

ENDORSED FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

OCT 08 2020

CLERK OF THE COURT
ANGELICA SUNGA

BY: _____ Deputy Clerk

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

10 ENVIROPROTECT, LLC, in the public
interest,

11 Plaintiff,

12 vs.

13 NUTRITIONAL MEDICINALS, LLC, a
14 Delaware Limited Liability Company; and
15 DOES 1 through 50, inclusive,

16 Defendants.

Case Number: CGC-20-587042

COMPLAINT FOR INJUNCTIVE RELIEF
AND CIVIL PENALTIES

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement Act
of 1986 (Health and Safety Code § 25249.5 *et*
seq.)

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18
19 Plaintiff EnviroProtect, LLC ("EP" or "Plaintiff"), in the public interest, alleges as follows
20 as to matters within its own knowledge, and on information and belief as to all other matters:

21 INTRODUCTION

22 1. This action seeks to remedy the alleged failure of Nutritional Medicinals, LLC
23 ("Nutritional Medicinals") and DOES 1-50 (hereinafter individually referred to as "Defendant"
24 and collectively as "Defendants") to warn consumers in California that they are being exposed to
25 lead, a substance known to the State of California to cause cancer and
26 developmental/reproductive toxicity. Plaintiff alleges such exposures have occurred through the
27 manufacture, distribution, sale and consumer consumption of certain of Defendants' products
28

COMPLAINT

FAXED

1 sold under the “Functional Formularies” name including Liquid Hope (Original and Peptide
2 Formula), Nourish (Original and Peptide Formula), and Keto, which were imported, sold and/or
3 distributed for sale in California by Nutritional Medicinals (the “Products”). California
4 consumers are directly exposed to lead through the ingestion of the Products.

5 2. Pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
6 Safety Code Section 25249.5 *et seq.* (hereinafter “Proposition 65”), it is unlawful for businesses
7 to knowingly and intentionally expose individuals in California to chemicals known to the State
8 to cause cancer and/or birth defects or other reproductive harm above the safe harbor levels,
9 which include the No Significant Risk Levels (“NSRLs”) and/or Maximum Allowable Dose
10 Levels (“MADLs”) without providing “clear and reasonable” warnings to individuals prior to
11 their exposure.

12 3. Despite the fact that Defendants’ Products allegedly expose consumers to levels of lead
13 above the listed MADLs, Plaintiff contends that Defendants failed to provide any warnings
14 whatsoever about the carcinogenic and reproductive hazards associated with lead exposure.
15 Moreover, Defendants’ manufacture, packaging, distribution, marketing, and/or sales of the
16 Products without the required health hazard warnings, causes consumers to be involuntarily,
17 unknowingly and unwittingly exposed to levels of lead that violate Proposition 65. Thus,
18 Defendants’ conduct subjects them to civil penalties and injunctive relief.

19 **JURISDICTION AND VENUE**

20 4. This Court has jurisdiction over this action pursuant to Cal. Health & Safety Code §
21 25249.7, which allows enforcement in any court of competent jurisdiction. The California
22 Superior Court has jurisdiction over this action pursuant to California Constitution Article VI,
23 Section 10, which grants the Superior Court “original jurisdiction in all cases except those given
24 by statute to other trial courts.” The statute under which this is brought does not specify any other
25 court with jurisdiction.

26 5. This Court has jurisdiction over Defendants because they are business entities that do
27 sufficient business, have sufficient minimum contacts or otherwise intentionally avails themselves
28

1 of the California market through the sale, marketing, or use of the Products in the California
2 market and/or by having such other contact with California so as to render the exercise of
3 jurisdiction over them by the California courts consistent with traditional notions of fair play and
4 substantial justice.

5 6. Venue is proper in this Court because, upon information and belief, one or more of the
6 violations arise in San Francisco County.

