

From:

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ALAMEDA COUNTY

September 02, 2016

CLERK OF  
THE SUPERIOR COURT  
By Alicia Espinoza, Deputy

CASE NUMBER:

**RG16826645**

9 **SUPERIOR COURT OF CALIFORNIA**  
10 **COUNTY OF ALAMEDA**

11 ERIKA MCCARTNEY, in the public interest, )

12 Plaintiff, )

13 v. )

14 TRANSITION NUTRITION, INC., a California )  
15 corporation; and DOES 1 through 500, inclusive, )

16 Defendants. )

CIVIL ACTION NO. RG16826645

**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, 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 "Divine Organics Raw Cacao Powder" ("the Product.") The Product is available to consumers in  
10 California through a multitude of retail channels including, without limitation: (a) third-party  
11 traditional brick-and-mortar retail locations; (b) via the internet through Defendant's website; and  
12 (c) via the internet through third-party retail websites. Consumers are exposed to cadmium when  
13 they consume the Product.  
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15 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et seq.*, it is  
16 unlawful for businesses to knowingly and intentionally expose individuals in California to  
17 chemicals known to the State to cause cancer, birth defects or other reproductive harm without  
18 providing clear and reasonable warnings to individuals prior to their exposure. Defendant  
19 introduces a product contaminated with significant quantities of cadmium into the California  
20 marketplace, exposing consumers of the Product to cadmium.  
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22 3. Despite the fact that the Defendant exposes consumers to cadmium, during the  
23 relevant period Defendant provided no clear and reasonable warning about the reproductive hazards  
24 associated with cadmium exposure. Defendant's conduct thus violates the warning provision of  
25 Proposition 65, 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 TRANSITION NUTRITION, INC. is a person in the course of doing business within the meaning of Health & Safety Code § 25249.11. Each 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.

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**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.

**BACKGROUND**

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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  
26

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 in homes, workplaces and everywhere in California where the Product is  
7 consumed.

8  
9 15. Proposition 65 requires that a clear and reasonable warning be provided prior to  
10 exposure to the identified chemicals. During the course of the relevant period herein, Violator  
11 placed certain language on the label of the product in question, reading:

12 CAL PROP 65 WARNING: This product contains a chemical known to the State of  
13 California to cause cancer and birth defects or other reproduction harm. For more  
information and clarity go to our website.

14 The label further contains Violator's website: [www.divineorganics.com](http://www.divineorganics.com) The home page of  
15 this site contains a prominent link captioned "CA PROP 65: Why is it on my superfood?"  
16 Clicking through links the user to [www.divineorganics.com/california-prop-65-warning-why-is-it-](http://www.divineorganics.com/california-prop-65-warning-why-is-it-on-my-superfood/)  
17 [on-my-superfood/](http://www.divineorganics.com/california-prop-65-warning-why-is-it-on-my-superfood/). During the operative period, this webpage has contained a number of  
18 statements which are false and/or misleading, rendering the warning language neither "clear," nor  
19 "reasonable." Those statements include, but are not limited to the following:

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21 (a) DIVINE ORGANICS does not require a warning at this time, but we will  
22 voluntarily comply with Prop 65 in following [sic] products when sold in California:

23 **CACAO PRODUCTS**  
24 **GOJIBERRIES (according to testing)**  
**MACA**  
**MESQUITE**

25 (b) The standard in California is more stringent than what is required at the U.S.  
26 federal level, and by other governments including Canada and the European Union.

1 (c) Chemicals that may trigger this requirement, such as Lead, Cadmium, Nickel  
2 and Arsenic, have been found in products of some of the other companies within the  
3 superfood industry.

4 (d) Though these elements are naturally present in the fertile soil where they are  
5 metabolized by plants and play a vital part in a balanced and nutrient-dense diet, these same  
6 elements can be extracted and isolated, as they are used in a concentrated toxic form for  
7 paints, chemicals, cleaners, solvents, glues, even pharmaceuticals. Prop 65 requires a  
8 warning that the product might contain a very small amount of this chemical, despite its  
9 origin.

