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7 **ERIKA MCCARTNEY**

8
9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN FRANCISCO**
11

12
13 ERIKA MCCARTNEY, in the public interest,)

14 Plaintiff,)

15 v.)

16 NUTRACEUTICAL CORPORATION, a)
17 Delaware corporation; and DOES 1 through 400)
18 inclusive,)

19 Defendants.)
20

CIVIL ACTION NO. CGC-17-558822

**[PROPOSED] STIPULATED CONSENT
JUDGMENT**

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

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[PROPOSED] STIPULATED CONSENT JUDGMENT

McCartney v. Nutraceutical Corporation, et al. Civil Action No. CGC-17-558822

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 referred to as “Proposition 65”) regarding Defendant Nutraceutical
5 Corporation’s maca, including but not limited to “Allvia™ Clinical Strength Maca Dietary
6 Supplement” and products where the sole active ingredient is maca (hereinafter the “Covered
7 Products”). Plaintiff alleges that the Covered Product exposes consumers in California to lead.
8 Lead is hereinafter referred to as the “Listed Chemical.”

9 **1.2** Plaintiff ERIKA MCCARTNEY (“MCCARTNEY”) is a California resident acting
10 as private enforcer of Proposition 65. MCCARTNEY alleges that she brings this action in the public
11 interest pursuant to California Health and Safety Code section 25249.5 *et seq.*, asserts that she is
12 dedicated to, among other causes, helping safeguard the public from health hazards by reducing the
13 use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and
14 employees, and encouraging corporate responsibility.

15 **1.3** Defendant Nutraceutical Corporation is a Delaware corporation
16 (“NUTRACEUTICAL” or “Defendant”).

17 **1.4** MCCARTNEY and NUTRACEUTICAL are referred to individually as a “Party” or
18 collectively as the “Parties.”

19 **1.5** NUTRACEUTICAL manufactures, acquires, distributes and/or sells the Covered
20 Product.

21 **1.6** On or about December 15, 2016¹ and February 16, 2017, pursuant to California
22 Health and Safety Code section 25249.7(d)(1), MCCARTNEY served 60-Day Notices of Violation
23 of Proposition 65 on the California Attorney General, other public enforcers and
24 NUTRACEUTICAL alleging that NUTRACEUTICAL violated Proposition 65 by exposing
25 persons in California to lead in connection with their use of the Covered Product without first
26 providing a Proposition 65 warning (the “Notices of Violation”).

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¹ Nutraceutical did not receive the Notice of Violation dated December 15, 2016.

1 **1.7** After more than sixty (60) days passed since service of the Notices of Violation, and
2 no designated governmental agency having filed a complaint against NUTRACEUTICAL with
3 regard to the Covered Product or the alleged violations, MCCARTNEY filed a complaint (the
4 “Complaint”) for injunctive relief and civil penalties. The Complaint, dated May 10, 2017, is based
5 on the allegations in the Notices of Violation in connection with the Covered Product.

6 **1.8** NUTRACEUTICAL generally denies all material and factual allegations of the
7 Notices of Violation and the Complaint, and specifically denies that any Proposition 65 warning is
8 required on the Covered Product, that any reasonable user of the Covered Product would be exposed
9 to chemicals in amounts or concentrations that would require a warning, and that Plaintiff or any
10 California consumer have been harmed or damaged by its conduct. NUTRACEUTICAL and
11 MCCARTNEY each reserve all rights to allege additional facts, claims, and affirmative defenses if
12 the Court does not approve this Consent Judgment.

13 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
14 resolve disputed claims and avoid prolonged and costly litigation.

15 **1.10** Nothing in this Consent Judgment, nor compliance with its terms, shall constitute or
16 be construed as an admission by any of the Parties, or by any of their respective officers, directors,
17 shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers,
18 franchisees, licensees, distributors, wholesalers, or retailers, of any fact, conclusion of law, issue of
19 law, violation of law, fault, wrongdoing, or liability, including without limitation, any admission
20 concerning any alleged violation of Proposition 65. Except as expressly set forth herein, nothing in
21 this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense the
22 Parties may have in any other or future legal proceeding.

