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8 Attorneys for Plaintiff
9 **ERIKA MCCARTNEY**

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12 ERIKA MCCARTNEY, in the public interest,

13 Plaintiff,

14 v.

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

17 Defendants.

CIVIL ACTION NO. CGC-16-554683

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 1.1 This Action arises out of the alleged violations of California’s Safe Drinking
3 Water and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5 et
4 seq. (also known as and hereinafter referred to as “Proposition 65”) regarding the following
5 products (hereinafter collectively the “Covered Products”): (a) Biovea Natural Foods 100% Raw
6 Organic Cacao Powder, with cadmium content in excess of 4.1 micrograms per 6.6 grams; (b)
7 Biovea Cacao Nibs, with cadmium content in excess of 4.1 micrograms per 18 grams; (c) Biovea
8 Goji Berries, with lead content in excess of .5 micrograms per 28 grams; (d) Biovea Maca Root
9 Powder, with lead content in excess of .5 micrograms per 3.1 grams.

10 1.2 Plaintiff Erika McCartney (“MCCARTNEY”) is a California resident acting as a
11 private enforcer of Proposition 65. MCCARTNEY has brought this enforcement action in the
12 public interest against Biovea, LLC, (“BIOVEA” or “Defendant”) concerning lead or cadmium in
13 the Covered Products pursuant to California Health and Safety Code Section 25249.7(d).
14 MCCARTNEY contends she is dedicated to, among other causes, helping safeguard the public
15 from health hazards by reducing the use and misuse of hazardous and toxic chemicals, facilitating
16 a safe environment for consumers and employees, and encouraging corporate responsibility.

17 1.3 Defendants have sold and sell the Covered Product in California.

18 1.4 MCCARTNEY and BIOVEA are hereinafter sometimes referred to individually as
19 a “Party” or collectively as the “Parties.”

20 1.5 On or about August 1, 2016 and December 8, 2016, pursuant to California Health
21 and Safety Code Section 25249.7(d)(1), MCCARTNEY served a 60-Day Notices of Violations of
22 Proposition 65 (“Notice of Violations”) on the California Attorney General, other public
23 enforcers, and BIOVEA alleging violations of California Health and Safety Code Section 25249.6
24 with respect to unwarned exposures to cadmium arising from the sale and use of the Covered
25 Products in California. Defendants acknowledge that the notices were received by BIOVEA.

26 1.6 After more than sixty (60) days passed since service of the Notice of Violations,
27 and with no designated governmental agency having filed a complaint against BIOVEA with
28

1 regard to the Covered Products or the alleged violations, MCCARTNEY filed the complaint in
2 this matter ("Complaint") in this Court.

3 1.7 BIOVEA generally denies all material and factual allegations contained in or
4 arising from MCCARTNEY's Notice of Violations and Complaint, and asserts that it has various
5 affirmative defenses to the claims asserted therein. BIOVEA further specifically denies that the
6 Plaintiff or California consumers have been harmed or damaged by its conduct or the products it
7 has sold or sells, including the Covered Products.

8 1.8 The Parties enter into this Consent Judgment and settlement ("Consent Judgment")
9 in order to settle, compromise, and resolve disputed claims and avoid prolonged and costly
10 litigation. For purposes of the approval and entry of this Consent Judgment only, the Parties
11 stipulate that this Court has jurisdiction over the subject matter of this Action and personal
12 jurisdiction over the Parties, that venue is proper in this Court, and that this Court has jurisdiction
13 to enter this Consent Judgment pursuant to the terms set forth herein.

14 1.9 Nothing in this Consent Judgment, nor compliance with its terms, shall constitute
15 or be construed as an admission by any of the Parties (or by any of BIOVEA's officers, directors,
16 shareholders, employees, agents, subsidiaries, divisions, affiliates, suppliers or licensees) of any
17 fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or liability, including
18 without limitation, any admission concerning any alleged violation of Proposition 65. Except as
19 expressly set forth herein, nothing in this Consent Judgment shall prejudice, waive, or impair any
20 right, remedy, argument, or defense the Parties have or may have in any other or future legal
21 proceeding. Provided, however, nothing in this Section shall affect the enforceability of this
22 Consent Judgment.

23 1.10 The "Effective Date" of this Consent Judgment shall be the date upon which this
24 Consent Judgment, after having been fully executed by all of the Parties, has been approved and
25 entered by the Court.