10 (e) Under Cal Prop 65, the State of California has determined a safety zone for  
11 these chemicals. This was calculated by identifying the level of exposure that has been  
12 shown to have no observable effect and then dividing that level by 1,000, to provide a very  
13 large margin of safety. This margin has been proven in various cases to be calculated so  
14 low, that it has conflicted when the minerals are occurring naturally in the soil.

15 16. The foregoing statements, among others, are false and/or misleading, so as to render  
16 any warning neither "clear" nor "reasonable. Accordingly, during the relevant one-year period  
17 herein, no clear and reasonable warning was provided with the Product regarding the reproductive  
18 hazards of cadmium.

19 17. Any person acting in the public interest has standing to enforce violations of  
20 Proposition 65 provided that such person has supplied the requisite public enforcers with a valid  
21 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the action  
22 within such time. Health & Safety Code § 25249.7(d).

23 18. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff  
24 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the  
25 District Attorneys of every county in California, the City Attorneys of every California city with a  
26 population greater than 750,000 and to the named Defendant. In compliance with Health & Safety  
Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)  
the name and address of each violator; (2) the statute violated; (3) the time period during which  
violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure

1 to cadmium from the Product, and (b) the specific type of Product sold and used in violation of  
2 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of  
3 the violations described in each Notice.

4 19. Plaintiff also sent a Certificate of Merit for each Notice to the California Attorney  
5 General, the District Attorneys of every county in California, the City Attorneys of every California  
6 city with a population greater than 750,000 and to the named Defendant. In compliance with  
7 Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each Certificate certified that Plaintiff's  
8 counsel: (1) has consulted with one or more persons with relevant and appropriate experience or  
9 expertise who reviewed facts, studies or other data regarding the exposures to Cadmium alleged in  
10 each Notice; and (2) based on the information obtained through such consultations, believes that  
11 there is a reasonable and meritorious case for a citizen enforcement action based on the facts  
12 alleged in each Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. §  
13 3102, each Certificate served on the Attorney General included factual information - provided on a  
14 confidential basis – sufficient to establish the basis for the Certificate, including the identity of the  
15 person(s) consulted by the Plaintiff's counsel and the facts, studies or other data reviewed by such  
16 persons.  
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19 20. None of the public prosecutors with the authority to prosecute violations of  
20 Proposition 65 has commenced and/or is diligently prosecuting a cause of action against  
21 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in each of  
22 Plaintiff's Notices.  
23

24 21. Defendant both knows and intends that individuals will consume the Product, thus  
25 exposing them to cadmium.  
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1           22. Under Proposition 65, an exposure is “knowing” where the party responsible for  
2 such exposure has:

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

6           27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final  
7 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §  
8 12201).

9           23. Defendant has also been informed of the cadmium in the Product by the 60-Day  
10 Notice of Violation and accompanying Certificate of Merit served on them.

11           24. Defendant also has constructive knowledge that its Product contains cadmium due to  
12 the widespread media coverage concerning the problem of Cadmium in consumer products in  
13 general, and, in particular, cocoa products.

14           25. As an entity that manufactures, imports, distributes and/or sells the Product for use  
15 in the California marketplace, Defendant knows or should know that the Product contains cadmium  
16 and that individuals who consume the Product will be exposed to cadmium. The cadmium  
17 exposures to consumers who consume the Product are a natural and foreseeable consequence of  
18 Defendant’s placing the Product into the stream of commerce.

19           26. Nevertheless, Defendant continues to expose consumers to cadmium without prior  
20 clear and reasonable warnings regarding the reproductive hazards of cadmium.

21           27. 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  
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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 \$2,500 per day for each violation of Proposition 65;

2. That the Court, pursuant to Health & Safety Code § 25249.7(a), preliminarily and 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: August 19, 2016

PACIFIC JUSTICE CENTER

By:   
Robert B. Hancock  
Attorneys for Plaintiff

## 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:

Transition Nutrition, Inc.  
c/o Carolyn D. Daly, Registered Agent  
20 Pamaron  
Novato, CA 94949

**(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 September 2, 2016.

  
Robert B. Hancock