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ELECTRONICALLY

**FILED**

Superior Court of California,  
County of San Francisco

**08/23/2016**

Clerk of the Court

BY:EDNALEEN ALEGRE

Deputy Clerk

9 SUPERIOR COURT OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 ERIKA MCCARTNEY, in the public interest, )

12 Plaintiff, )

13 v. )

14 ESSENTIAL LIVING FOODS, INC. a Florida )  
15 corporation; and DOES 1 through 500, inclusive, )

16 Defendants. )

CIVIL ACTION NO. CGC-15-545331

**FIRST AMENDED COMPLAINT FOR  
INJUNCTIVE RELIEF AND CIVIL  
PENALTIES**

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

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 and/or lead, chemicals known to  
7 the State of California to cause birth defects and other reproductive harm. Such exposures have  
8 occurred, and continue to occur, through the manufacture, distribution, sale and consumption of the  
9 following products: (hereinafter collectively "the Products"), with the subject contaminant(s)  
10 designated: Essential Living Raw Organic Cacao Powder (cadmium); Keen Wah Decadence Bar –  
11 Coconut Almond (lead); Keen Wah Decadence Bar – Cacao Chia (lead, cadmium); Keen Wah  
12 Decadence Bar – Cayenne Cinnamon (lead); Essential Living Foods – Montana Mix (lead);  
13 Essential Living Foods – Superberry Symphony (lead); Essential Living Foods – Superfood Trail  
14 Mix (lead); Essential Living Foods – Cacao Nibs (cadmium); Essential Living Foods – Dried  
15 Mulberries (lead); Essential Living Foods – Maca Blend (lead); Essential Living Foods – Machu  
16 Picchu Mix (lead, cadmium); Essential Living Foods – Jungle Peanuts (lead, cadmium); Essential  
17 Living Foods – Goji Berries (lead, cadmium); Essential Living Foods – Goji Berry Powder (lead);  
18 Essential Living Foods – Wild Protein (lead); Essential Living Foods – Coco Gogo (lead); Essential  
19 Living Foods – Enlighten Mix (lead); Essential Living Foods – Chocolate Covered Goji Berries  
20 (lead); Essential Living Foods – Superfood Smoothie (lead.)

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24 2. The Products are available to consumers in California through a multitude of retail  
25 channels including, without limitation: (a) third-party traditional brick-and-mortar retail locations;  
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1 (b) via the internet through Defendant's website; and (c) via the internet through third-party retail  
2 websites. Consumers are exposed to cadmium and/or lead when they consume the Products.

3 3. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is  
4 unlawful for businesses to knowingly and intentionally expose individuals in California to  
5 chemicals known to the State to cause cancer, birth defects or other reproductive harm without  
6 providing clear and reasonable warnings to individuals prior to their exposure. Defendant  
7 introduces products contaminated with significant quantities of cadmium and/or lead into the  
8 California marketplace, exposing consumers of the Product to those chemicals.

9  
10 4. Despite the fact that the Defendant exposes consumers to cadmium and/or lead,  
11 during the relevant period Defendant provided no warning about the reproductive hazards  
12 associated with cadmium or lead exposure. Defendant's conduct thus violates the warning  
13 provision of Proposition 65, Health & Safety Code § 25249.6.

#### 14 PARTIES

15  
16 5. Plaintiff brings this enforcement action in the public interest pursuant to Health &  
17 Safety Code § 25249.7(d).

18 6. Defendant ESSENTIAL LIVING FOODS, INC. is a person in the course of doing  
19 business within the meaning of Health & Safety Code § 25249.11. ESSENTIAL LIVING FOODS,  
20 INC. manufactures, distributes and/or sells the Product for sale and use in California.

21 7. The true names of DOES 1 through 500 are unknown to Plaintiff at this time. When  
22 their identities are ascertained, the Complaint shall be amended to reflect their true names.  
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**JURISDICTION AND VENUE**

8. 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.

9. 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.

10. Venue is proper in San Francisco County Superior Court because one or more of the violations arise in the County of San Francisco.

**BACKGROUND FACTS**

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

12. To effectuate this goal, Proposition 65 prohibits exposing people to chemicals listed by the State of California as known to cause cancer, birth defects or other reproductive harm above certain levels without a “clear and reasonable warning” unless the business responsible for the exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6 states, in pertinent part:

1 No person in the course of doing business shall knowingly and intentionally  
2 expose any individual to a chemical known to the state to cause cancer or  
3 reproductive toxicity without first giving clear and reasonable warning to such  
4 individual ....

5 13. On May 1, 1997, the State of California officially listed cadmium as a chemical  
6 known to cause reproductive toxicity. Cadmium is specifically identified as a reproductive toxicant  
7 under two subcategories: "developmental reproductive toxicity," which means harm to the  
8 developing fetus, and "male reproductive toxicity," which means harm to the male reproductive  
9 system. 27 California Code of Regulations ("C.C.R.") § 27001(c). On May 1, 1998, one year  
10 after it was listed as a chemical known to cause reproductive toxicity, cadmium became subject to  
11 the clear and reasonable warning requirement regarding reproductive toxicants under Proposition  
12 65.

