

## SETTLEMENT AGREEMENT

### 1. RECITALS

#### 1.1 The Parties

This settlement agreement (“Settlement Agreement”) is entered into by and between Erika McCartney (“Ms. McCartney”) on the one hand, and The Hershey Company (“HERSHEY”) on the other. Ms. McCartney and HERSHEY shall hereinafter collectively be referred to as the “Parties.”

#### 1.2 Allegations

Ms. McCartney alleges HERSHEY manufactured, distributed, supplied, and/or sold “Dagoba Organic Drinking Chocolate Unsweetened Cacao Powder With Bits of Unsweetened Chocolate” (hereinafter the “Covered Product”) for use by consumers, causing users in California to be exposed to cadmium (the “Listed Substance”) without providing “clear and reasonable warnings,” in violation of Proposition 65.

On August 30, 2017, a 60-Day Notice of Violation, with a Certificate of Merit, was provided by Ms. McCartney to HERSHEY and various public enforcement agencies regarding the alleged violation of Proposition 65 (“Notice”). No public prosecutor commenced any action in the 60-day period following issuance of the Notice.

On February 15, 2018, the San Francisco Superior Court entered a consent judgment in *As You Sow v. Trader Joe’s Company*, Case No. CGC-15-548791 (“*As You Sow* Consent Judgment”), to which HERSHEY is a signatory defendant. HERSHEY contends that the

Covered Product herein is also a “Covered Product” pursuant to Section 2.4 of the *As You Sow* Consent Judgment, thereby barring the instant claim.

### **1.3 No Admissions**

HERSHEY denies all allegations in Ms. McCartney’s 60-Day Notice and maintains that the Covered Product is and has been in compliance with all laws, that no exposures to cadmium from the Covered Product occurred at levels requiring Proposition 65 warnings, that any level of cadmium in the Covered Product is naturally occurring and that HERSHEY has not violated Proposition 65. This Settlement Agreement shall not be construed as an admission of liability, or of any fact or issue of law, by HERSHEY, but as a compromise of claims that are expressly contested and denied. However, nothing in this section shall affect the Parties’ obligations, duties, and responsibilities under this Settlement Agreement.

### **1.4 Compromise**

The parties enter into this Settlement Agreement in order to resolve the controversies described above and to avoid prolonged and costly litigation between them.

### **1.5 Effective Date**

The “Effective Date” shall be the date upon which the Settlement Agreement is signed by both Parties and delivered to the opposing party.

## **2. REFORMULATION**

**2.1** As of the Effective Date, HERSHEY shall not offer for sale to a consumer in California, directly sell to a consumer in California, or “Distribute into California” any Covered Product unless it contains a cadmium concentration equal to or less than that scheduled to become a threshold for triggering Proposition 65 warnings as of February 14, 2019 under the *As You Sow* Consent Judgment. For purposes of this provision, “Distribute into California” means

to ship any of the Covered Product to California for sale or to sell any of the Covered Product to a distributor, retailer, or other customer that HERSHEY knows or has reason to know will sell or use the Covered Product in California.

### **3. PAYMENTS**

#### **3.1 Civil Penalty Pursuant to Proposition 65**

HERSHEY shall pay a civil penalty of \$2,500, to be apportioned in accordance with Health and Safety Code section 25249.12(c)(1) and (d), with 75% paid to State of California Office of Environmental Health Hazard Assessment, and the remaining 25% paid to Ms. McCartney.

The civil penalty shall be made by (1) a check or money order made payable to “Office of Environmental Health Hazard Assessment” in the amount of \$1,875; (2) a check or money order made payable to “Erika McCartney” in the amount of \$625. HERSHEY shall remit the payments within ten (10) days of the Effective Date.

#### **3.2 Payment of Attorneys’ Fees and Expenses**

In full satisfaction of all claims for attorneys’ fees, costs, and expenses incurred, HERSHEY shall pay the amount of \$17,500. This amount shall be made by check or money order made payable to “Robert B. Hancock.” HERSHEY shall remit the payments within ten (10) days of the Effective Date.

