

1 Melvin B. Pearlston (SBN 54291)  
Robert B. Hancock (SBN 179439)  
2 PACIFIC JUSTICE CENTER  
50 California Street, Suite 1500  
3 San Francisco, California 94111  
Telephone: (415) 310-1940  
4 Email: [robh@rbhancocklaw.com](mailto:robh@rbhancocklaw.com)

5  
6  
7  
8  
9  
10 SUPERIOR COURT OF CALIFORNIA  
11 COUNTY OF SAN FRANCISCO  
12

13 ERIKA MCCARTNEY, in the public interest, )

14 Plaintiff, )

15 v. )

16 SUNFOOD CORPORATION, a California  
Corporation; and DOES 1 through 500,  
inclusive, )

17 Defendants. )  
18

CIVIL ACTION NO. CGC-17-557098

[PROPOSED] CONSENT JUDGMENT

[Cal. Health & Safety Code  
Sec. 25249.6, *et seq.*]

19  
20  
21  
22  
23  
24  
[PROPOSED] CONSENT JUDGMENT

McCartney v. Sunfood Corporation, Civil Action No. CGC-17-557098

1 **1. INTRODUCTION**

2 1.1 This action arises out of the alleged violations of California's Safe Drinking Water and  
3 Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5 *et seq.* (also  
4 known as and hereinafter referred to as "Proposition 65") regarding the following product  
5 (hereinafter collective the "Covered Product"): Sunfood Goji Berries.

6 1.2 Plaintiff Erika McCartney ("MCCARTNEY") is a California resident acting as a  
7 private enforcer of Proposition 65. MCCARTNEY has brought this enforcement action in the  
8 public interest against Sunfood Corporation ("SUNFOOD" or "Defendant") concerning lead in the  
9 Covered Product pursuant to California Health and Safety Code Section 25249.7(d).  
10 MCCARTNEY contends she is dedicated to, among other causes, helping safeguard the public  
11 from health hazards by reducing the use and misuse of hazardous and toxic chemicals, facilitating  
12 a safe environment for consumers and employees, and encouraging corporate responsibilities.

13 1.3 SUNFOOD has sold the Covered Product in California during the relevant period.

14 1.4 MCCARTNEY and SUNFOOD are hereinafter sometimes referred to individually as  
15 a "Party" or collectively as the "Parties."

16 1.5 On or about December 7, 2016, pursuant to California Health and Safety Code Section  
17 25249.7(d)(1), MCCARTNEY served a 60-day Notice of Violations of Proposition 65 ("Notice of  
18 Violations") on the California Attorney General, other public enforcers, and SUNFOOD alleging  
19 violations of California Health and Safety Code Section 25249.6 with respect to unwarned  
20 exposures of lead arising from the sale and use of the Covered Product in California.

21 1.6 After more than sixty (60) days passed since service of the Notice of Violations, and  
22 with no designated governmental agency having filed a complaint against SUNFOOD with regard  
23  
24

1 to the Covered Product or the Alleged Violations, MCCARTNEY filed the complaint in this matter  
2 (“Complaint”) in this Court.

3 1.7 SUNFOOD generally denies all material and factual allegations contained in or arising  
4 from MCCARTNEY’s Notice of Violations and Complaint and asserts that it has various  
5 affirmative defenses to the claims asserted therein. SUNFOOD further specifically denies that the  
6 Plaintiff or California consumers have been harmed or damaged by its conduct or the products it  
7 has sold or sells, including the Covered Product.

8 1.8 The Parties enter into this Consent Judgment and settlement (“Consent Judgment” or  
9 “Settlement”) in order to settle, compromise, and resolve disputed claims and avoid prolonged and  
10 costly litigation. For purposes of the approval and entry of this Settlement only, the Parties  
11 stipulate that this Court has jurisdiction over the subject matter of this Action and personal  
12 jurisdiction over the Parties, that venue is proper in this Court, and that this Court has jurisdiction  
13 to enter this Consent Judgment pursuant to the terms set forth herein.

