

1 Philip T. Emmons (SBN 124902)
2 Law Office of Philip T. Emmons
3 1990 N. California Blvd., 8th Floor
4 Walnut Creek, CA 94596
5 T: (925) 287-6436
6 F: (925) 287-6437

7 Attorneys for Plaintiff
8 Environmental Research Center, Inc.

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
05/21/2015
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

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-14-543098

**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 (1) Futurebiotics Colon Green
- 3 (2) Futurebiotics Living Energy
- 4 (3) Futurebiotics Circu A.V.
- 5 (4) Futurebiotics Vital K
- 6 (5) Futurebiotics 100% Pure Shark Cartilage
- 7 (6) Futurebiotics Nutrition for Men Male Power
- 8 (7) Futurebiotics Cholestra-Lo
- 9 (8) Futurebiotics Pressur-Lo
- 10 (9) Futurebiotics Nutrition for Men Hair, Skin & Nails
- 11 (10) Futurebiotics Prostadvance

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

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

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

28 6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to

1 remedy Defendants' failure to provide clear and reasonable warnings regarding exposures to the
2 lead.

3 JURISDICTION AND VENUE

4 7. This Court has jurisdiction over this action pursuant to California Constitution
5 Article VI, Section 10, which grants the Superior Court "original jurisdiction in all causes except
6 those given by statute to other trial courts." The statute under which this action is brought does
7 not specify any other basis for jurisdiction.

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

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

19 PARTIES

20 10. Plaintiff ENVIRONMENTAL RESEARCH CENTER, INC. ("ERC") is a non-
21 profit corporation organized under California's Non-Profit Benefit Corporation Law. ERC is
22 dedicated to, among other causes, reducing the use and misuse of hazardous and toxic
23 substances, consumer protection, worker safety and corporate responsibility.

24 11. ERC is a "Person" within the meaning of H&S Code §25118 and H&S Code
25 §25249.11(a), and brings this enforcement action "in the public interest" pursuant to H&S Code
26 §25249.7(d).

27 12. Defendant FUTUREBIOTICS, LLC is a New York limited liability company and
28 is a "Person" within the meaning of H&S Code §25249.11(a). Defendant FUTUREBIOTICS,

1 LLC has manufactured, packaged, distributed, marketed, sold and/or has otherwise been
2 involved in the chain of commerce of, and continues to manufacture, package, distribute, market,
3 sell, and/or otherwise continues to be involved in the chain of commerce of THE PRODUCTS
4 for sale or use in California. Based on information and belief, Defendant FUTUREBIOTICS,
5 LLC, at all times relevant to this action, has had and now has 10 or more employees and is a
6 “Person in the course of doing business” pursuant to H&S Code §25249.11(b).

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

17 STATUTORY BACKGROUND

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

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

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

28 16. Proposition 65 provides that any person who “violates or threatens to violate” the

1 statute “may be enjoined in any court of competent jurisdiction.” (H&S Code §25249.7(a).)
2 “Threaten to violate” is defined to mean creating “a condition in which there is a substantial
3 probability that a violation will occur.” (H&S Code §25249.11(e).) Violators are liable for civil
4 penalties of up to \$2,500 per day for each violation of Proposition 65. (H&S Code §25249.7(b).)

5 FACTUAL BACKGROUND

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

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

15 19. Plaintiff is informed and believes, and based on such information and belief,
16 alleges THE PRODUCTS have been marketed, distributed, sold, or otherwise provided to
17 individuals in California without the requisite clear and reasonable warnings before, on, and after
18 December 10, 2009. THE PRODUCTS continue to be marketed, distributed and sold in
19 California without the requisite warning information.

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

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

1 b. Defendant FUTUREBIOTICS, LLC was provided, with each Notice of
2 Violations, a copy of a document entitled "The Safe Drinking Water and
3 Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is
4 also known as Appendix A to Title 27 of CCR §25903.

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

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

14 28. By committing the acts alleged in this Complaint, Defendants at all times relevant
15 to this action, and continuing through the present, have violated and continue to violate H&S
16 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
17 individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding
18 allowable exposure levels without Defendants first giving clear and reasonable warnings to such
19 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants have manufactured,
20 packaged, distributed, marketed, sold and/or have otherwise been involved in the chain of
21 commerce of, and continue to manufacture, package, distribute, market, sell, and/or otherwise
22 continue to be involved in the chain of commerce of THE PRODUCTS, which have been, are,
23 and will be used and/or handled by individuals in California, without Defendants providing clear
24 and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer,
25 birth defects and other reproductive harm posed by exposure to lead through the use and/or
26 handling of THE PRODUCTS. Furthermore, Defendants have threatened to violate H&S Code
27 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided
28 for use and/or handling to individuals in California.

1 provided copies by First Class Mail of the Notices of Violations and
2 Certificates of Merit.

3 b. Defendant FUTUREBIOTICS, LLC was provided, with each Notice of
4 Violations, a copy of a document entitled "The Safe Drinking Water and
5 Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is
6 also known as Appendix A to Title 27 of CCR §25903.

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

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

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

1 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided
2 for use and/or handling to individuals in California.

3 36. By the above-described acts, Defendants are liable, pursuant to H&S Code
4 §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6
5 relating to THE PRODUCTS.

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

7 **THE NEED FOR INJUNCTIVE RELIEF**

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

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

15 **PRAYER FOR RELIEF**

16 Wherefore, Plaintiff prays for the following relief:

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

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

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

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

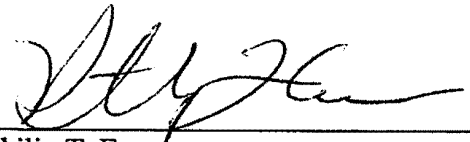
27 E. Such other and further relief as may be just and proper.

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: 5/21/15

LAW OFFICE OF PHILIP T. EMMONS

By: 

Philip T. Emmons
Attorney for Plaintiff
Environmental Research Center, Inc.

1 *Environmental Research Center v. Futurebiotics, LLC, et al.*

2 Case Number: CGC-14-543098

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I, Philip T. Emmons, am a resident of the State of California, over the age of eighteen years, an active member of the State Bar of California, and not a party to the within entitled action. My business address is the Law Office of Philip T. Emmons, 1990 N. California Blvd., 8th Floor, Walnut Creek, CA 94596.

On 5/21/15, I electronically served the following document(s) via File & ServeXpress:


FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

on the recipients designated on the Transaction Receipt located on the File & ServeXpress website on 5/21/15, which includes the following:

Monty Agarwal ARNOLD & PORTER LLP Three Embarcadero Center, 10 th Floor San Francisco, CA 94111	
---	--

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 5/21/15


Philip T. Emmons