7 **THE PARTIES**

8 7. EP is a limited liability company organized under the laws of California acting in the
9 interest of the general public seeking to further, among other causes, the protection of the
10 environment, awareness of dangerous chemicals in consumer products, and corporate
11 accountability. EP is a "person" within the meaning of Cal. Health & Safety Code § 25249.11(a)
12 and brings this enforcement action in the public interest pursuant to Cal. Health & Safety Code §
13 25249.7(d).

14 8. EP is informed and believes, and thereon alleges, that defendant Nutritional Medicinals is a
15 Delaware Limited Liability Company who supplies meal replacement products to various retail
16 stores in the state of California as well as ships such products directly to California consumers.
17 Nutritional Medicinals is a "person in the course of doing business" within the meaning of Cal.
18 Health & Safety Code § 25249.11(b). Nutritional Medicinals is subject to Proposition 65 as it
19 employs ten or more persons and has employed ten or more persons at all relevant times to this
20 action.

21 9. EP is unaware of the true names or capacities of the Defendants sued herein under the
22 fictitious names DOES 1-50, but prays for leave to amend and serve such fictitiously named
23 Defendants pursuant to California Code of Civil Procedure § 474, once their names and capacities
24 become known.

25 10. EP is informed and believes, and thereon alleges, that each and all of the acts and
26 omissions alleged herein were performed by, or are attributable to, Defendants and DOES 1-50,
27 each acting as the agent for the other, with legal authority to act on the other's behalf. Upon
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1 information and belief, the acts of Defendants were in accordance with, and represent the official
2 policies of Defendants.

3 11. At all times herein mentioned, upon information and belief, the Defendants, and each of
4 them, ratified each and every act or omission complained of herein. At all times herein
5 mentioned, upon information and belief, Defendants, and each of them, aided and abetted the acts
6 and omissions of each and all the other Defendants proximately causing the damages herein
7 alleged.

8 12. EP is informed and believes, and thereon alleges, that each of Defendants are in some
9 manner intentionally, negligently, or otherwise responsible for the acts, omissions, occurrences,
10 and transactions alleged herein.

11 **STATUTORY AND REGULATORY BACKGROUND**

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

15 14. To effectuate this goal, Proposition 65 requires that individuals be provided with a "clear
16 and reasonable warning" before being exposed to substances listed by the State of California as
17 causing cancer or reproductive toxicity. Cal. Health and Safety Code §25249.6 states, in pertinent
18 part:

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

23 15. A product exposure to a chemical is one that "results from a person's acquisition,
24 purchase, storage, consumption, or other reasonably foreseeable use of a product" 27 C.C.R.
25 §25600(h).

26 16. In this case, the exposures are caused by consumer products. Consumer products are
27 defined as "any article, or component part thereof, including food, that is produced, distributed, or
28 sold for the personal use, consumption or enjoyment of a consumer." 27 C.C.R. §25102(i).

1 17. Proposition 65 provides that any “person who violates or threatens to violate” the statute
2 may be enjoined in a court of competent jurisdiction. Cal. Health & Safety Code §25249.7. The
3 phrase “threaten to violate” is defined to mean creating “a condition in which there is a substantial
4 probability that a violation will occur” Cal. Health & Safety Code §25249.11(e). Violators are
5 liable for civil penalties of up to \$2,500 per day for each violation of the Act. Cal. Health &
6 Safety Code §25249.7.

7 18. On February 27, 1987, the State of California officially listed lead as a chemical known to
8 cause developmental toxicity in the fetus and male and female reproductive toxicity. On October
9 1, 1992, the State of California officially listed lead as a chemical known to cause cancer. One
10 year after lead was listed as a chemical known to cause cancer and reproductive/developmental
11 toxicity, lead became subject to the clear and reasonable warning requirement regarding under
12 Proposition 65. 27 C.C.R. §27001(c); Cal. Health & Safety Code §25249.10(b). Due to the
13 toxicity of lead, the California Office of Environmental Health Hazard Assessment (“OEHHA”)
14 set the NSRL for lead as a carcinogen at 15 micrograms per day and a MADL for lead as chemical
15 known to cause reproductive toxicity at 0.5 micrograms per day.