26 **2. INJUNCTIVE RELIEF: WARNINGS**

27 2.1 Beginning on the Effective Date, BIOVEA shall be permanently enjoined from
28 Distributing into California any Covered Products which expose a person to a "Daily Lead

1 Exposure Level” of more than 0.5 micrograms of lead per day or a “Daily Cadmium Exposure
2 Level” of more than 4.1 micrograms of cadmium per day unless it meets the warning
3 requirements set forth in Paragraph 2.2 below.

4 2.1.1 As used in this Consent Judgment, “Distributing into California” means
5 to (1) sell directly to any person in California; (2) distribute to any person in California for
6 resale; or (3) distribute to any third party outside California who BIOVEA knows will
7 redistribute into California.

8 2.1.2 For purposes of this Consent Judgment, the “Daily Lead Exposure Level”
9 shall be measured in micrograms, and shall be calculated using the following formula:
10 micrograms of lead per gram of product, multiplied by grams of product per serving of the
11 product (using the largest serving size appearing on the product label), multiplied by servings of
12 the product per day (using the largest number of servings in a recommended dosage appearing
13 on the product label), which equals micrograms of lead exposure per day.

14 2.1.3 For purposes of this Consent Judgment, the “Daily Cadmium Exposure
15 Level” shall be measured in micrograms, and shall be calculated using the following formula:
16 micrograms of cadmium per gram of product, multiplied by grams of product per serving of the
17 product (using the largest serving size appearing on the product label), multiplied by servings of
18 the product per day (using the largest number of servings in a recommended dosage appearing
19 on the product label), which equals micrograms of cadmium exposure per day.

20 2.2 Clear and Reasonable Proposition 65 Warnings

21 For Covered Products that are subject to the Proposition 65 warning requirement
22 based on Sections 2.1 and above, the following warning (“Warning”) shall be provided as
23 specified below:

24 For the cocoa powder and cacao nibs products:

25 **WARNING:** Consuming this product can expose you to cadmium, a chemical known to
26 the State of California to cause birth defects or other reproductive harm. For more information go
to www.P65Warnings.ca.gov/food.

27 For the goji berries and maca powder products:
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1 **WARNING:** Consuming this product can expose you to lead, a chemical known to the
2 State of California to cause birth defects or other reproductive harm. For more information go
3 to www.P65Warnings.ca.gov/food.

4 In lieu of the preceding warning, BIOVEA may use any warning language that complies
5 with Title 27, California Code of Regulations, section 25600 et seq., as amended August 30,
6 2016.

7 The Warning shall either be affixed to or printed on (at the point of manufacture, prior to
8 shipment to California, or prior to distribution within California) the outside packaging or
9 container of each unit of the Covered Products or provided at the point of display of the Covered
10 Products wherever it is offered for sale in California. The Warning shall be displayed with such
11 conspicuousness, as compared with other words, statements, designs or devices on the outside
12 packaging or at the point of display in California, as to render it likely to be read and understood
13 by an ordinary individual prior to purchase or use. If the Warning is displayed on the product
14 container or labeling, the Warning shall be at least the same size as the largest of any other health
15 or safety warnings on the product container or labeling, and the word "WARNING" shall be in all
16 capital letters and in bold print. If presented at the point of display, the Warning shall be
17 presented on a sign or shelf label in a font no smaller than the largest type size used for other
18 information on the sign or on a shelf label for similar products.

19 **3. REQUIRED MONETARY PAYMENTS**

20 3.1 Within seven (7) business days of the Effective Date, BIOVEA shall issue four
21 separate checks and send them to counsel for MCCARTNEY, Robert B. Hancock, Pacific Justice
22 Center, 50 California Street, San Francisco, California 94111. The checks shall be payable to the
23 following parties and the payment shall be apportioned as follows:

24 3.2 \$16,000 as civil penalties pursuant to California Health and Safety Code Section
25 25249.7(b)(1). Of this amount, \$12,000 shall be payable to the Office of Environmental Health
26 Hazard Assessment ("GEHHA"), \$2,000 shall be payable to MCCARTNEY, and \$2,000 shall be
27 payable to CancerCare, a qualified 501(c)(3) charitable organization, dedicated to providing
28 financial aid to cancer patients for treatment costs. MCCARTNEY hereby waives any statutory

1 entitlement to penalties in excess of \$2,000. MCCARTNEY's counsel shall promptly forward all
2 checks to the payees indicated.

