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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF SAN FRANCISCO

9 ENVIRONMENTAL RESEARCH
10 CENTER, INC.,

11 Plaintiff,

12 v.

13 FUTUREBIOTICS, LLC; and DOES 1-50,
14 inclusive,

15 Defendants.

Case No.

CGC - 13 - 536037

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

[Health & Safety Code §25249.5, et seq.]

16
17 Plaintiff Environmental Research Center, Inc. brings this action in the interests of the
18 general public and, on information and belief, hereby alleges:

19 **INTRODUCTION**

20 1. This action seeks to remedy Defendants' continuing failure to warn consumers in
21 California that they are being exposed to lead, a substance known to the State of California¹ to
22 cause cancer, birth defects and other reproductive harm.

23 2. Defendants have manufactured, packaged, distributed, marketed, sold and/or have
24 otherwise been involved in the chain of commerce of, and continue to manufacture, package,
25 distribute, market, sell, and/or otherwise continue to be involved in the chain of commerce of the
26 following products (referred to collectively as "THE PRODUCTS"), which contain the chemical
27 lead and which have been and continue to be offered for sale, sold and/or otherwise provided for
28

¹ All statutory and regulatory references herein are to California law, unless otherwise specified.

1 use and/or handling to individuals in California:

- 2 a. Futurebiotics Vital Green
- 3 b. Futurebiotics Colon Green
- 4 c. Futurebiotics Living Energy
- 5 d. Futurebiotics Circu A.V.
- 6 e. Futurebiotics Vital K
- 7 f. Futurebiotics 100% Pure Shark Cartilage

8 3. The use and/or handling of each of THE PRODUCTS causes exposures to lead at
9 levels requiring a "clear and reasonable warning" under California's Safe Drinking Water and
10 Toxic Enforcement Act of 1986, Health & Safety Code ("H&S Code") §25249.5, *et. seq.* (also
11 known as "Proposition 65"). Defendants have failed to provide the health hazard warnings
12 required by Proposition 65.

13 4. The continued manufacturing, packaging, distributing, marketing and/or sales of
14 THE PRODUCTS without the required health hazard warnings, causes individuals to be
15 involuntarily and unwittingly exposed to levels of lead that violate Proposition 65.

16 5. Plaintiff seeks injunctive relief enjoining Defendants from the continued
17 manufacturing, packaging, distributing, marketing and/or selling of THE PRODUCTS for sale or
18 use in California without first providing clear and reasonable warnings, within the meaning of
19 Proposition 65, regarding the risks of cancer, birth defects and other reproductive harm posed by
20 exposure to lead through the use and/or handling of THE PRODUCTS. Plaintiff seeks an
21 injunctive order compelling Defendants to bring their business practices into compliance with
22 Proposition 65 by providing clear and reasonable warnings to each individual who may be
23 exposed to lead from the use and/or handling of THE PRODUCTS.

24 6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to
25 remedy Defendants' failure to provide clear and reasonable warnings regarding exposures to the
26 lead.

27 **JURISDICTION AND VENUE**

28 7. This Court has jurisdiction over this action pursuant to California Constitution

1 Article VI, Section 10, which grants the Superior Court “original jurisdiction in all causes except
2 those given by statute to other trial courts.” The statute under which this action is brought does
3 not specify any other basis for jurisdiction.

4 8. This Court has jurisdiction over Defendants because, based on information and
5 belief, Defendants are businesses having sufficient minimum contacts with California, or
6 otherwise intentionally availing themselves of the California market through the marketing,
7 distribution and/or sale of THE PRODUCTS in the State of California to render the exercise of
8 jurisdiction over them by the California courts consistent with traditional notions of fair play and
9 substantial justice.

10 9. This Court is the proper venue for this action because the Defendants have
11 violated California law in the San Francisco County, California. Furthermore, this Court is the
12 proper venue under Code of Civil Procedure §395.5 and H&S Code §25249.7(a), which provides
13 that any person who violates or threatens to violate H&S Code §§25249.5 or 25249.6 may be
14 enjoined in any court of competent jurisdiction.