13 14. On February 27, 1987, the State of California officially listed lead as a chemical  
14 known to cause reproductive toxicity. Lead is specifically identified as a reproductive toxicant  
15 under two subcategories: "developmental reproductive toxicity," which means harm to the  
16 developing fetus, "male reproductive toxicity," which means harm to the male reproductive system,  
17 and "female reproductive toxicity," which means harm to the female reproductive system. 27  
18 California Code of Regulations ("C.C.R.") § 27001(c). On February 27, 1988, one year after it was  
19 listed as a chemical known to cause reproductive toxicity, lead became subject to the clear and  
20 reasonable warning requirement regarding reproductive toxicants under Proposition 65.  
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22 15. The level of exposure to a chemical causing reproductive toxicity under Proposition  
23 65 is determined by multiplying the level in question times the reasonably anticipated rate of  
24 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 16. Defendant's Products contain sufficient quantities of cadmium and/or lead such that  
4 consumers, including pregnant women, who consume the Products are exposed to these chemicals.  
5 The primary route of exposure for the violations is direct ingestion when consumers orally ingest  
6 the Products. These exposures occur in homes, workplaces and everywhere in California where the  
7 Products are consumed.

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9 17. During the relevant one-year period herein, no clear and reasonable warnings were  
10 provided with the Products regarding the reproductive hazards of cadmium and/or lead.

11 18. Any person acting in the public interest has standing to enforce violations of  
12 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid  
13 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action  
14 within such time. Health & Safety Code § 25249.7(d).

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

20           22. Defendant both knows and intends that individuals will consume the Products, thus  
21 exposing them to cadmium and/or lead.  
22

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

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).

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5 24. Defendant has also been informed of the cadmium and/or lead in the Product by the  
6 60-Day Notice of Violation and accompanying Certificate of Merit served on them.

7 25. Defendant also has constructive knowledge that its Products contain cadmium  
8 and/or lead due to the widespread media coverage concerning the problem of cadmium and lead in  
9 consumer products in general.

10 26. As an entity that manufactures, imports, distributes and/or sells the Products for use  
11 in the California marketplace, Defendant knows or should know that the Products contain cadmium  
12 and/or lead and that individuals who consume the Products will be exposed to cadmium. The  
13 cadmium exposures to consumers who consume the Products are a natural and foreseeable  
14 consequence of Defendant's placing the Products into the stream of commerce.  
15

16 27. Nevertheless, Defendant continues to expose consumers to cadmium and/or lead  
17 without prior clear and reasonable warnings regarding the reproductive hazards of cadmium.

18 28. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior  
19 to filing this Complaint.  
20

21 29. Any person "violating or threatening to violate" Proposition 65 may be enjoined in  
22 any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is  
23 defined to mean "to create a condition in which there is a substantial probability that a violation  
24 will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil penalties not  
25 to exceed \$2,500 per day for each violation of Proposition 65.  
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**CAUSE OF ACTION**

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

30. Plaintiff realleges and incorporates by reference as if specifically set forth herein Paragraphs 1 through 29, inclusive.

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

32. Cadmium and lead are chemicals listed by the State of California as known to cause birth defects and other reproductive harm.

33. Defendant knows that average users of the Products will expose users of the Product to cadmium and/or lead. Defendant intends that the Products be used in a manner that results in exposures to cadmium and/or lead from the Products.

34. Defendant has failed to provide clear and reasonable warnings regarding the reproductive toxicity of cadmium and lead to users of the Products.

35. By committing the acts alleged above, Defendant has at all times relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to cadmium and/or lead without first giving clear and reasonable warnings to such individuals regarding their reproductive toxicity.

**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 \$2,500 per day for each violation of Proposition 65;

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

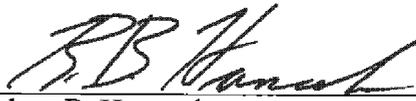
5           3.       That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendant to  
6 take action to stop ongoing unwarranted exposures to cadmium resulting from use of Products sold,  
7 as Plaintiff shall specify in further application to the Court;

8           4.       That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other applicable  
9 theory or doctrine, grant Plaintiff her reasonable attorneys' fees and costs of suit; and  
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11           5.       That the Court grant such other and further relief as may be just and proper.

12 Dated: August 23, 2016.

PACIFIC JUSTICE CENTER

13  
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15 By:   
16 Robert B. Hancock  
17 Attorneys for Plaintiff  
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## PROOF OF SERVICE

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of San Francisco, California; my business address is Pacific Justice Center, 50 California Street, Suite 1500, San Francisco, California 94111.

On the date below I served a copy, with all exhibits, of the following document(s):

### FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

on all interested parties in said case addressed as follows:

Scott R. Hatch  
CALL & JENSEN  
610 Newport Center Dr., Ste. 700  
Newport Beach, CA 92660  
shatch@calljensen.com

**(BY MAIL)** By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in sealed envelopes with postage fully prepaid.

**(BY HAND)** By placing the documents in an envelope or package addressed to the persons listed above and providing them to a professional messenger service for delivery.

**(BY FEDERAL EXPRESS)** By depositing copies of the above documents in a box or other facility regularly maintained by Federal Express with delivery fees paid or provided for.

**(BY EXPRESS MAIL)** By placing the above documents in the United States mail for Express Mail delivery in a sealed envelope addressed as above, with Express Mail postage thereon fully prepaid.

**(BY FAX)** By use of facsimile machine telephone number (415) 354-3508, I faxed a true copy to the addressee(s) listed at the facsimile number(s) indicated after the party's address. The transmission was reported as complete without error. The attached transmission report, which sets for the date and time for the transmission, was properly issued by the transmitting facsimile machine.

**(BY ELECTRONIC TRANSMISSION)** By sending a file of the above document(s) via electronic transmission (e-mail) using e-mail address at the e-mail address designated for each party identified above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration is executed on August 23, 2016.



Robert B. Hancock