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**SUPERIOR COURT OF CALIFORNIA**

14

**COUNTY OF SAN FRANCISCO**

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ERIKA MCCARTNEY, in the public interest, )  
Plaintiff, )

CIVIL ACTION NO. CGC-17-558379

17

v. )

**[PROPOSED] STIPULATED CONSENT  
JUDGMENT**

18

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TREE OF LIFE, LLC; KEHE DISTRIBUTORS, )  
LLC; KEHE ENTERPRISES, LLC; KEHE )  
DISTRIBUTORS, INC.; and DOES 1 through )  
500, inclusive, )

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

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Defendants. )

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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 hereinafter referred to as “Proposition 65”) regarding the following product:  
5 Tree of Life Goji Berries (hereinafter the “Covered Product”). Plaintiff alleges the Covered  
6 Product exposes consumers in California to lead (hereinafter the “Listed Chemical.”)

7 **1.2** Plaintiff Erika McCartney (“MCCARTNEY”) is a California resident acting as a  
8 private enforcer of Proposition 65. MCCARTNEY brings this Action in the public interest  
9 pursuant to California Health and Safety Code Section 25249.6. MCCARTNEY asserts that she is  
10 dedicated to, among other causes, helping safeguard the public from health hazards by reducing the  
11 use and misuse of hazardous and toxic chemicals and substances, facilitating a safe environment for  
12 consumers and employees, and encouraging corporate responsibility.

13 **1.3** Defendants Tree of Life, LLC and KeHE Distributors, LLC are referred to  
14 hereinafter as “KeHE” or “Defendants” Only one of the aforementioned Defendants shall be  
15 required to comply with the requirements of Sections 3 and 4, below, and satisfaction by one of  
16 them with those requirements shall be deemed to be satisfaction by all Defendants.

17 **1.5** MCCARTNEY and KeHE are hereinafter sometimes referred to individually as a  
18 “Party” or collectively as the “Parties.”

19 **1.6** On or about February 14, 2017, pursuant to California Health and Safety Code  
20 Section 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violation of Proposition 65  
21 (“Notice of Violation”) on the California Attorney General, other public enforcers, and KeHE.  
22 True and correct copies of the Notice of Violation is attached hereto as Exhibit A.

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

3 **1.8** The Notice of Violation and Complaint allege that Defendants manufactured,  
4 distributed, and/or sold in California the Covered Product without first providing clear and  
5 reasonable warnings of alleged exposures to the Listed Chemical, in violation of California Health  
6 and Safety Code Section 25249.6. KeHE denies all material and factual allegations of the Notice of  
7 Violation, and specifically denies that the Plaintiff or California consumers have been harmed or  
8 damaged by its conduct. KeHE further asserts that the levels of the Listed Chemical in the Covered  
9 Product are naturally occurring as the result of natural geological and plant processes.  
10 MCCARTNEY and KeHE each reserve all rights to allege additional facts, claims, and affirmative  
11 defenses if the Court does not approve this Consent Judgment.

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

23 **1.10** The “Effective Date” of this Consent Judgment shall be the date this Consent  
24 Judgment is entered as a Judgment.

1     **2.     JURISDICTION AND VENUE**

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

5     **3.     INJUNCTIVE RELIEF**

6             **3.1**     Beginning on the Effective Date, if a one ounce serving of the Covered Product  
7 contains more than 0.5 micrograms of lead, KeHE shall be permanently enjoined from  
8 manufacturing for sale in California, directly selling to a consumer in California or “Distributing  
9 into California” the Covered Product without a Proposition 65 compliant warning, consistent with  
10 Section 3.3, below, unless exempted under Section 3.2 below, without Court modification of this  
11 Consent Judgment. “Distributing into California” or “Distribute into California” means to ship any  
12 of the Covered Product to California at retail, for resale, or to sell to a distributor that KeHE knows  
13 or has reason to know may sell the Covered Product in California.