15 PARTIES

16 10. Plaintiff ENVIRONMENTAL RESEARCH CENTER, INC. (“ERC”) is a non-
17 profit corporation organized under California’s Non-Profit Benefit Corporation Law. ERC is
18 dedicated to, among other causes, reducing the use and misuse of hazardous and toxic
19 substances, consumer protection, worker safety and corporate responsibility.

20 11. ERC is a “Person” within the meaning of H&S Code §25118 and H&S Code
21 §25249.11(a), and brings this enforcement action “in the public interest” pursuant to H&S Code
22 §25249.7(d).

23 12. Defendant FUTUREBIOTICS, LLC is a New York limited liability company and
24 is a “Person” within the meaning of H&S Code §25249.11(a). Defendant FUTUREBIOTICS,
25 LLC has manufactured, packaged, distributed, marketed, sold and/or has otherwise been
26 involved in the chain of commerce of, and continues to manufacture, package, distribute, market,
27 sell, and/or otherwise continues to be involved in the chain of commerce of THE PRODUCTS
28 for sale or use in California. Based on information and belief, Defendant FUTUREBIOTICS,

1 LLC, at all times relevant to this action, has had and now has 10 or more employees and is a
2 “Person in the course of doing business” pursuant to H&S Code §25249.11(b).

3 13. Defendants DOES 1-50 are named herein under fictitious names, as their true
4 names and capacities are unknown to Plaintiff. ERC is informed and believes, and thereon
5 alleges, that each of said Does has manufactured, packaged, distributed, marketed, sold and/or
6 has otherwise been involved in the chain of commerce of, and continues to manufacture,
7 package, distribute, market, sell, and/or otherwise continues to be involved in the chain of
8 commerce of THE PRODUCTS for sale or use in California, and/or is responsible, in some
9 actionable manner, for the events and happenings referred to herein, either through its conduct or
10 through the conduct of its agents, servants or employees, or in some other manner, causing the
11 harms alleged herein. Plaintiff will seek leave to amend this Complaint to set forth the true
12 names and capacities of Does when ascertained.

13 STATUTORY BACKGROUND

14 14. The People of the State of California have declared in Proposition 65 their right
15 “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
16 reproductive harm.” (Section 1(b) of Initiative Measure, Proposition 65).

17 15. To effect this goal, Proposition 65 requires that individuals be provided with a
18 “clear and reasonable warning” before being exposed to substances listed by the State of
19 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent
20 part:

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

24 16. Proposition 65 provides that any person who “violates or threatens to violate” the
25 statute “may be enjoined in any court of competent jurisdiction.” (H&S Code §25249.7(a).)
26 “Threaten to violate” is defined to mean creating “a condition in which there is a substantial
27 probability that a violation will occur.” (H&S Code §25249.11(e).) Violators are liable for civil
28 penalties of up to \$2,500 per day for each violation of Proposition 65. (H&S Code §25249.7(b).)

1 **FACTUAL BACKGROUND**

2 17. On February 27, 1987, the State of California officially listed the chemical lead as
3 a chemical known to cause developmental and reproductive toxicity. Lead became subject to the
4 warning requirement one year later and was therefore subject to the “clear and reasonable”
5 warning requirements of Proposition 65 beginning on February 27, 1988. (27 California Code of
6 Regulations (“CCR”) §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

7 18. On October 1, 1992, the State of California officially listed the chemical lead as a
8 chemical known to cause cancer. Lead became subject to the warning requirement one year later
9 and was therefore subject to the “clear and reasonable” warning requirements of Proposition 65
10 beginning on October 1, 1993. (27 CCR §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

11 19. Plaintiff is informed and believes, and based on such information and belief,
12 alleges THE PRODUCTS have been marketed, distributed, sold, or otherwise provided to
13 individuals in California without the requisite clear and reasonable warnings before, on, and after
14 March 25, 2008. THE PRODUCTS continue to be marketed, distributed and sold in California
15 without the requisite warning information.

