

## SETTLEMENT AGREEMENT

### BETWEEN ERICKA MCCARTNEY AND OMG!, INC.

#### 1. RECITALS

##### 1.1 The Parties

This settlement agreement (“Settlement Agreement”) is entered into by and between Erika McCartney (“MCCARTNEY”) on the one hand, and OMG! Food Company, LLC (“OMG!”). MCCARTNEY and OMG! shall hereinafter collectively be referred to as the “Parties.”

MCCARTNEY is a citizen of the State of California. For purposes of this settlement only, OMG! does not dispute that it is a person in the course of doing business as the term is defined in the California Safe Drinking Water and Toxic Enforcement Act, codified at California Health and Safety Code Paragraph 25249.5, *et seq.* (“Proposition 65”).

##### 1.2 Allegations

MCCARTNEY alleges OMG! manufactured, distributed, supplied, and/or sold “OMG! Raw Cacao Nibs,” “OMG! Organic Cacao Powder,” “OMG! Organic Spirulina Powder,” and “Ancestral Roots Goji Berries” (the “Covered Products”) for use by consumers, causing users in California to be exposed to lead (in the cases of “OMG! Organic Spirulina Powder” and “Ancestral Roots Goji Berries” and cadmium (in the cases of “OMG! Raw Cacao Nibs” and “OMG! Organic Cacao Powder” (the “Listed Substance”) in amounts exceeding the maximum allowable dosage level (“MADL”) established by the California Office of Environmental Health Hazard Assessment (“OEHHA”) without providing “clear and reasonable warnings,” in violation of Proposition 65. Lead and cadmium are subject to Proposition 65 warning requirements because they are listed as known to the State of California to cause cancer and birth defects or other reproductive harm.

On December 12, 2017, MCCARTNEY sent out a 60-Day Notice of Violation, along with a Certificate of Merit, which were provided by MCCARTNEY to OMG!, Amazon.com, Inc. (“Amazon”), 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.

### **1.3 No Admissions**

OMG! denies all allegations in MCCARTNEY’s 60-Day Notice and maintains that the Covered Products are and have been in compliance with all laws, and that OMG! has not violated Proposition 65. This Settlement Agreement shall not be construed as an admission of liability by OMG!, but as a compromise of claims that are expressly contested and denied. However, nothing in this Paragraph 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 controversy described above and to avoid prolonged and costly litigation between them.

### **1.5 Effective Date**

The “Effective Date” shall be thirty (30) days from the date upon which the Settlement Agreement is signed by both Parties and delivered to the opposing party.

## **2. INJUNCTIVE RELIEF: COMMITMENT TO REFORMULATE OR WARN**

### **2.1 Cacao Products**

OMG! Raw Cacao Nibs and OMG! Organic Cacao Powder (“Cacao Products”):  
Commencing within sixty (60) days of the Effective Date, and continuing thereafter, OMG! shall only ship, sell, or offer for sale in California, reformulated Cacao Products pursuant to Section 2.6,

or Cacao Products that are labeled with a clear and reasonable warning pursuant to Sections 2.4 and 2.5 concerning cadmium content in the Cacao Products. For purposes of this Settlement Agreement, "Reformulated Product" includes all Covered Products that meet the Reformulation Standards set forth in Section 2.3.

## **2.2 OMG! Organic Spirulina Powder and Ancestral Roots Goji Berries**

OMG! Organic Spirulina Powder and Ancestral Roots Goji Berries: Commencing within one hundred twenty (120) days of the Effective Date, and continuing thereafter, OMG! shall only ship, sell, or offer for sale in California, OMG! Organic Spirulina Powder (as set forth in Section 2.6), or OMG! Organic Spirulina Powder that is labeled with a clear and reasonable warning pursuant to Sections 2.4 and 2.5 concerning lead content in OMG! Organic Spirulina Powder.