3 3.3 \$30,000 payable to Robert B. Hancock as reimbursement of MCCARTNEY's
4 attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and Costs.").

5 3.4 Any failure to remit payment on or before its due date or any failure of said checks
6 to clear shall be deemed a material breach of this Settlement. In that event, the Parties agree that,
7 unless they then all stipulate otherwise: (1) this Settlement shall be deemed mutually rescinded,
8 and all Parties shall be restored to their positions prior to its execution and entry by the Court; and
9 (2) Plaintiff and Defendants shall jointly take all steps necessary to set aside the Consent
10 Judgment entered in connection with the Action, including, without limitation, by way of *ex parte*
11 relief, stipulation or noticed motion.

12 4. MODIFICATION

13 This Consent Judgment may be modified only by written agreement and stipulation of the
14 Parties and upon the Court's approval.

15 5. OVERSIGHT AND ENFORCEMENT OF TERMS

16 5.1 The Court shall retain jurisdiction to oversee, enforce and/or modify the terms of
17 this Consent Judgment.

18 5.2 Any Party may, by means of filing an application for an order to show cause,
19 enforce the terms and conditions contained in this Consent Judgment. The prevailing party in any
20 such action or application may request that the Court award its reasonable attorney's fees and
21 costs associated with such action or application.

22 6. APPLICATION OF CONSENT JUDGMENT

23 This Consent Judgment shall apply to and be binding upon the Parties and their respective
24 privies, successors, and assigns, and it shall be deemed to inure to the benefit of the Parties and
25 their respective privies, successors and assigns.

26 7. BINDING EFFECT, CLAIMS COVERED AND RELEASED

27 7.1 This Consent Judgment is a full, final, and binding resolution between
28 MCCARTNEY, on behalf of herself and in the public interest, on the one hand, and BIOVEA and

1 its past and present officers, directors, owners, members, shareholders, employees, agents, parent
2 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, customers,
3 distributors, wholesalers, retailers, and all other upstream and downstream entities and persons in
4 the distribution chain of any Covered Products, and the predecessors, successors and assigns of
5 any of them (collectively, "Released Parties"), on the other hand, of any and all direct or
6 derivative violations (or claimed violations) of Proposition 65 or its implementing regulations for
7 failure to provide Proposition 65 warnings of exposure to cadmium and lead from the handling,
8 use, or consumption of the Covered Products, and it fully resolves all claims that have been or
9 could have been asserted up to and including the Effective Date for the alleged failure to provide
10 Proposition 65 warnings for the Covered Products regarding cadmium and lead as set forth in the
11 Notice of Violations and Complaint.

12 7.2 MCCARTNEY on her own behalf (and not in her role as a representative of the
13 public interest) further hereby releases and discharges, BIOVEA and the Released Parties from
14 any and all claims and causes of action and obligations to pay damages, restitution, fines, civil
15 penalties, payment in lieu of civil penalties and expenses (including but not limited to expert
16 analysis fees, expert fees, attorney's fees and costs) (collectively, "Claims") based on exposure to
17 cadmium and lead from the Covered Products and/or failure to warn about cadmium and lead in
18 the Covered Products to the extent the Covered Products were sold by BIOVEA prior to the
19 Effective Date.

20 7.3 Unless modified pursuant to Section 4 above, compliance with the terms of
21 Section 2.1 of this Consent Judgment shall be deemed to constitute compliance with
22 Proposition 65 regarding the Covered Products.

23 7.4 It is possible that other Claims not known to MCCARTNEY arising out of the
24 facts alleged in the Notice of Violations or the Complaint will develop or be discovered.
25 MCCARTNEY acknowledges on behalf of herself (and not in her role as a representative of the
26 public interest) that the Claims released herein include all known and unknown Claims and
27 waives California Civil Code Section 1542 as to any such unknown Claims. California Civil
28 Code Section 1542 reads as follows:

1 "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR
2 DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME
3 OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE
4 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

5 MCCARTNEY acknowledges and understands the significance and consequences of this specific
6 waiver of California Civil Code section 1542.