14             **3.2**     All units of the Covered Product that have been or will have been distributed,  
15 shipped, or sold, or otherwise placed in the stream of commerce through and including the  
16 Effective Date of this Consent Judgment are exempt from the provisions of Sections 3.1 and 3.3  
17 and are included within the release in Sections 8.1 through 8.4. To be in compliance with the  
18 terms of this Consent Judgment, KeHE is not required to undertake any efforts or conduct to  
19 remove such Covered Product from the stream of commerce.

20             **3.3     Clear and Reasonable Warnings**

21             For the Covered Product that are subject to the warning requirement of Section 3.1, KeHE  
22 shall provide one of the following warnings (“Warning”) as specified below:

23                     3.3.1    Option 1

24  
25                     **WARNING:** Consuming this product can expose you to chemicals  
26 including lead, which is known to the State of California to cause birth

1 defects or other reproductive harm. For more information, go to  
2 www.P65Warnings.ca.gov/food.

3 The warning shall be set off from other surrounding information in the label and enclosed in a box.

4 3.3.2 Option 2

5  **WARNING:** Reproductive Harm – www.P65Warnings.ca.gov.

6 The pictogram specified in Section 3.3.3 shall be in yellow with a black exclamation mark;  
7 provided however, the pictogram may be in white instead of yellow if the Covered Product label  
8 does not contain the color yellow.

9 The Warning shall be displayed on the packaging of the Covered Products with such  
10 conspicuousness, as compared with other words, statements designs or devices on the outside  
11 packaging or labeling, as to render it likely to be read and understood by an ordinary individual  
12 prior to use. If the Warning is displayed on the product container or labeling, the Warning shall be  
13 no smaller than the largest of any other health or safety warnings on the product container or  
14 labeling. If printed on the labeling itself, the Warning shall be contained in the same section of the  
15 labeling that states other safety warnings concerning the use of the Covered Product.

16 Displaying the Warning on the outside packaging or container of each unit of the Covered  
17 Product is deemed to be a clear and reasonable warning under, and to fully comply with, Health &  
18 Safety Section 25249.6 and the implementing regulations at Title 27 California Code of  
19 Regulations, as they may be hereinafter amended.

20 **4. SETTLEMENT PAYMENT**

21 **4.1** Tree of Life shall make a total payment of \$43,000 within ten days of the Effective  
22 Date, which shall be in full and final satisfaction of any and all civil penalties, payment in lieu of  
23 all civil penalties, and attorneys' fees and costs.

24 **4.2** The payment will be in the form of three separate checks sent to counsel for  
25 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,  
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1 California 94111. The checks shall be payable to the following parties and the payment shall be  
2 apportioned as follows:

3 **4.3** \$10,000 as civil penalties pursuant to California Health and Safety Code Section  
4 25249.7(b)(1). Of this amount, \$7,500 shall be payable to the Office of Environmental Health  
5 Hazard Assessment (“OEHHA”), and \$2,500 shall be payable to MCCARTNEY. (Cal. Health &  
6 Safety Code § 25249.12(c)(1) & (d)). MCCARTNEY’s counsel will forward the civil penalty to  
7 OEHHA.

8 **4.4** \$33,000 payable to Robert B. Hancock as reimbursement of MCCARTNEY’s  
9 attorneys’ fees, costs, investigation and litigation expenses (“Attorney’s Fees and Costs”).  
10 MCCARTNEY and her counsel shall be responsible on their own to establish in the Motion for  
11 Court Approval that such Attorney’s Fees and Costs are appropriate for the work done in this  
12 matter.

13 **4.5** Any failure to remit any of the foregoing payments results in mutual rescission of  
14 the agreement, as though no resolution had been had. In that event, the Parties stipulate to vacating  
15 the Consent Judgment, and will cooperate in securing an order for the same.