Commencing within sixty (60) days of the Effective Date, OMG! shall only ship, sell, or offer for sale in California reformulated Ancestral Roots Goji Berries (as set forth in Section 2.6), or Ancestral Roots Goji Berries that are labeled with a clear and reasonable warning pursuant to Sections 2.4 and 2.5 concerning lead content in the Ancestral Roots Goji Berries.

## **2.3 Reformulation Standard**

Reformulated Products shall meet or exceed the standards outlined in Section 2.6. Acceptable formulated and Reformulated Product is defined as set forth in Section 2.6, when analyzed pursuant to the acceptable methodology used by any state or federal agency for determining cadmium and/or lead content in a substance, including those set forth in Section 2.7.

## **2.4 Warning Obligations for Covered Product**

Commencing within the respective dates set forth in Section 2.1, 2.2, and 2.3, and except as otherwise provided in any Paragraph with respect to "Reformulated Products", OMG! shall be permanently enjoined from Distributing into California any Covered Product that is not a

Reformulated Product without a Warning as set forth in Paragraph 2.5 below. “Distributing into California” or “Distribute into California” means to ship any of the Covered Product that is not a Reformulated Product to California for sale or to sell any of the Covered Product that is not a Reformulated Product to a distributor that OMG! knows or has reason to know will redistribute or sell such product in or into California.

## **2.5 Warnings**

Covered Products requiring a warning pursuant to Paragraph 2.4 above shall bear the warning (“Warning”) specified below prior to OMG! Distributing such Covered Product.


For OMG! Organic Spirulina Powder and Ancestral Roots Goji Berries:

**WARNING:** Consuming this product can expose you to lead, which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65warnings.ca.gov/food](http://www.P65warnings.ca.gov/food).

For OMG! Raw Cacao Nibs and OMG! Organic Cacao Powder:

**WARNING:** Consuming this product can expose you to cadmium, which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65warnings.ca.gov/food](http://www.P65warnings.ca.gov/food).

Alternatively, OMG! may provide the following warning for the Covered Products:

 **WARNING:** Cancer and Reproductive Harm – [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

### **2.5.1 Product Labeling**

The Warning shall be placed on the Covered Product’s label and shall comply with the requirements pertaining to safe harbor Proposition 65 warnings for food as set forth in Title 27, California Code of Regulations, Paragraphs 25607 *et seq.*, as they may be amended from time to time.

### **2.5.2 Internet Sales**

In addition to the labeling requirements set forth in Paragraphs 2.5 and 2.5.1, OMG! must provide an internet Warning to California consumers of the Covered Products that are not a Reformulated Product using the language set forth in Paragraph 2.5 prior to the customer's completion of purchase. If the short-form Warning is provided on the label of a Covered Product that is not a Reformulated Product, the Warning provided on the website may use the same content. The Warning that is given on the website shall be in the same type size or larger than the Covered Product description text and shall appear either: (1) on the same webpage on which the Covered Product is displayed; (b) on the same webpage as the order form for the Covered Product; (c) on the same page as the price for the Covered Product; or (d) on one or more webpages displayed to the customer during the checkout process. The Warning may also be provided by a clearly marked hyperlink labeled "**WARNING: California Proposition 65**" on the product display page prior to the purchase of the Covered Product (language in brackets optional.)

### **2.6 Reformulated Products**

The Parties agree that, with respect to "Ancestral Roots Goji Berries," a "Reformulated Product" is any unit of Covered Product containing lead concentrations at or below the corresponding warning levels set forth in the Consent Judgment entered on February 15, 2018 by San Francisco Superior Court in *As You Sow v Trader Joe's Company, et al.*, Case No. CGC-15-548791 ("*As You Sow*") as follows:

- 0.100 ppm, provided, however, that as of February 15, 2025, the foregoing lead concentration level shall be deemed to have been reduced to 0.065 ppm unless the *As You Sow* parties stipulate otherwise, as defined in the *As You Sow* Consent Judgment.