16 20. As a proximate result of acts by Defendants, as persons in the course of doing
17 business within the meaning of H&S Code §25249.11(b), individuals throughout the State of
18 California, including in the County of San Francisco, have been exposed to lead without clear
19 and reasonable warnings. The individuals subject to exposures to lead include normal and
20 foreseeable users of THE PRODUCTS, as well as all other persons exposed to THE
21 PRODUCTS.

22 21. At all times relevant to this action, Defendants have knowingly and intentionally
23 exposed the users and/or handlers of THE PRODUCTS to lead without first giving clear and
24 reasonable warnings to such individuals.

25 22. Individuals using or handling THE PRODUCTS are exposed to lead in excess of
26 the “maximum allowable daily” and “no significant risk” levels determined by the State of
27 California, as applicable.

28 23. At all times relevant to this action, Defendants have, in the course of doing

1 business, failed to provide individuals using and/or handling THE PRODUCTS with clear and
2 reasonable warnings that THE PRODUCTS exposes individuals to lead.

3 24. THE PRODUCTS continue to be marketed, distributed, and/or sold in California
4 without the requisite clear and reasonable warnings.

5 **FIRST CAUSE OF ACTION**

6 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, et seq. concerning**
7 **THE PRODUCTS, which are identified in Plaintiff's March 25, 2011 and December 10,**
8 **2012 60-Day Notices of Violations)**

9 25. Plaintiff realleges and incorporates by reference Paragraphs 1 through 24,
10 inclusive, as if specifically set forth herein.

11 26. On March 25, 2011 and December 10, 2012, Plaintiff sent 60-Day Notices of
12 Proposition 65 violations to the requisite public enforcement agencies and to Defendant
13 FUTUREBIOTICS, LLC ("Notices of Violations"). THE PRODUCTS were identified in the
14 Notices of Violations as containing lead exceeding allowable levels. The Notices of Violations
15 were issued pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d)
16 and the statute's implementing regulations regarding the notice of violations to be given to
17 certain public enforcement agencies and to the violator. The Notices of Violations were issued
18 as follows:

- 19 a. Defendant FUTUREBIOTICS, LLC and the California Attorney General
20 were provided copies by First Class Certified Mail of the Notices of
21 Violations, along with Certificates of Merit by the attorney for the noticing
22 party stating that there is a reasonable and meritorious cause for this
23 action. The requisite county district attorneys and city attorneys were
24 provided copies by First Class Mail of the Notices of Violations and
25 Certificates of Merit.
- 26 b. Defendant FUTUREBIOTICS, LLC was provided, with each Notice of
27 Violations, a copy of a document entitled "The Safe Drinking Water and
28 Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is
also known as Appendix A to Title 27 of CCR §25903.

1 c. The California Attorney General was provided, with each Notice of
2 Violations, additional factual information sufficient to establish a basis for
3 the respective Certificate of Merit, including the identity of the persons
4 consulted with and relied on by the certifier, and the facts, studies, or other
5 data reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1)
6 and 25249.7(h)(2).

7 27. The appropriate public enforcement agencies have failed to commence and
8 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendants
9 based on the allegations herein.

10 28. By committing the acts alleged in this Complaint, Defendants at all times relevant
11 to this action, and continuing through the present, have violated and continue to violate H&S
12 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
13 individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding
14 allowable exposure levels without Defendants first giving clear and reasonable warnings to such
15 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants have manufactured,
16 packaged, distributed, marketed, sold and/or have otherwise been involved in the chain of
17 commerce of, and continue to manufacture, package, distribute, market, sell, and/or otherwise
18 continue to be involved in the chain of commerce of THE PRODUCTS, which have been, are,
19 and will be used and/or handled by individuals in California, without Defendants providing clear
20 and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer,
21 birth defects and other reproductive harm posed by exposure to lead through the use and/or
22 handling of THE PRODUCTS. Furthermore, Defendants have threatened to violate H&S Code
23 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided
24 for use and/or handling to individuals in California.

