consequences of this specific  
9 waiver of the California Civil Code Section 1542.

10 7.5 MCCARTNEY, on the one hand, and TRANSITION NUTRITION, on the other  
11 hand, each release and waive all Claims they may have against each other for any statements or  
12 actions made or undertaken by them in connection with the Notices of Violation, Complaint, First  
13 Amended Complaint or the allegations contained therein. However, this shall not affect or limit  
14 any Party’s right to seek to enforce the terms of this Consent Judgment. In addition, going forward,  
15 the Parties shall not cause any aspect of the action, the Notices of Violations, the Complaint, the  
16 First Amended Complaint or the terms of this Consent Judgment not otherwise available in the  
17 public record to be reported to the public or any media or news reporting outlet. Any statement to  
18 the public or any media or news reporting outlet shall be limited to what is available in the public  
19 record and documents publicly filed. Regardless of the form or formality of a communication or  
20 statement to the media or other person or entity, neither any Party nor their counsel shall disparage  
21 the other. Notwithstanding these obligations, the Parties may make such disclosure regarding the  
22 action and terms of this Consent Judgment as necessary to auditors or as otherwise required by  
23 state or federal law.

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1                                   **8.     CONSTRUCTION AND SEVERABILITY**

2           8.1     The terms and conditions of this Consent Judgment have been reviewed by the  
3     respective counsel for the Parties prior to its signing, and each party has had an opportunity to fully  
4     discuss the terms and conditions with its counsel. In any subsequent interpretation or construction  
5     of this Consent Judgment, the terms and conditions shall not be construed against any Party.

6           8.2     In the event that any of the provisions of this Consent Judgment is held by a court  
7     to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely  
8     affected.

9           8.3     The terms and conditions of this Consent Judgment shall be governed by and  
10    construed in accordance with the laws of the State of California.

11                                   **9.     PROVISION OF NOTICE**

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

15           **For Erika McCartney**

16           PACIFIC JUSTICE CENTER

17           Robert B. Hancock

18           50 California Street, Suite 1500

19           San Francisco, California 94111

20  
21           **For Transition Nutrition, Inc.**

22           PEG CAREW TOLEDO, LAW CORPORATION

23           Peg Carew Toledo

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1 3001 Douglas Boulevard, Suite 340

2 Roseville, California 95661

3 **10. COURT APPROVAL**

4 10.1 The Parties shall use their reasonable best efforts to support the Court's approval  
5 of the Consent Judgment and entry of the Consent Judgment.

6 10.2 If the California Attorney General objects to any term in this Consent Judgment,  
7 the Parties shall use their best efforts to resolve the concern in a timely manner, and, if possible,  
8 prior to the hearing on the Motion for Court Approval.

9 10.3 If, despite the Parties' best efforts, the Court does not approve this settlement and  
10 enter a Consent Judgment thereon, the Parties shall have the option of (a) proceeding to try and  
11 resolve the matter amicably, or (b) determining that the settlement is null and void and of no force  
12 or effect, in which event, all payment-related obligations set forth in Section 3 above shall be  
13 deemed never to have existed and the Parties may thereafter proceed of their own accord.

14 **11. EXECUTION AND COUNTERPARTS**

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

18 **12. ENTIRE AGREEMENT, AUTHORIZATION**

19 12.1 This Consent Judgment contains the sole and entire agreement and understanding  
20 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,  
21 negotiations, commitments, and understandings related hereto. No representations, oral or  
22 otherwise, express or implied, other than those contained herein have been made by any Party.

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1           12.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized  
2 by the Party he or she represents to enter into this Consent Judgment. Except as explicitly provided  
3 herein, each party shall bear its own fees and costs.

4                           **13.    REQUEST FOR FINDINGS AND APPROVAL**

5           13.1 This Consent Judgment has come before the Court upon the request of the Parties.  
6 The Parties request the Court fully review this Consent Judgment and, being fully informed  
7 regarding the matters which are the subject to this action, to make the findings pursuant to  
8 California Health and Safety Code Section 25249.7(f)(4), and approve the settlement and enter  
9 this Consent Judgment.

10           **IT IS SO STIPULATED:**

11  
12 Dated: 4/23/2018

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

13  
14 Dated: \_\_\_\_\_

TRANSITION NUTRITION, INC.

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

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

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1 APPROVED AS TO FORM:

PACIFIC JUSTICE CENTER

2 Dated: 4/23/18

By: *RB Hancock*  
Robert B. Hancock  
Attorneys for Plaintiff

5 Dated: \_\_\_\_\_

PEG CAREW TOLEDO, LAW CORPORATION

By: \_\_\_\_\_  
Peg Carew Toledo  
Attorney for Defendant

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