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ENDORSED  
FILED  
ALAMEDA COUNTY

FEB 24 2016

CLERK OF THE SUPERIOR COURT  
By: D. OLIVER, Deputy

10 SUPERIOR COURT OF CALIFORNIA  
11 COUNTY OF ALAMEDA

RF 168 050 80

12 ERIKA MCCARTNEY, in the public interest, )  
13 Plaintiff, )  
14 v. )  
15 VITACOST.COM, INC., a Delaware )  
16 corporation; and DOES 1 through 500, inclusive, )  
17 Defendants. )  
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CIVIL ACTION NO.  
**COMPLAINT FOR INJUNCTIVE  
RELIEF AND CIVIL PENALTIES**  
[Cal. Health and Safety Code  
Sec. 25249.6, *et seq.*]

**BY FAX**

1 Erika McCartney, in the public interest, based on information and belief and investigation of  
2 counsel, except for information based on knowledge, hereby makes the following allegations.

### 3 4 INTRODUCTION

5 1. This Complaint seeks to remedy Defendant's continuing failure to adequately warn  
6 individuals in California that they are being exposed to cadmium, a chemical known to the State of  
7 California to cause birth defects and other reproductive harm. Such exposures have occurred, and  
8 continue to occur, through the manufacture, distribution, sale and consumption of Defendant's  
9 Vitacost Organic Cacao Nibs (the "Product"). The Product is available to consumers in California  
10 through certain retail channels including, without limitation, via the internet through Defendant's  
11 and third-party retail websites. Consumers are exposed to cadmium when they consume the  
12 Product.  
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14 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is  
15 unlawful for businesses to knowingly and intentionally expose individuals in California to  
16 chemicals known to the State to cause cancer, birth defects or other reproductive harm without  
17 providing clear and reasonable warnings to individuals prior to their exposure. Defendant  
18 introduces a product contaminated with significant quantities of cadmium into the California  
19 marketplace, exposing consumers of the Product to cadmium.  
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21 3. Despite the fact that the Defendant exposes consumers to cadmium, during the  
22 relevant period Defendant provided no warning about the reproductive hazards associated with  
23 cadmium exposure. Defendant's conduct thus violates the warning provision of Proposition 65,  
24 Health & Safety Code § 25249.6.  
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**PARTIES**

4. Plaintiff brings this enforcement action in the public interest pursuant to Health & Safety Code § 25249.7(d).

5. Defendant VITACOST.COM, INC. is a person in the course of doing business within the meaning of Health & Safety Code § 25249.11. This Defendant manufactures, distributes and/or sells the Product for sale and use in California.

6. The true names of DOES 1 through 500 are unknown to Plaintiff at this time. When their identities are ascertained, the Complaint shall be amended to reflect their true names.

**JURISDICTION AND VENUE**

7. The Court has jurisdiction over this action pursuant to Health & Safety Code § 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to California Constitution Article VI, Section 10, because this case is a cause not given by statute to other trial courts.

8. This Court has jurisdiction over Defendant as a business entity that does sufficient business, has sufficient minimum contacts in California or otherwise intentionally avails itself of the California market through the sale, marketing or use of the Product in California and/or by having such other contacts with California so as to render the exercise of jurisdiction over it by the California courts consistent with traditional notions of fair play and substantial justice.

9. Venue is proper in Alameda County Superior Court because one or more of the violations arise in the County of Alameda, and because Defendant, a corporation, has designated no principal place of business in California.

## BACKGROUND FACTS

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2           10.     The People of the State of California have declared by initiative under Proposition  
3 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or  
4 other reproductive harm.” Proposition 65 § 1(b).

5           11.     To effectuate this goal, Proposition 65 prohibits exposing people to chemicals listed  
6 by the State of California as known to cause cancer, birth defects or other reproductive harm above  
7 certain levels without a “clear and reasonable warning” unless the business responsible for the  
8 exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6  
9 states, in pertinent part:  
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11           No person in the course of doing business shall knowingly and intentionally  
12 expose any individual to a chemical known to the state to cause cancer or  
13 reproductive toxicity without first giving clear and reasonable warning to such  
14 individual ....

15           12.     On May 1, 1997, the State of California officially listed cadmium as a chemical  
16 known to cause reproductive toxicity. Cadmium is specifically identified as a reproductive toxicant  
17 under two subcategories: “developmental reproductive toxicity,” which means harm to the  
18 developing fetus, and “male reproductive toxicity,” which means harm to the male reproductive  
19 system. 27 California Code of Regulations (“C.C.R.”) § 27001(c). On May 1, 1998, one year  
20 after it was listed as a chemical known to cause reproductive toxicity, cadmium became subject to  
21 the clear and reasonable warning requirement regarding reproductive toxicants under Proposition  
22 65.

23           13.     The level of exposure to a chemical causing reproductive toxicity under Proposition  
24 65 is determined by multiplying the level in question times the reasonably anticipated rate of  
25 exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For exposures to consumer  
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1 products, the level of exposure is calculated using the reasonably anticipated rate of intake or  
2 exposure for average users of the consumer product. 27 C.C.R. § 25821(c)(2).

3 14. Defendant's Product contains sufficient quantities of cadmium such that consumers,  
4 including pregnant women, who consume the Product are exposed to cadmium. The primary route  
5 of exposure for the violations is direct ingestion when consumers orally ingest the Product. These  
6 exposures occur everywhere in California where the Product is consumed.

7 15. During the relevant one-year period herein, no clear and reasonable warning was  
8 provided with the Product regarding the reproductive hazards of cadmium.