7 7.5 MCCARTNEY, on one hand, and BIOVEA, on the other hand, each release and
8 waive all Claims they may have against each other for any statements or actions made or
9 undertaken by them in connection with the Notice of Violations and Complaint or the allegations
10 contained therein. However, this shall not affect or limit any Party's right to seek to enforce the
11 terms of this Consent Judgment. In addition, going forward, the Parties shall not cause any aspect
12 of the Action, the Notice of Violations, the Complaint, or the terms of this Consent Judgment not
13 otherwise available in the public record to be reported to the public or any media or news
14 reporting outlet. Any statement to the public or any media or news reporting outlet shall be
15 limited to what is available in the public record and documents publicly filed. Regardless of the
16 form or formality of a communication or statement to the media or other person or entity, neither
17 any Party nor their counsel shall disparage the other. Notwithstanding these obligations, the
18 Parties may make such disclosures regarding the Action and terms of this Consent Judgment as
19 necessary to auditors or as otherwise required by state or federal law.

20 3. CONSTRUCTION AND SEVERABILITY

21 8.1 The terms and conditions of this Consent Judgment have been reviewed by the
22 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to
23 fully discuss the terms and conditions with its counsel. In any subsequent interpretation or
24 construction of this Consent Judgment, the terms and conditions shall not be construed against
25 any Party.

26 8.2 In the event that any of the provisions of this Consent Judgment is held by a court
27 to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
28 affected.

1 8.3 The terms and conditions of this Consent Judgment shall be governed by and
2 construed in accordance with the laws of the State of California.

3 **9. PROVISION OF NOTICE**

4 All notices required to be given to either Party to this Consent Judgment by the other shall
5 be in writing and sent to the following agents listed below by: (a) first-class, registered, (b)
6 certified mail, (b) overnight courier, or (c) personal delivery to the following:

7 For Erika McCartney:
8 Robert B. Hancock
9 PACIFIC JUSTICE CENTER
 50 California Street, Suite 1500
 San Francisco, California 94111

10 For BICVEA:
11 Peg Carew Toledo
12 PEG CAREW TOLEDO, LAW CORPORATION
 3001 Douglas Boulevard, Suite 340
 Roseville, California 95661

13 **10. COURT APPROVAL**

14 10.1 The Parties shall use their reasonable best efforts to support the Court's approval
15 and entry of the Consent Judgment.

16 10.2 If the California Attorney General objects to any term in this Consent Judgment,
17 the Parties shall use their best efforts to resolve the concern in a timely manner, and, if possible,
18 prior to the hearing on the Motion for Court Approval.

19 10.3 If, despite the Parties' best efforts, the Court does not approve this settlement and
20 enter a Consent Judgment thereon, the parties shall have the option of (a) proceeding to try and
21 resolve the matter amicably or (b) determining that the settlement is null and void and of no force
22 or effect, in which event, all payment-related obligations set forth in Section 3 above shall be
23 deemed never to have existed and the Parties may thereafter proceed of their own accord.

24 **11. EXECUTION AND COUNTERPARTS**

25 This Consent Judgment may be executed in counterparts, which taken together shall be
26 deemed one document. A facsimile or .pdf signature shall be construed as valid and as the
27 original signature.

1 **12. ENTIRE AGREEMENT AUTHORIZATION**

2 12.1 This Consent Judgment contains the sole and entire agreement and understanding
3 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,
4 negotiations, commitments and understandings related hereto. No representations, oral or
5 otherwise, express or implied, other than those contained herein have been made by any party.
6 No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to
7 exist or to bind any party.

8 12.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized
9 by the party he or she represents to enter to this Consent Judgment. Except as explicitly provided
10 herein, each party shall bear its own fees and costs.

11 **13. REQUEST FOR FINDINGS AND FOR APPROVAL**

12 13.1 This Consent Judgment has come before the Court upon the request of the Parties.
13 The Parties request the Court to fully review this Consent Judgment and, being fully informed
14 regarding the matters which are the subject of this action, to make the findings pursuant to
15 California Health and Safety Code Section 25249.7(f)(4), and approve and enter this Consent
16 Judgment.

17 **IT IS SO STIPULATED.**

18 Dated: November 15, 2017



Erika McCarthy

21 Dated: November 14, 2017

BIOVEA, LLC

23 By: 

24 Its: CEO

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1 APPROVED AS TO FORM:

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Dated: 11/15/17

PACIFIC JUSTICE CENTER

By: 
Robert E. Hancock
Attorneys for Plaintiff

Dated: 11-14-17

PEG CAREW TOLEDO,
LAW CORPORATION

By: 
Peg Carew Toledo
Attorney for Defendant

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JUDGMENT

Based upon the Parties' Stipulation, and good cause appearing therefor, this Consent Judgment is approved and judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____

Judge of the Superior Court