23 **1.11** The “Effective Date” of this Consent Judgment shall be the date this Consent
24 Judgment is entered as a judgment.

25 **2. JURISDICTION AND VENUE**

26 **2.1** For purposes of the approval of entry of this Consent Judgment only, the Parties
27 stipulate that this Court has jurisdiction over the subject matter of this action and personal
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1 jurisdiction over the Parties, that venue is proper in this Court, and that this Court has jurisdiction
2 to enter this Consent Judgment pursuant to the terms set forth herein.

3
4 **3. INJUNCTIVE RELIEF AND WARNINGS**

5 **3.1** Beginning on the Effective Date, and except as provided in Section 3.2 below,
6 NUTRACEUTICAL shall be permanently enjoined from offering for sale to a consumer in
7 California, directly selling to a consumer in California, or Distributing into California the Covered
8 Product, unless the label of the Covered Product contains a Proposition 65 compliant warning,
9 consistent with Section 3.2, below. "Distributing into California" means to ship the Covered
10 Product to California for sale or to sell the Covered Product to a distributor that NUTRACEUTICAL
11 knows will redistribute the Covered Product in or into California.

12 **3.2 Clear and Reasonable Warnings**

13 (A) For the Covered Product that is subject to the warning requirement of Section 3.1,
14 NUTRACEUTICAL shall provide a compliant warning. The Parties agree the following long-form
15 and short-form warnings constitute clear and reasonable warnings:

16 **California Residents Only**

17 **WARNING:** Consuming this product can expose you to chemicals including lead, which
18 are known to the State of California to cause birth defects or other reproductive harm. For
19 more information, go to www.P65Warnings.ca.gov/food.

20 Or

21 **California Residents Only**

22 **⚠ WARNING:** Reproductive Harm-www.P65warnings.ca.gov

23 (B) The warning shall be permanently affixed to or printed on (at the point of
24 manufacture, or distribution, but prior to shipment into California, or prior to distribution within
25 California) the outside packaging or container of the Covered Product. The warning shall be
26 displayed with such conspicuousness, as compared with other words, statements, designs or devices
27 on the outside packaging or labeling, as to render it likely be to read and understood by an ordinary
28 individual prior to use. If the warning is displayed on the product packaging or labeling, the warning

1 shall be at least the same size as the largest of any other health or safety warnings on the product
2 packaging or labeling, and the word "WARNING" shall be in all capital letters and bold. If the
3 product label does not use the color yellow, the triangle symbol in the short-form warning may be
4 in black and white.

5 (C) In lieu of the preceding warning content and methods set forth above,
6 NUTRACEUTICAL may use any warning content and method that complies with Title 27,
7 California Code of Regulations, section 25600 *et seq.*, as amended August 30, 2016 and
8 subsequently thereafter.

9 **4. REQUIRED MONETARY PAYMENTS**

10 **4.1** Defendant shall pay \$7,500 within ten (10) business days of the Effective Date,
11 which shall be a full and final satisfaction of all civil penalties pursuant to California Health and
12 Safety Code section 25249.7(b)(1). Of this amount, one check shall be payable to the Office of
13 Environmental Health Hazard Assessment ("OEHHA"), in the sum of \$5,625, a second check shall
14 be payable to MCCARTNEY in the sum of \$1,875. The payment will be in the form of two separate
15 checks sent to counsel for MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California
16 Street, Suite 1500, San Francisco, California 94111.

17 **4.2** Defendant shall pay \$42,500 as reimbursement of MCCARTNEY's attorneys' fees,
18 costs, investigation and litigation expenses ("Attorneys' Fees and Costs") within ten (10) business
19 days of the Effective Date. The check shall be made payable to Robert B. Hancock and sent to
20 Robert B. Hancock, Pacific Justice Center, 50 California Street, Suite 1500, San Francisco,
21 California 94111.

22 **5. MODIFICATION OF CONSENT JUDGMENT**

23 **5.1** This Consent Judgment may be modified only by: (i) written agreement and
24 stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment
25 by the Court; or (ii) upon entry of a modified Consent Judgment by the Court pursuant to a motion
26 by one of the Parties after exhausting the meet and confer process set forth as follows. If either
27 Party requests or initiates a modification, then it shall meet and confer with the other Party in good
28 faith before filing a motion with the Court seeking to modify it. MCCARTNEY is entitled to

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

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

14 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate this
15 Consent Judgment.

