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ENDORSED
FILED
Superior Court of California
County of San Francisco
OCT 06 2016
CLERK OF THE COURT
BY: ROSSALY DE LA VEGA
Deputy Clerk

9 SUPERIOR COURT OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

16-554683

11 ERIKA MCCARTNEY, in the public interest,

12 Plaintiff,

13 v.

14 BIOVEA, LLC, an Arizona limited liability
15 company; and DOES 1 through 500, inclusive,

16 Defendants.

CIVIL ACTION NO.

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

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

17
18 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 "Biovea Natural Foods 100% Raw Organic Cacao Powder" ("the Product.") The Product is
10 available to consumers in California through a retail channels including, without limitation, via the
11 internet through Defendant's third-party retail websites. Consumers are exposed to cadmium when
12 they consume the 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 clear and reasonable warning about the reproductive hazards
23 associated with cadmium exposure. Defendant's conduct thus violates the warning provision of
24 Proposition 65, Health & Safety Code § 25249.6.
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PARTIES

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

14 5. Defendant BIOVEA, LLC is a person in the course of doing business within the
15 meaning of Health & Safety Code § 25249.11. Each defendant manufactures, distributes and/or
16 sells the Product for sale and use in California.

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

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JURISDICTION AND VENUE

23 7. The Court has jurisdiction over this action pursuant to Health & Safety Code §
24 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant to
25 California Constitution Article VI, Section 10, because this case is a cause not given by statute to
26 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 San Francisco County Superior Court because one or more of the
violations arise in the County of San Francisco, and Defendant has designated no principal place of
business in the State of California.

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.

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

11 16. 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 17. 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 Product, and (b) the specific type of Product sold and used in violation of
24 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of
25 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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15
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).

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

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 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.

15
16 25. Nevertheless, Defendant continues to expose consumers to cadmium without prior
17 clear and reasonable warnings regarding the reproductive hazards of cadmium.

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

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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
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)

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

29. By placing the Product 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.

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

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

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

33. 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 without first giving clear and reasonable warnings to such individuals regarding the reproductive toxicity of cadmium.

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 Product 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 Product 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: October 5, 2016.

PACIFIC JUSTICE CENTER

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14 By: 
15 Robert B. Hancock
16 Attorneys for Plaintiff
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