14 1.9 Nothing in this Consent Judgment, nor compliance with its terms, shall constitute or be  
15 construed as an admission by any of the Parties (or by any of SUNFOOD’s respective officers,  
16 directors, shareholders, employees, agents, subsidiaries, divisions, affiliates, suppliers, or  
17 licensees) of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or  
18 liability, including without limitation, any admission concerning any alleged violation of  
19 Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment shall  
20 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any  
21 other or future legal proceeding. Provided, however, nothing in this Section shall affect the  
22 enforceability of this Settlement.

1 1.10 The "Effective Date" of this Settlement shall be the date upon which this Consent  
2 Judgment, after having been fully executed by all of the Parties, has been approved and entered by  
3 the Court.

4 **2. INJUNCTIVE RELIEF: WARNINGS**

5 2.1 Beginning on the Effective Date, SUNFOOD shall be permanently enjoined from  
6 Distributing into California any Covered Product without a warning as set forth in paragraph 2.2  
7 below. "Distributing into California" means to ship any of the Covered Products to California for  
8 sale or to sell any of the Covered Products to a distributor that SUNFOOD knows or has reason to  
9 know will sell the Covered Products in California.

10 2.2 Clear and Reasonable Proposition 65 Warnings. For a Covered Product that is subject  
11 to the Proposition 65 warning requirement based on sections 2.1 and above, prior to Distributing  
12 such Covered Product, the following warning ("Warning") shall be specified below, examples of  
13 which are attached hereto as Exhibit A and Exhibit B, respectively:

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

16 The parties agree that the form and substance of the warning depicted in Exhibits A and B attached  
17 hereto complies with the requirements of this paragraph.

18 The Warning shall either be affixed to or printed on (at the point of manufacture, prior to  
19 shipment to California, or prior to distribution within California) the outside packaging or  
20 container of each unit of the Covered Product or provided at the point of display of the Covered  
21 Product wherever it is offered for sale in California. The Warning shall be displayed with such  
22 conspicuousness, as compared with other words, statements, designs or devices on the outside  
23 packaging or at the point of display in California, as to render it likely to be read and understood

1 by an ordinary individual prior to purchase or use. If the Warning is displayed on the product  
2 container or labeling, the Warning shall be at least the same size as the largest of any other health  
3 or safety warnings on the product container or labeling, and the word "WARNING" shall be in all  
4 capital letters and in bold print. If presented at the point of display, the Warning shall be presented  
5 on a sign or shelf label in a font no smaller than the largest type size used for other information on  
6 the sign or on a shelf label for similar products.

7 The Parties agree that should the Office of Environmental Health and Hazard Assessment  
8 ("OEHHA") warning regulations change, that SUNFOOD may either conform with the OEHHA  
9 regulations, or conform with the terms provided in this Consent Judgment, and in so doing, will  
10 be in compliance with this Consent Judgment.

11 2.3 Defendant must, within ten days of the Effective Date, either eliminate its Proposition  
12 65-centric website, or replace the website with language as included in Exhibit C attached hereto.

### 13 **3. REQUIRED MONETARY PAYMENTS**

14 3.1 Beginning on the first of the month following entry of the Effective Date of the Consent  
15 Judgment, SUNFOOD shall issue the following payments and send them to counsel for  
16 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, Suite 1500, San  
17 Francisco, California 94111. The checks shall be payable to the following parties and the payment  
18 shall be apportioned as follows:

19 3.2 \$55,000 as civil penalties pursuant to California Health and Safety Code Section  
20 25249.7(b)(1). Of this amount, \$41,250 shall be payable to the Office of Environmental Health  
21 and Hazard Assessment ("OEHHA"), \$8,000 shall be payable to MCCARTNEY, and \$5,750 shall  
22 be payable to *CancerCare*, a qualified 501(c)(3) charitable organization, dedicated to providing  
23 financial aid to cancer patients for treatment costs. MCCARTNEY hereby waives any statutory  
24

1 entitlement to penalties in excess of \$8,000. These amounts shall be paid by separate checks, in  
2 eight equal monthly installments to begin the first of the month following entry of the Consent  
3 Judgment, in amounts of \$5,156.25, \$1,000, and \$718.75, respectively. MCCARTNEY's counsel  
4 shall promptly forward all checks to the payees indicated.