The Parties agree that, with respect to “OMG! Organic Spirulina Powder,” a “Reformulated Product” is any unit of Covered Product containing at or below two (2) micrograms of lead per serving size as identified on the label of the Covered Product. Nothing in this Agreement requires OMG! to withdraw any of the OMG! Organic Spirulina Powder products from retailers, distributors, or otherwise, if those products are already in the stream of commerce, in process, or are ready for distribution or sale as of the reformulation deadline. In addition, prior to the reformulation deadline, nothing in this Agreement precludes OMG! from purchasing, manufacturing, using, selling, or distributing non-reformulated OMG! Organic Spirulina Powder.

The Parties further agree that, with respect to “OMG! Raw Cacao Nibs” and “OMG! Organic Cacao Powder,” “Reformulated Products” are any units of Covered Products containing cadmium concentrations at or below the corresponding warning levels set forth in the Consent Judgment entered on February 15, 2018 by San Francisco Superior Court in *As You Sow v Trader Joe’s Company, et al.*, Case No. CGC-15-548791 (“*As You Sow*”) as follows:

- 0.960 ppm, provided, however, that as of February 15, 2025, the foregoing lead concentration level shall be deemed to have been reduced to 0.800 ppm unless the *As You Sow* parties stipulate otherwise, as defined in the *As You Sow* Consent Judgment.

**2.6.1** Reformulated Products Distributed into California by OMG! into California shall be exempt from the requirements of Paragraphs 2.4 and 2.5. Parties agree that OMG! may only Distribute into California Reformulated Products if OMG! is in compliance with the provisions set forth in Paragraph 2.6.

## **2.7 Testing Program**

Before Distributing into California any Reformulated Product, OMG! will test or arrange for the testing for lead (for OMG! Organic Spirulina Powder and Ancestral Roots Goji Berries) or cadmium (for OMG! Raw Cacao Nibs and OMG! Organic Cacao Powder) for any Reformulated Product that it intends to Distribute into California without a Warning. OMG! may rely on testing conducted prior to entry of this Settlement Agreement if such testing documents lead or cadmium levels in the Covered Products either already in the stream of commerce, in process, or which are ready for distribution or sale.

**2.7.1** OMG! may use a testing laboratory with Environmental Laboratory Certification from the State of California, California Water Boards, Environmental Laboratory Accreditation Program; NSF International; American Association for Laboratory Accreditation for Chemical Testing; International Standards Organization/IEC via ANSI-ASQ; or an in-house laboratory or other facility experienced in testing for lead levels in foods that complies with the Production and Process Control System: Requirements for Laboratory Operations set forth in 21 C.F.R. Part 111, Subpart J, including but not limited to the requirements for written procedures, requirements for laboratory control processes, requirements for laboratory methods for testing and examination, record retention policies, and other laboratory requirements.

**2.7.2** The lead and/or cadmium concentrations must be measured using inductively coupled plasma mass spectrometry ("ICP-MS") utilizing scientifically appropriate adherence to the protocols set forth in EPA Methods 6020, 6020a, isotope dilution, or Association of Agricultural Chemists ("AOAC") Method 993.14. The laboratory must digest at least 1 gram of each sample, analyze each sample undiluted by ICP-MS, and use an instrument

quantitation limit corresponding to less than 0.01 ppm of lead or cadmium in the finished product.

**2.7.3** To fulfill its testing obligation under Paragraph 2.7 and using a testing method described therein, OMG! must test or cause to be tested three (3) samples of the final product which comprises each Covered Product for which Reformulated Product status is sought, with samples randomly selected from three (3) different lots (or from the maximum number of lots that are available for testing if there are fewer than three (3) lots available). The testing required under this Paragraph 2.7.3 must be repeated annually for two years following the compilation of the initial data set described in herein. Notwithstanding any language to the contrary herein, if at any time there is a material change in formula of a Covered Product designated as a Reformulated Product that is reasonably likely to affect the lead levels in the Reformulated Product, that Covered Product shall be tested pursuant to Paragraph 2.7 for a minimum of two years. All laboratory test data and certifications (if applicable) must be retained by OMG! for a period of three years from the date of completed testing. However, OMG! is not required to test any Covered Products if they are providing a warning for those products that complies with Paragraphs 2.4 and/or 2.5.