16 **6.2** Subject to Section 6.3, any Party may, by motion or application for an order to show
17 cause filed with this Court, enforce the terms and conditions contained in this Consent Judgment.
18 The prevailing party in any such motion or application may request that the Court award its
19 reasonable attorneys' fees and costs associated with such motion or application.

20 **6.3** Before filing a motion or application for an order to show cause, MCCARTNEY
21 shall provide NUTRACEUTICAL with thirty (30) days' written notice of any alleged violations of
22 the terms and conditions contained in this Consent Judgment. As long as NUTRACEUTICAL cures
23 any such alleged violations within the 30-day period (or if any such violation cannot practicably be
24 cured within thirty (30) days, it expeditiously initiates a cure within thirty (30) days and completes
25 it as soon as practicable) and NUTRACEUTICAL provides proof to MCCARTNEY that the alleged
26 violation(s) were the result of good faith mistake or accident, then NUTRACEUTICAL shall not be
27 in violation of the Consent Judgment. NUTRACEUTICAL shall have the ability to avail itself of
28 the benefits of this section two (2) times following the Effective Date.

1 **7. APPLICATION OF CONSENT JUDGMENT**

2 7.1 This Consent Judgment shall apply to and be binding upon and benefit the Parties
3 and their respective officers, directors, successors, and assigns and it shall benefit the Parties and
4 their respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
5 divisions, affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers, retailers,
6 predecessors, successors, and assigns.

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

8 8.1 This Consent Judgment is a full, final, and binding resolution between
9 MCCARTNEY, on behalf of herself and in the public interest, and NUTRACEUTICAL, of any and
10 all direct or derivative violations (or claimed violations) of Proposition 65 or its implementing
11 regulations for failure to provide Proposition 65 warnings of exposure from the handling or use of
12 the Covered Product and fully resolves all claims that have been or could have been asserted in this
13 action by any person up to and including the Effective Date. MCCARTNEY, on behalf of herself
14 and in the public interest, hereby forever releases and discharges NUTRACEUTICAL and its past
15 and present officers, directors, owners, shareholders, employees, agents, attorneys, parent
16 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, customers,
17 distributors, wholesalers, retailers, and all other upstream and downstream entities and persons in
18 the distribution chain of any Covered Product, and the predecessors, successors and assigns of any
19 of them (collectively, "Released Parties"), from any and all claims and causes of action and
20 obligations to pay damages, restitution, fines, civil penalties, payment in lieu of civil penalties and
21 expenses (including but not limited to expert analysis fees, expert fees, attorneys' fees and costs)
22 (collectively, "Claims") arising under, based on, or derivative of Proposition 65 or its implementing
23 regulations up through the Effective Date relating to actual or potential exposure to chemicals
24 known by the State of California to cause cancer, birth defects or other reproductive harm, from the
25 Covered Product and/or failure to warn about lead, as set forth in the Notices of Violation and the
26 Complaint.

27 8.2 Compliance with the terms of this Consent Judgment shall be deemed to constitute
28 compliance by any Released Party with Proposition 65 regarding alleged exposures from the

1 Covered Product as described above or set forth in the Notices of Violation and the Complaint.
2 However, to the extent that the Proposition 65 warning regulations impose an independent duty to
3 warn on third-party online retailers for the Covered Product, this Section 8.2 does not relieve those
4 third-party online retailers of their independent duty to warn, to the extent that such a duty exists
5 under the law.

6 **8.3** It is possible that other Claims not known to MCCARTNEY arising out of the facts
7 alleged in the Notices of Violation or the Complaint and relating to the Covered Product that were
8 manufactured, sold or distributed into California before the Effective Date will develop or be
9 discovered. MCCARTNEY, on behalf of herself only, acknowledges that the Claims released
10 herein include all known and unknown Claims and waives California Civil Code section 1542 as to
11 any such unknown Claims. California Civil Code section 1542 reads as follows:

12 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
13 **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT**
14 **TO EXIST IN HIS OR HER FAVOR AT THE TIME OF**
15 **EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM**
OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
HER SETTLEMENT WITH THE DEBTOR.