16 **5. MODIFICATION OF CONSENT JUDGMENT**

17 **5.1** This Consent Judgment may be modified only by: (i) Written agreement and  
18 stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment  
19 by the Court; or (ii) Upon entry of a modified Judgment by the Court pursuant to a motion by one  
20 of the Parties after exhausting the meet and confer process set forth as follows. If either Party  
21 requests or initiates a modification of this Consent Judgment, then that Party shall meet and confer  
22 with the other Party in good faith before filing a motion with the Court seeking to modify the  
23 Consent Judgment. MCCARTNEY is entitled to reimbursement of all reasonable attorneys’ fees  
24 and costs regarding the Parties’ meet and confer efforts for any modification requested or initiated  
25 by KeHE. Similarly, KeHE is entitled to reimbursement of all reasonable attorney’s fees and costs  
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1 regarding the Parties' meet and confer efforts for any modification requested or initiated by  
2 MCCARTNEY. If, despite their meet and confer efforts, the Parties are unable to reach agreement  
3 on any proposed modification, the Party seeking the modification may file the appropriate motion  
4 and the prevailing Party on such motion shall be entitled recover its reasonable fees and costs  
5 associated with such motion. One basis, but not the exclusive basis, for KeHE to seek a  
6 modification of this Consent Judgment is if Proposition 65 is changed, narrowed, limited, or  
7 otherwise rendered inapplicable in whole or in part to the Covered Product or either Listed  
8 Chemical due to legislative change, a change in the implementing regulations, court decisions, or  
9 other legal basis.

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

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

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

17 **6.3** Before filing a motion or application for an order to show cause, MCCARTNEY  
18 shall provide KeHE with 30 (thirty) days written notice of any alleged violations of the terms and  
19 conditions contained in this Consent Judgment. As long as KeHE cures any such alleged violations  
20 within the 30 (thirty) day period (or if any such violation cannot practicably be cured within 30  
21 days, it expeditiously initiates a cure within 30 days and completes it as soon as practicable), then  
22 KeHE shall not be in violation of the Consent Judgment.

23 **7. APPLICATION OF CONSENT JUDGMENT**

24 This Consent Judgment shall apply to and be binding upon the Parties and their respective  
25 successors and assigns.  
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1 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

2 **8.1** This Consent Judgment is a full, final, and binding resolution between  
3 MCCARTNEY, on behalf of herself and in the public interest, and Defendants, and each of their  
4 past and present officers, directors, owners, shareholders, employees, agents, attorneys, parent  
5 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, customers,  
6 distributors, wholesalers, private labelers, co-packers, retailers, and all other upstream and  
7 downstream entities and persons in the distribution chain of any Covered Product, and the  
8 predecessors, successors and assigns of any of them (collectively, “Released Parties”), of any and  
9 all direct or derivative violations (or claimed violations) of Proposition 65 or its implementing  
10 regulations for failure to provide Proposition 65 warnings of exposure to the Listed Chemical from  
11 the handling, use, or consumption of the Covered Product and fully resolves all claims that have  
12 been or could have been asserted in this Action for alleged failure to provide Proposition 65  
13 warnings regarding the Listed Chemical for Covered Products manufactured, sold or Distributed  
14 into California by Defendants before the Effective Date.

15 MCCARTNEY, on behalf of herself and in the public interest, hereby forever releases and  
16 discharges, Released Parties, from any and all claims and causes of action and obligations to pay  
17 damages, restitution, fines, civil penalties, payment in lieu of civil penalties and expenses  
18 (including but not limited to expert analysis fees, expert fees, attorney’s fees and costs)  
19 (collectively, “Claims”) arising under, based on, or derivative of Proposition 65 or its implementing  
20 regulations or any other statutory or common law claims based on alleged exposure to the Listed  
21 Chemical from the Covered Product and/or failure to warn about the Listed Chemical, as set forth  
22 in the Notice of Violation and the Complaint.

23 **8.2** Compliance with the terms of this Consent Judgment shall be deemed to constitute  
24 compliance by any Released Party with Proposition 65 regarding alleged exposures to the Listed  
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1 Chemical from the Covered Product manufactured, sold or Distributed into California by  
2 Defendants on and after the Effective Date .