**2.7.4** On and after the Effective Date, any single test result which exceeds 1.92 ppm of cadmium as calculated under this Paragraph 2.4 shall be deemed a potential "Outlier."

**2.7.5** At OMG!'s option, any single Outlier test result may be subject to validation before it is deemed a final Outlier result for purposes of this Settlement Agreement. The validation process shall consist of two steps.

(a) First, OMG! shall check its equipment, test processes, validation procedures, laboratory contamination, operator error and any other factors which could have



produced an erroneous result. If the result is determined erroneous due to testing error or failure to satisfy quality assurance or quality control procedures, the result shall be discarded and not used for any purpose under this Settlement Agreement. The Covered Product shall then be re-tested as if such test were the first test.

(b) Second, if a single Outlier test result is obtained and the steps in 2.7.5(a) have not invalidated the result, then OMG! may collect up to three (3) more samples from the same lot or batch and have those samples tested in accordance with this Paragraph 2.7. The arithmetic mean of the test results of all samples tested from the single lot or batch (including the original Outlier test result) shall then be determined. That mean test result shall be deemed the final result and shall constitute the applicable test result for purposes of this Settlement Agreement. If this validated test result is an Outlier as defined in Paragraph 2.7.4, then the terms of Paragraph 2.7.7 shall apply to that Outlier test result.

**2.7.6** If there is an allegation that a Covered Product is in violation of Paragraph 2.1, 2.2, 2.3, 2.4, 2.5, and/or 2.6, MCCARTNEY may make a written request to OMG! for producing that Covered Product, delivered to the address of OMG! as set forth on Attachment B, for data generated in compliance with Paragraph 2.7. In response to such a request, OMG! will provide to MCCARTNEY the date the analysis was performed, the name of the laboratory conducting the test, the test method used by the laboratory, the detection limit used by the laboratory, the lot numbers of the samples tested, and the analytical results within thirty (30) days of MCCARTNEY's written request. MCCARTNEY shall keep all such information and data confidential. OMG! shall provide to MCCARTNEY within 45 days of completing the initial testing of its Covered Products under Paragraph 2.7, and annually thereafter during the testing period set forth in Paragraph 2.7.3, a list of all such products for which the test results obtained

pursuant to this Paragraph II indicate a Proposition 65 warning is required pursuant to Paragraph 2.4 herein.

**2.7.7** When calculating whether a Covered Product qualifies as a Reformulated Product: (1) OMG! must compare the warning threshold value set forth in Paragraph 2.6 to the arithmetic mean of at least three (3) samples tested in accordance with Paragraph 2.7. However, OMG! may, at its option, calculate the arithmetic mean using up to ten (10) samples.

Notwithstanding the foregoing, OMG! may not include an Outlier test result (as defined in Paragraph 2.7.4) in calculating the arithmetic mean. If OMG! elects to sell a Covered Product to California consumers for which an Outlier test result is obtained and validated as provided for in Paragraph 2.7.5 then that specific product lot or batch from which the Outlier result was derived shall be subject to the warning obligations of Paragraphs 2.4 and 2.5. OMG! shall have thirty (30) days from the date the relevant test result mean is calculated to satisfy the applicable obligations of Paragraphs 2.4 and 2.5 for Covered Products manufactured, distributed or sold after that date.

