

MAR 10 2014

CLERK OF THE COURT

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 ENVIRONMENTAL RESEARCH
12 CENTER, INC.,

13 Plaintiff,

14 v.

15 FUTUREBIOTICS, LLC; and DOES 1-50,
16 inclusive,

17 Defendants.

Case No. CGC-13-536037

**FIRST AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF AND CIVIL
PENALTIES**

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

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

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

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

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

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

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

26 **JURISDICTION AND VENUE**

27 7. This Court has jurisdiction over this action pursuant to California Constitution
28 Article VI, Section 10, which grants the Superior Court “original jurisdiction in all causes except

1 those given by statute to other trial courts.” The statute under which this action is brought does
2 not specify any other basis for jurisdiction.

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

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

14 PARTIES

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

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

22 12. Defendant FUTUREBIOTICS, LLC is a New York limited liability company and
23 is a “Person” within the meaning of H&S Code §25249.11(a). Defendant FUTUREBIOTICS,
24 LLC has manufactured, packaged, distributed, marketed, sold and/or has otherwise been
25 involved in the chain of commerce of, and continues to manufacture, package, distribute, market,
26 sell, and/or otherwise continues to be involved in the chain of commerce of THE PRODUCTS
27 for sale or use in California. Based on information and belief, Defendant FUTUREBIOTICS,
28 LLC, at all times relevant to this action, has had and now has 10 or more employees and is a

1 “Person in the course of doing business” pursuant to H&S Code §25249.11(b).

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

12 **STATUTORY BACKGROUND**

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

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

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

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

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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 December 10, 2009. THE PRODUCTS continue to be marketed, distributed and sold in
15 California 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 expose 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 December 10, 2012 60-Day Notice of**
8 **Violations)**

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

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

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

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

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

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

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

28 30. An action for injunctive relief under Proposition 65 is specifically authorized by

1 Health & Safety Code §25249.7(a).

2 31. Continuing commission by Defendants of the acts alleged above will irreparably
3 harm the citizens of the State of California, for which harm they have no plain, speedy, or
4 adequate remedy at law.

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

6 **SECOND CAUSE OF ACTION**

7 **(Civil Penalties for Violations of Health and Safety Code §25249.5, et seq. concerning THE**
8 **PRODUCTS, which are identified in Plaintiff's December 10, 2012 60-Day Notice of**
9 **Violations)**

10 32. Plaintiff realleges and incorporates by reference Paragraphs 1 through 31,
11 inclusive, as if specifically set forth herein.

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

- 19 a. Defendant FUTUREBIOTICS, LLC and the California Attorney General
20 were provided copies by First Class Certified Mail of the Notice of
21 Violations, along with a Certificate of Merit by the attorney for the
22 noticing party stating that there is a reasonable and meritorious cause for
23 this action. The requisite county district attorneys and city attorneys were
24 provided copies by First Class Mail of the Notice of Violations and the
25 Certificate of Merit.
- 26 b. Defendant FUTUREBIOTICS, LLC was provided, with the 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 the 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 34. 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 35. 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 36. By the above-described acts, Defendants are liable, pursuant to H&S Code
26 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6
27 relating to THE PRODUCTS.

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