16 MCCARTNEY, on behalf of herself only, acknowledges and understands the significance and
17 consequences of this specific waiver of California Civil Code section 1542.

18 **8.4** MCCARTNEY, on one hand, and NUTRACEUTICAL, on the other hand, each
19 release and waive all Claims they may have against each other for any statements or actions made
20 or undertaken by them in connection with the Notices of Violation or the Complaint. However, this
21 shall not affect or limit any Party's right to seek to enforce the terms of this Consent Judgment.

22 **9. CONSTRUCTION AND SEVERABILITY**

23 **9.1** The terms and conditions of this Consent Judgment have been reviewed by the
24 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to fully
25 discuss the terms and conditions with its counsel. In any subsequent interpretation or construction
26 of this Consent Judgment, the terms and conditions shall not be construed against any Party.

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1 **9.2** In the event that any of the provisions of this Consent Judgment are held by a court
2 to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
3 affected.

4 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
5 construed in accordance with the laws of the State of California.

6 **10. PROVISION OF NOTICE**

7 **10.1** All notices required to be given to either Party to this Consent Judgment by the other
8 shall be in writing and sent to the following agents listed below by: (a) first-class, registered,
9 (b) certified mail, (c) overnight courier, or (d) personal delivery to the following:

10 **For Erika McCartney:**

11 Melvin B. Pearlston
12 Robert B. Hancock
13 PACIFIC JUSTICE CENTER
14 50 California Street, Suite 1500
15 San Francisco, California 94111

16 **For NUTRACEUTICAL:**

17 Stan Soper
18 Senior Vice President, International and Chief Legal Officer
19 Nutaceutical Corporation
20 1777 Sunpeak Dr.
21 Park City, Utah 84098

22 **11. COURT APPROVAL**

23 **11.1** Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall notice
24 a Motion for Court Approval. The Parties shall use their best efforts to support entry of this Consent
25 Judgment.

26 **11.2** If the California Attorney General objects to any terms in this Consent Judgment, the
27 Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to
28 the hearing on the motion.

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

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12. EXECUTION AND COUNTERPARTS

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

13. ENTIRE AGREEMENT, AUTHORIZATION

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

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

14. REQUEST FOR FINDINGS AND FOR APPROVAL

14.1 This Consent Judgment has come before the Court upon the request of the Parties. The Parties request the Court to fully review this Consent Judgment and, being fully informed regarding the matters which are the subject of this action, to make the findings pursuant to California Health and Safety Code section 25249.7(f)(4), and approve this Consent Judgment.

IT IS SO STIPULATED.

Dated: 11/2/18



Erika McCartney

Dated: _____

NUTRACEUTICAL CORPORATION

By: _____

Its: _____

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18 regarding the matters which are the subject of this action, to make the findings pursuant to
19 California Health and Safety Code section 25249.7(f)(4), and approve this Consent Judgment.

20 **IT IS SO STIPULATED.**

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22 Dated: _____

Erika McCartney

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25 Dated: 11/13/18

NUTRACEUTICAL CORPORATION

By: [Signature]

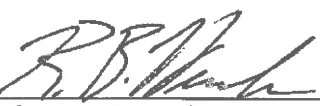
Its: Chief legal officer

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APPROVED AS TO FORM:

Dated: 11/2/18

PACIFIC JUSTICE CENTER

By: 
Robert B. Hancock
Attorneys for Plaintiff
ERIKA MCCARTNEY

Dated: _____

PEG CAREW TOLEDO,
LAW CORPORATION

By: _____
Peg Carew Toledo
Attorneys for Defendant
Nutraceutical Corporation

1 APPROVED AS TO FORM:

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Dated: _____

PACIFIC JUSTICE CENTER


By: _____

Robert B. Hancock
Attorneys for Plaintiff
ERIKA MCCARTNEY

Dated: 11-13-18

PEG CAREW TOLEDO,
LAW CORPORATION

By: _____


Peg Carew Toledo
Attorneys for Defendant
Nutraceutical Corporation

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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: _____, 2018

Judge of the Superior Court

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