All payments under this Agreement shall be mailed or transmitted via overnight delivery to the following address:

PACIFIC JUSTICE CENTER  
ATTN: Robert B. Hancock, Esq.  
50 California Street, Suite 1500  
San Francisco, CA 94111

Any failure to remit any of the foregoing payments shall be deemed to be a material breach of this Settlement Agreement, and the Parties agree that in that event, the Settlement Agreement shall be rescinded in full, and the Parties restored to their respective positions as though the Settlement Agreement had never existed.

#### **4. RELEASES**

##### **4.1 Ms. McCartney's Release of HERSHEY**

Ms. McCartney, acting in her individual capacity, her past and current agents, representatives, attorneys, successors, and/or assignees, in consideration of the promises and monetary payments contained herein, hereby releases and waives all rights to institute or participate in (directly or indirectly) any form of legal action and releases and discharges: (a) HERSHEY and each entity to which HERSHEY has directly or indirectly distributed or sold the Covered Product, including but not limited to all retailers, distributors, wholesalers, and customers; and (b) all past and current parents, subsidiaries, affiliates, directors, officers, employees, shareholders, agents, attorneys, successors, and assignees, of the entities identified in (a) above (the released entities and individuals identified in (a) and (b) above are collectively referred to as "Releasees"), with respect to any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees (including but not limited to investigation fees, attorneys' fees, and expert fees), costs, and expenses arising under Proposition 65 or any other statutory or common law based on any exposures to, or failure to warn about any exposures to cadmium in the Covered Product.

##### **4.2 HERSHEY's Release of Ms. McCartney**

HERSHEY, by this Settlement Agreement, waives all rights to institute any form of legal action against Ms. McCartney, her past and current agents, representatives, attorneys, experts,

successors, and/or assignees, for actions or statements made or undertaken, whether in the course of investigating claims in this matter or seeking enforcement of Proposition 65 against HERSHEY in this matter.

#### **4.3 Waiver of Unknown Claims**

Each of the Parties acknowledges that they are familiar with Section 1542 of California Civil Code which provides as follows:

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

Each of the Parties waives and relinquishes any right or benefit it or she has or may have under Section 1542 of the California Civil Code or any similar provision under the statutory or non-statutory law of any other jurisdiction to the full extent that it or she may lawfully waive all such rights and benefits pertaining to the claims in this Settlement Agreement. The Parties acknowledge that each may subsequently discover facts in addition to, or different from, those that it believes to be true with respect to the claims released in Sections 4.1 and 4.2 and that such releases are intended to cover known and unknown claims. The Parties agree that this Settlement Agreement and the releases contained herein shall be and remain effective in all respects, notwithstanding the discovery of such additional or different facts.

Nothing in Section 4 prevents or limits a Party's right to enforce the terms of this Settlement Agreement.

## **5. SEVERABILITY**

Should any non-material part or provision of this Settlement Agreement for any reason be declared by a Court to be invalid, void, unenforceable, or against law or public policy, the remaining portions and provisions shall continue in full force and effect.

## **6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California.

## **7. INTEGRATION**

This Settlement Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and may not be amended or modified except in writing executed by both Parties.

## **8. COUNTERPARTS**

This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which, when taken together, shall constitute the same document. Execution and delivery of this Settlement Agreement by e-mail, facsimile, or other electronic means shall constitute legal and binding execution and delivery. Any photocopy of the executed Settlement Agreement shall have the same force and effect as the originals.

## **9. MODIFICATION**

This Settlement Agreement may be modified by written stipulation of the Parties.

## **10. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Party. Each Party has read, understands, and agrees to all of the terms and conditions of this Settlement agreement. Each Party warrants to the other that it is free to enter into this

Settlement Agreement and is not subject to any conflicting obligation which will or might prevent or interfere with the execution or performance of this Settlement Agreement by said Party.

**AGREED:** The Hershey Company

Date: 6/25/18

By:

Its: VP SEC Corp Governance & Compliance

**AGREED:** Erika McCartney

Date: 6/18/18

Erika McCartney