

Melvin B. Pearlston (SBN 54291)
Robert B. Hancock (SBN 179438)
PACIFIC JUSTICE CENTER
50 California Street, Suite 1500
San Francisco, California 94111
Tel: (415) 310-1940
e-mail: rbh@lawyer.com

Attorneys for Plaintiff

ENDORSED
FILED
Superior Court of California
County of San Francisco

APR 26 2017

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

CUC 17-558387

ERIKA MCCARTNEY, in the public interest,

Plaintiff,

v.

ORGANIC LIVING SUPERFOODS LLC.; and
DOES 1 through 500, inclusive,

Defendants.

CIVIL ACTION NO.

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

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

BY FAX
ONE LEGAL LLC

1 Erika McCartney, in the public interest, based on information and belief, except for
2 information pertaining directly to Plaintiff, 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 Organic Living
9 Superfoods Cacao Nibs (the "Product"). The Product is available through a multitude of retail
10 channels including, without limitation: (a) third-party traditional brick-and-mortar retail locations;
11 (b) via the internet through third-party retail websites; and (c) directly at Defendant's online store.
12 Consumers are exposed to cadmium when they consume the Product.

13
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 cadmium into the California marketplace, exposing
19 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 ORGANIC LIVING SUPERFOODS LLC 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 business entities that do sufficient business, have sufficient minimum contacts in California or otherwise intentionally avail themselves 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 them 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 no defendant has designated a principal office in California.

BACKGROUND FACTS

10. 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).

11. 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:

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

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

13. The level of exposure to a chemical causing reproductive toxicity under Proposition 65 is determined by multiplying the level in question times the reasonably anticipated rate of exposure for an individual to a given medium. 27 C.C.R. § 25821(b). For exposures to consumer

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. The Product contains sufficient quantities of cadmium such that consumers who
4 consume the Product are exposed to cadmium. The primary route of exposure for the violations is
5 direct ingestion when consumers orally ingest the Product. These exposures occur in homes,
6 workplaces and 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

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

14 17. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff
15 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General, the
16 District Attorneys of every county in California, the City Attorneys of every California city with a
17 population greater than 750,000 and to the named Defendant. In compliance with Health & Safety
18 Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the following information: (1)
19 the name and address of each violator; (2) the statute violated; (3) the time period during which
20 violations occurred; (4) specific descriptions of the violations, including (a) the routes of exposure
21 to cadmium from the Product, and (b) the specific type of Product sold and used in violation of
22 Proposition 65; and (5) the name of the specific Proposition 65-listed chemical that is the subject of
23 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 each 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 knows and intend that individuals will consume the Product, thus
21 exposing them to cadmium.
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23 21. 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).
4

5 22. Defendant has further 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 the Product contains cadmium due
8 to 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 sell the Product for use in
11 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, 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.
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20 26. Plaintiff has engaged in good-faith efforts to resolve the claims alleged herein prior
21 to filing this Complaint by way of her 60-day Notice, to which no response was received.

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 restates and realleges paragraphs 1 through 27, inclusive, as though fully set
6 forth herein.

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

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

15 32. On information and belief, Defendant has failed to provide clear and reasonable
16 warnings regarding the reproductive toxicity of cadmium to users of the Product.
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18 33. By committing the acts alleged above, Defendant has at times relevant to this
19 Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to
20 cadmium without first giving clear and reasonable warnings to such individuals regarding the
21 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 each 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), preliminarily and permanently enjoin each Defendant from offering the Product for sale in California without either reformulating the Product 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 each 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: April 26, 2016

PACIFIC JUSTICE CENTER

By: 
Robert B. Hancock
Attorneys for Plaintiff