9 16. Any person acting in the public interest has standing to enforce violations of  
10 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid  
11 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action  
12 within such time. Health & Safety Code § 25249.7(d).

13 17. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff  
14 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the  
15 District Attorneys of every county in California, the City Attorneys of every California city with a  
16 population greater than 750,000 and to the named Defendant. In compliance with Health & Safety  
17 Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)  
18 the name and address of each violator; (2) the statute violated; (3) the time period during which  
19 violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure  
20 to cadmium from the Product, and (b) the specific type of Product sold and used in violation of  
21 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of  
22 the violations described in each Notice.  
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1 18. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney  
2 General, the District Attorneys of every county in California, the City Attorneys of every California  
3 city with a population greater than 750,000 and to the named Defendant. In compliance with  
4 Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that Plaintiff's  
5 counsel: (1) has consulted with one or more persons with relevant and appropriate experience or  
6 expertise who reviewed facts, studies or other data regarding the exposures to Cadmium alleged in  
7 each Notice; and (2) based on the information obtained through such consultations, believes that  
8 there is a reasonable and meritorious case for a citizen enforcement action based on the facts  
9 alleged in each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. §  
10 3102, each Certificate served on the Attorney General included factual information - provided on a  
11 confidential basis – sufficient to establish the basis for the Certificate, including the identity of the  
12 person(s) consulted by the Plaintiff's counsel and the facts, studies or other data reviewed by such  
13 persons.  
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16 19. None of the public prosecutors with the authority to prosecute violations of  
17 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against  
18 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of  
19 Plaintiff's Notices.

20 20. Defendant both knows and intends that individuals will consume the Product, thus  
21 exposing them to cadmium.

22 21. Under Proposition 65, an exposure is "knowing" where the party responsible for  
23 such exposure has:  
24

25 knowledge of the fact that a[n] ... exposure to a chemical listed pursuant  
26 to [Health & Safety Code § 25249.8(a)] is occurring. No knowledge that  
the ... exposure is unlawful is required.

1 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final  
2 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §  
3 12201).

4 22. Defendant has also been informed of the cadmium in the Product by the 60-Day  
5 Notice of Violation and accompanying Certificate of Merit served on it.  
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7 23. Defendant also has constructive knowledge that its Product contains cadmium due to  
8 the widespread media coverage concerning the problem of cadmium in consumer products in  
9 general, and, in particular, cocoa and cacao products.

10 24. As an entity that manufactures, imports, distributes and/or sells the Product for use  
11 in the California marketplace, Defendant knows or should know that the Product contains cadmium  
12 and that individuals who consume the Product will be exposed to cadmium. The cadmium  
13 exposures to consumers who consume the Product are a natural and foreseeable consequence of  
14 Defendant's placing the Product into the stream of commerce.  
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16 25. Nevertheless, on information and belief, Defendant continues to expose consumers  
17 to cadmium without prior clear and reasonable warnings regarding the reproductive hazards of  
18 cadmium.

19 26. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior  
20 to filing this Complaint.  
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22 27. Any person "violating or threatening to violate" Proposition 65 may be enjoined in  
23 any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is  
24 defined to mean "to create a condition in which there is a substantial probability that a violation  
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1 will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not  
2 to exceed \$2,500 per day for each violation of Proposition 65.

3 **CAUSE OF ACTION**

4 **(Violations of the Health & Safety Code 25249.6)**

5 28. Plaintiff realleges and incorporates by reference as if specifically set forth herein  
6 Paragraphs 1 through 27, inclusive.

7 29. By placing the Product into the stream of commerce, each Defendant is a person in  
8 the course of doing business within the meaning of Health & Safety Code § 25249.11.

9 30. Cadmium is a chemical listed by the State of California as known to cause birth  
10 defects and other reproductive harm.

11 31. Defendant knows that average use of the Product will expose users of the Product to  
12 cadmium. Defendant intends that the Product be used in a manner that results in exposures to  
13 cadmium from the Products.

14 32. Defendant has failed to provide clear and reasonable warnings regarding the  
15 reproductive toxicity of cadmium to users of the Products.

16 33. By committing the acts alleged above, Defendant has at all times relevant to this  
17 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to  
18 cadmium without first giving clear and reasonable warnings to such individuals regarding the  
19 reproductive toxicity of cadmium.  
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**PRAYER FOR RELIEF**

Wherefore, Plaintiff prays for judgment against Defendant as follows:

1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess civil penalties against the Defendant in the amount of up to \$2,500 per day for each violation of Proposition 65;

2. That the Court, pursuant to Health & Safety Code § 25249.7(a), permanently enjoin Defendant from offering the Product for sale in California without either reformulating the Products such that no Proposition 65 warnings are required or providing prior clear and reasonable warnings, as Plaintiff shall specify in further application to the Court;

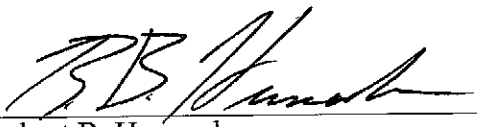
3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendant to take action to stop ongoing unwarranted exposures to cadmium resulting from use of Product sold, as Plaintiff shall specify in further application to the Court;

4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable theory or doctrine, grant Plaintiff her reasonable attorneys' fees and costs of suit; and

5. That the Court grant such other and further relief as may be just and proper.

Dated: February 23, 2016.

PACIFIC JUSTICE CENTER

By:   
Robert B. Hancock  
Attorneys for Plaintiff