5 3.3 \$80,000 payable to Robert B. Hancock as reimbursement of MCCARTNEY's  
6 attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and Costs"), to be  
7 paid in eight equal monthly installments to begin the first of the month following entry of the  
8 consent judgment, in amounts of \$10,000 per installment.

9 3.4 Any failure to remit any of the foregoing payments within 30 days after written notice  
10 by MCCARTNEY of SUNFOOD's failure to remit said payments, results in mutual rescission of  
11 the agreement, as though no resolution had been had. In that event, the parties stipulate to vacating  
12 the Consent Judgment, and will cooperate in securing an order for the same. In addition to the  
13 Provision of Notice contained in section 9 of this Consent Judgment, MCCARTNEY shall serve  
14 written notice via electronic mail to Grant Teeple ([grant@teeplehall.com](mailto:grant@teeplehall.com)); Robert Deupree  
15 ([rdeupree@sunfood.com](mailto:rdeupree@sunfood.com)); and Erica Peterson ([epeterson@globaladgroup.us](mailto:epeterson@globaladgroup.us)).

#### 16 4. MODIFICATION

17 This Consent Judgment may be modified only by written agreement and stipulation of the  
18 Parties and upon having such stipulation reported to the Office of the California Attorney General  
19 at least twenty-one days in advance of its submission to the Court for approval.

#### 20 5. OVERSIGHT AND ENFORCEMENT OF TERMS

21 5.1 The Court shall retain jurisdiction to oversee, enforce and/or modify the terms of this  
22 Consent Judgment.

1       5.2     Any Party may, by means of filing an application for an order to show cause, enforce  
2 the terms and conditions contained in this Settlement and Consent Judgment. The prevailing party  
3 in any such action or application may request that the Court award its reasonable attorneys' fees  
4 and costs associated with such action or application.

5  
6                                   **6. APPLICATION OF CONSENT JUDGMENT**

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

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

11       7.1     This Consent Judgment is a full, final, and binding resolution between MCCARTNEY,  
12 on behalf of herself and in the public interest on the one hand, and SUNFOOD on the other hand,  
13 of any and all direct or derivative violations (or claimed violations) of Proposition 65 or its  
14 implementing regulations for failure to provide Proposition 65 warnings of exposure to lead from  
15 the handling use, or consumption of the Covered Product, and it fully resolves all claims that have  
16 been or could have been asserted up to and including the Effective Date for the alleged failure to  
17 provide Proposition 65 warnings for the Covered Product regarding lead as set forth in the Notices  
18 of Violations and Complaint.

19       7.2     MCCARTNEY on her own behalf (and not in her role as a representative of the public  
20 interest) further hereby releases and discharges SUNFOOD and its past and present officers,  
21 directors, owners, shareholders, employees, agents, parent companies; subsidiaries, divisions,  
22 affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers, retailers, and all  
23 other upstream and downstream entities and persons in the distribution chain of any Covered  
24

1 Product, and the predecessors, successor and assigns of any of them (collectively, "Released  
2 Parties"), from any and all claims and causes of action and obligations to pay damages, restitution,  
3 fines, civil penalties, payment in lieu of civil penalties and expenses (including but not limited to  
4 expert analysis fees, expert fees, attorneys' fees and costs) (collectively, "Claims") based on  
5 exposure to lead from the Covered Product and/or failure to warn about lead in the Covered  
6 Product to the extent that the Covered Product was sold prior to the Effective Date.