### **3 PAYMENTS**

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

OMG! shall pay a civil penalty of \$7,000.00, to be apportioned in accordance with Health and Safety Code Paragraph 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 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 \$5,250.00; and (2) a check or money order made payable to “Erika McCartney” in the amount of \$1,750.00. Provided that OMG! receives appropriate and necessary information from each of the recipients to allow for proper

documentation relating to tax reporting, OMG! shall remit the payments within thirty (30) 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 in connection with the Notice and negotiation of this Settlement Agreement, OMG! shall pay MCCARTNEY the amount of \$22,000.00. This amount shall be made by check or money order made payable to "Environmental Law Foundation." OMG! shall remit the payments as follows: Four (4) monthly installment payments of \$5,500.00 each, beginning thirty (30) days from payment of the civil penalty stated in Section 3.1 of this Agreement, and continuing every thirty (30) days until the fourth and final installment is paid.

All payments under this Agreement shall be mailed or overnighted to the following address:

James Wheaton, Esq.  
ENVIRONMENTAL LAW FOUNDATION  
1222 Preservation Park Way, Suite 200  
Oakland, CA 94612

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 MCCARTNEY's Release of OMG! and Other Releasees**

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) OMG! and Amazon, and each entity to which OMG! and/or Amazon has directly or indirectly distributed or sold the Covered Product, including but not limited to all retailers, distributors, wholesalers, marketplace hosts 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, lead (in the cases of "OMG! Organic Spirulina Powder" and "Ancestral Roots Goji Berries") or cadmium (in the cases of "OMG! Raw Cacao Nibs" and "OMG! Organic Cacao Powder").

The Parties agree that compliance with the requirements of this Settlement Agreement by OMG! shall constitute compliance with Proposition 65 by any Releasee with respect to any exposure to lead (in the cases of "OMG! Organic Spirulina Powder" and "Ancestral Roots Goji Berries") or cadmium (in the cases of "OMG! Raw Cacao Nibs" and "OMG! Organic Cacao Powder") manufactured or purchased by OMG! after the Effective Date.

#### **4.2 OMG!'s Release of MCCARTNEY**

OMG!, by this Settlement Agreement, waive all rights to institute any form of legal action against 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 or seeking enforcement of Proposition 65 against OMG! in this matter.

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

Each of the Parties acknowledges that they are familiar with Paragraph 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 Paragraph 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 or she believes to be true with respect to the claims released in Paragraphs 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 Paragraph 4 prevents or limits a Party's right to enforce the terms of this Settlement Agreement.

### **5 PROVISION OF NOTICE**

All notices required to be given to either Party to this Settlement Agreement by the other shall be in writing and sent to the following agents listed below by: (a) first-class, registered, certified mail; (b) overnight courier; or (c) personal delivery as set forth below. Either MCCARTNEY or OMG! may specify in writing to the other Party a change of address to which all notices and other announcements shall be sent.

**For Erika McCartney**  
Environmental Law Foundation  
1222 Preservation Park Way, Suite 200  
Oakland, CA 94612

**For OMG!**  
OMG! Food Company, LLC  
Attn: Francisco Correa  
2373 E. Pacifica Place  
Rancho Dominguez, CA 90220

**With a copy to the following:**

K&L Gates LLP  
Attn: Caitlin C. Blanche and Damon M. Pitt  
1 Park Plaza Drive, 12th Floor  
Irvine, CA 92614

## **6 CONSTRUCTION**

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

## **7 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.

## **8 GOVERNING LAW**

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

## **9 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.

## **10 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.

## **11 MODIFICATION**

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

## **12 APPLICATION OF SETTLEMENT AGREEMENT**

This Settlement Agreement shall apply to and be binding upon the Parties and their respective officers, directors, successors and assigns, and it shall benefit the Parties and their respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, franchisees, licensees, customers, distributors, wholesalers, retailers, predecessors, successors, and assigns and any of them.

## **13 ENTIRE AGREEMENT, AUTHORIZATION**

This Settlement Agreement 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 with

respect to the subject matter herein. No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party with respect to the subject matter herein.

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:** OMG! FOOD COMPANY, LLC

Date: 3/4/2020


By: FRANCISCO CORREA

Its: 

**AGREED:**

2/28/2020

Date: \_\_\_\_\_



Erika McCartney