3 **8.3** It is possible that other Claims not known to MCCARTNEY arising out of the facts  
4 alleged in the Notice of Violation or the Complaint and relating to the Listed Chemical in the  
5 Covered Product that were manufactured, sold or Distributed into California by Defendants before  
6 the Effective Date will develop or be discovered. MCCARTNEY, on behalf of herself only,  
7 acknowledges that the Claims released herein include all known and unknown Claims and waives  
8 California Civil Code Section 1542 as to any such unknown Claims. California Civil Code Section  
9 1542 reads as follows:

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

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

16 **8.4** MCCARTNEY, on one hand, and KeHE, on the other hand, each release and waive  
17 all Claims they may have against each other for any statements or actions made or undertaken by  
18 them in connection with the Notice of Violation or the Complaint. However, this shall not affect or  
19 limit any Party’s right to seek to enforce the terms of this Consent Judgment.

20 **9. CONSTRUCTION AND SEVERABILITY**

21 **9.1** The terms and conditions of this Consent Judgment have been reviewed by the  
22 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to fully  
23 discuss the terms and conditions with its counsel. In any subsequent interpretation or construction  
24 of this Consent Judgment, the terms and conditions shall not be construed against any Party.

1           **9.2**     In the event that any of the provisions of this Consent Judgment is held by a court to  
2 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           All notices required to be given to either Party to this Consent Judgment by the other shall  
8 be in writing and sent to the following agents listed below by: (a) first-class, registered, (b) certified  
9 mail, (b) overnight courier, or (c) personal delivery to the following:

10           **For Erika McCartney:**

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

14           **For KeHE:**

15           Sarah Esmaili, Esq.  
16           ARNOLD & PORTER KAYE SCHOLER LLP  
17           Three Embarcadero Center, 10<sup>th</sup> Floor  
18           San Francisco, California 94111

18       **11.    COURT APPROVAL**

19           **11.1**    Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall  
20 prepare and file a Motion for Court Approval. The Parties shall use their reasonable best efforts to  
21 support entry of this Consent Judgment.

22           **11.2**    If the Court does not approve this Consent Judgment it shall be null and void and  
23 have no force or effect.

24           **11.3**    Within twenty (20) business days of the Effective Date, MCCARTNEY shall file a  
25 request for dismissal from this Action as to KeHE Distributors, Inc. and KeHE Enterprises, LLC,  
26 which are included within the term “Released Parties” in Section 8.

1 **12. EXECUTION AND COUNTERPARTS**

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

5 **13. ENTIRE AGREEMENT, AUTHORIZATION**

6 **13.1** This Consent Judgment contains the sole and entire agreement and understanding of  
7 the Parties with respect to the entire subject matter herein, and any and all prior discussions,  
8 negotiations, commitments and understandings related hereto. No representations, oral or  
9 otherwise, express or implied, other than those contained herein have been made by any Party. No  
10 other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist  
11 or to bind any Party.

12 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized  
13 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly  
14 provided herein, each Party shall bear its own fees and costs.

15 **14. REQUEST FOR FINDINGS AND FOR APPROVAL**

16 **14.1** This Consent Judgment has come before the Court upon the request of the Parties.  
17 The parties request the Court to fully review this Consent Judgment and, being fully informed  
18 regarding the matters which are the subject of this action, to:

19 (a) Find that the terms and provisions of this Consent Judgment represent a good  
20 faith settlement of all matters raised by the allegations of the Complaint, that the matter has been  
21 diligently prosecuted, and that the public interest is served by such settlement; and

22 (b) Make the findings pursuant to California Health and Safety Code Section 25249.7(f)(4), and  
23 approve the Settlement, and this Consent Judgment.

24 **IT IS SO STIPULATED.**

25 Dated: 7/11/18

  
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Erika McCartney

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Dated: 4/12/18

TREE OF LIFE, LLC  
Name: [Signature]  
Its: VP + General Counsel

Dated: 7/12/18

KEHE DISTRIBUTORS, LLC.  
Name: [Signature]  
Its: VP + General Counsel

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**ORDER AND 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