25 29. By the above-described acts, Defendants have violated H&S Code §25249.6 and
26 are therefore subject to an injunction ordering Defendants to stop violating Proposition 65, and to
27 provide required warnings to consumers and other individuals who will purchase, use and/or
28 handle THE PRODUCTS.

1 Toxic Enforcement Act of 1986 (Proposition 65): A Summary,” which is
2 also known as Appendix A to Title 27 of CCR §25903.

3 c. The California Attorney General was provided, with each Notice of
4 Violations, additional factual information sufficient to establish a basis for
5 the respective Certificate of Merit, including the identity of the persons
6 consulted with and relied on by the certifier, and the facts, studies, or other
7 data reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1)
8 and 25249.7(h)(2).

9 34. The appropriate public enforcement agencies have failed to commence and
10 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendants
11 based on the allegations herein.

12 35. By committing the acts alleged in this Complaint, Defendants at all times relevant
13 to this action, and continuing through the present, have violated and continue to violate H&S
14 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
15 individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding
16 allowable exposure levels without Defendants first giving clear and reasonable warnings to such
17 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants have manufactured,
18 packaged, distributed, marketed, sold and/or have otherwise been involved in the chain of
19 commerce of, and continue to manufacture, package, distribute, market, sell, and/or otherwise
20 continue to be involved in the chain of commerce of THE PRODUCTS, which have been, are,
21 and will be used and/or handled by individuals in California, without Defendants providing clear
22 and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer,
23 birth defects and other reproductive harm posed by exposure to lead through the use and/or
24 handling of THE PRODUCTS. Furthermore, Defendants have threatened to violate H&S Code
25 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided
26 for use and/or handling to individuals in California.

27 36. By the above-described acts, Defendants are liable, pursuant to H&S Code
28 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6

1 relating to THE PRODUCTS.

2 Wherefore, plaintiff prays judgment against Defendants, as set forth hereafter.

3 **THE NEED FOR INJUNCTIVE RELIEF**

4 37. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 36, as
5 if set forth below.

6 38. By committing the acts alleged in this Complaint, Defendants have caused
7 irreparable harm for which there is no plain, speedy or adequate remedy at law. In the absence
8 of equitable relief, Defendants will continue to create a substantial risk of irreparable injury by
9 continuing to cause consumers to be involuntarily and unwittingly exposed to lead through the
10 use and/or handling of THE PRODUCTS.

11 **PRAYER FOR RELIEF**

12 Wherefore, Plaintiff prays for the following relief:

13 A. A preliminary and permanent injunction enjoining Defendants, their agents,
14 employees, assigns and all persons acting in concert or participating with Defendants, from
15 manufacturing, packaging, distributing, marketing and/or selling THE PRODUCTS for sale or
16 use in California without first providing clear and reasonable warnings, within the meaning of
17 Proposition 65, that the users and/or handlers of THE PRODUCTS are exposed to the lead.

18 B. An assessment of civil penalties, pursuant to Health & Safety Code §25249.7(b),
19 against Defendants in the amount of \$2,500 per day for each violation of Proposition 65;

20 C. An award to Plaintiff of its reasonable attorney fees pursuant to California Code
21 of Civil Procedure §1021.5 or the substantial benefit theory;

22 D. An award of costs of suit herein; and

23 E. Such other and further relief as may be just and proper.

24 Dated: December 10, 2013

LAW OFFICE OF PHILIP T. EMMONS

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By: 

Philip T. Emmons

Attorney for Plaintiff

Environmental Research Center, Inc.