16 STATEMENT OF RELEVANT FACTS

17 19. EP purchased the Products in October 2019.

18 20. To test Defendants’ Products for lead, EP engaged a well-respected and accredited testing
19 laboratory to determine the amount of lead contained in the Products pursuant to testing methods
20 adopted by the Federal Consumer Products Safety Commission. The testing revealed that the
21 Product had levels of lead that Plaintiff believes would result in exposure of lead to consumers far
22 higher than the limit proscribed by MADL.

23 21. Plaintiff alleges that Defendants’ Products contain sufficient quantities of lead such that
24 individuals who ingest the Products, through feeding tubes, are exposed to significant amounts of
25 lead through the average and intended use of the Products.

1 22. Plaintiff alleges that Defendants know and intend that consumers will use the Products in
2 manner stated above, and that they will be exposed to any chemicals such as lead that exist in the
3 Products.

4 23. At all times relevant to this action, Defendants, therefore, have knowingly and
5 intentionally exposed the consumers of the Products to lead without first giving a clear and
6 reasonable warning to such individuals.

7 24. EP is informed and believes, and thereon alleges, that Defendants have, since October
8 2019, and continuing through the present, exposed consumers to lead without providing clear and
9 reasonable warnings regarding the carcinogenic and reproductive hazards of ingesting lead.

10 25. As a proximate result of acts by Defendants, as persons in the course of doing business
11 within the meaning of Health & Safety Code §25249.11, Plaintiff alleges they have subjected
12 consumers to violative exposures through the normal and foreseeable use of the Products.

13 26. Any person acting in the public interest has standing to enforce violations of Proposition
14 65 provided that such person has supplied the requisite public enforcers with a valid 60-Day
15 Notice of Violation and such public enforcers are not diligently prosecuting the action with such
16 time. Cal. Health & Safety Code §25249.7(d).

17 27. On February 21, 2020, EP provided a “60-Day Notice of Violations of California Health &
18 Safety Code Section 25249.5 et seq.” (“Notice”) to the California Attorney General, the District
19 Attorneys of every county in California, and the City Attorneys of every California city with a
20 population greater than 750,000 where EP alleges a violation occurred. Defendants were also
21 provided a copy of the Notice. The Notice included, *inter alia*, the following information: the
22 name, address, and telephone number of the noticing individual; the name of the alleged violator;
23 the statute violated; the approximate time period during which violations occurred; and
24 descriptions of the violations including the chemicals involved, the routes of toxic exposure, and
25 the specific product or type of product causing the violations. The Notice package to Defendants
26 also included the most recent version of Appendix A, the Final Adopted Regulatory Text for Title
27 27 of the California Code of Regulations, Section 5903 as amended. In compliance with
28

1 California Health & Safety Code § 25249.7(d) and 11 C.C.R. §3102, EP provided factual
2 information – on a confidential basis – to the Attorney General sufficient to satisfy basis for the
3 Certificate of Merit, including the testing performed by EP, and/or its litigation consultants, and
4 the facts, studies, or other data supporting the Certificate.

5 28. After expiration of the sixty (60) day notice period, the appropriate public enforcement
6 agencies have failed to commence and diligently prosecute a cause of action under California
7 Health & Safety Code §25249.5 *et seq.* against Defendants based on the allegations herein.

8 29. EP has engaged in good faith efforts to resolve the claims alleged herein prior to filing this
9 complaint, and as a result, the parties have reached a consent judgment that they intend to file with
10 the Court to resolve the claims in this lawsuit.

11 **FIRST CAUSE OF ACTION**

12 **(Injunctive Relief Pursuant to Cal. Health & Safety Code §25249.5 *et seq.*)**

13 30. EP incorporates by reference and re-alleges as if fully stated herein the material allegations
14 set out in paragraphs 1 through 29, inclusive.