7 7.3 Unless modified pursuant to Section 4 above, compliance with the terms of Section 2.1  
8 of this Consent Judgment shall be deemed to constitute compliance with Proposition 65 regarding  
9 the Covered Product.

10 7.4 It is possible that other Claims not known to MCCARTNEY arising out of the facts  
11 alleged in the Notice of Violations or the Complaint will develop or be discovered. MCCARTNEY  
12 acknowledges on behalf of herself (and not in the role as representative of the public interest) that  
13 the Claims released herein include all known and unknown Claims and waives California Civil  
14 Code Section 1542 as to any such unknown Claims. California Civil Code Section 1542 reads as  
15 follows:

16 **"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**  
17 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT**  
18 **THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER**  
19 **MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE**  
20 **DEBTOR."**

21 MCCARTNEY acknowledges and understands the significance and consequences of this  
22 specific waiver of the California Civil Code section 1542.

23 7.5 MCCARTNEY, on the one hand, and SUNFOOD, on the other hand, each release and  
24 waive all Claims they may have against each other for any statements or actions made or



1 undertaken by them in connection with the Notice of Violation and Complaint or the allegations  
2 contained therein. However, this shall not affect or limit any Party's right to seek to enforce the  
3 terms of this Settlement and Consent Judgment. In addition, going forward, the parties shall not  
4 cause any aspect of the Action, the Notice of Violations, the Complaint, or the terms of this  
5 Settlement not otherwise available in the public record to be reported to the public or any media  
6 or news reporting outlet. Any statement to the public or any media or news reporting outlet shall  
7 be limited to what is available in the public record and documents publicly filed. Regardless of  
8 the form or formality of a communication or statement to the media or other person or entity,  
9 neither any Party nor their counsel shall disparage the other. Notwithstanding these obligations,  
10 the Parties may make such disclosures regarding the Action and terms of this Settlement as  
11 necessary to auditors or as otherwise required by state or federal law.

12 **8. CONSTRUCTION AND SEVERABILITY**

13 8.1 The terms and conditions of this Consent Judgment and Settlement have been reviewed  
14 by the respective counsel for the Parties prior to its signing, and each party has had an opportunity  
15 to fully discuss the terms and conditions with its counsel. In any subsequent interpretation or  
16 construction of this Settlement, the terms and conditions shall not be construed against any Party.

17 8.2 In the event that any of the provisions of this Settlement is held by a court to be  
18 unenforceable, the validity of the remaining enforceable provision shall not be adversely affected.

19 8.3 The terms and conditions of this Settlement shall be governed by and construed in  
20 accordance with the laws of the State of California.

21 \\  
22 \\  
23 \\  
24



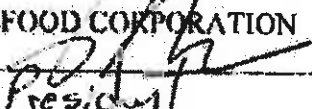


1 **IT IS SO STIPULATED:**

2 Dated: \_\_\_\_\_

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

3  
4 Dated: \_\_\_\_\_

SUNFOOD CORPORATION  
By:   
President

5  
6 APPROVED AS TO FORM:


PACIFIC JUSTICE CENTER

7 Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Robert B. Hancock  
Attorneys for Plaintiff

8  
9  
10 Dated: May 9, 2018


TEEPLE HALL, LLP

By:   
Grant G. Teeple  
Attorney for Defendant

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

**IT IS SO STIPULATED:**

Dated: 4/9/2018


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

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

SUNFOOD CORPORATION  
By: \_\_\_\_\_

**APPROVED AS TO FORM:**

Dated: 5/7/18

PACIFIC JUSTICE CENTER  
By:   
\_\_\_\_\_  
Robert B. Hancock  
Attorneys for Plaintiff

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

TEEPLE HALL, LLP  
By: \_\_\_\_\_  
Grant G. Teeple  
Attorney for Defendant

**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: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court