15 31. By committing the acts alleged in this Complaint, Plaintiff alleges that Defendants at all
16 times relevant to this action, and continuing through the present, have violated California Health
17 & Safety Code §25249.6 by, in the course of doing business, knowingly and intentionally
18 exposing individuals in California to chemicals known to the State of California to cause cancer or
19 reproductive toxicity without first giving clear and reasonable warnings to such persons who
20 consume the Products containing lead, pursuant to California Health & Safety Code §§25249.6
21 and 25249.11(f).

22 32. By the above-described acts, Plaintiff alleges Defendants have violated California Health
23 & Safety Code §25249.6 and are therefore subject to preliminary and permanent injunctions
24 ordering Defendants to stop violating Proposition 65, to provide warnings to all present and future
25 customers, and to provide warnings to Defendants' past customers who purchased or used the
26 Products without receiving a clear and reasonable warning.

1 33. An action for injunctive relief under Proposition 65 is specifically authorized by California
2 Health & Safety Code §25249.7(a).

3 34. Plaintiff alleges that Defendants actions in selling the Products without clear and
4 reasonable warnings will irreparably harm the citizens of the State of California, for which harm
5 they have no plain, speedy, or adequate remedy at law.

6 35. In the absence of preliminary and then permanent injunctive relief, Plaintiff alleges that
7 Defendants will continue to create a substantial risk of irreparable injury by continuing to cause
8 consumers to be involuntarily, unknowingly and unwittingly exposed to lead through the
9 consumption of the Products.

10 **SECOND CAUSE OF ACTION**

11 **(Civil Penalties Pursuant to Cal. Health & Safety Code §25249.5 *et seq*)**

12 36. EP incorporates by reference and re-alleges as if fully stated herein the material allegations
13 set out in paragraphs 1 through 35, inclusive.

14 37. By committing the acts alleged in this Complaint, Plaintiff alleges Defendants at all times
15 relevant to this action, and continuing through the present, have violated California Health &
16 Safety Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
17 individuals in California to chemicals known to the State of California to cause cancer or
18 reproductive toxicity without first giving clear and reasonable warnings to such persons who
19 consume the Products containing lead, pursuant to California Health & Safety Code §§25249.6
20 and 25249.11(f).

21 38. By engaging in the above-described acts, Plaintiff alleges Defendants are liable, pursuant
22 to California Health & Safety Code §25249.7(b), for a civil penalty of up to \$2,500 per day per
23 violation for each unlawful exposure to lead from the Products in an amount in excess of \$1
24 million.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, EP prays for relief and judgment against Defendants, and each of them, as
27 follows:

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1 As to the Causes of Action

2 1. A preliminary and permanent injunction, pursuant to California Health &
3 Safety Code Code §25249.7(a), enjoining Defendants, their agents, employees, assigns and all
4 persons acting in concert or participating with Defendants, from manufacturing, distributing,
5 marketing or selling the Products in California without either reformulating the Products or
6 providing a clear and reasonable warning, within the meaning of Proposition 65, that consumers of
7 the Products are exposed to lead;

8 2. An Order pursuant to California Health & Safety Code §25249.7(a)
9 compelling Defendants to use best methods to identify and locate each individual who purchased
10 the Products during the statutory period, and to provide a warning to such person that the use of
11 the Products will expose them to chemicals known to cause cancer and/or reproductive toxicity;

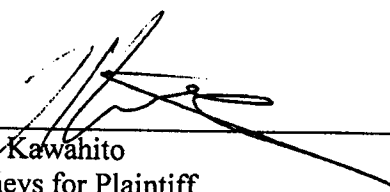
12 3. An assessment of civil penalties pursuant to California Health & Safety
13 Code §25249.7(b) against Defendants in the amount of \$2,500 per day for each violation of
14 Proposition 65, in an amount to be determined at trial;

15 4. For an award to EP of its reasonable attorneys' fees and costs of suit
16 incurred herein; and

17 5. For such equitable or other relief as the Court may deem just and proper.
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19 Dated: October 7, 2020

KAWAHITO LAW GROUP APC

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21 
22 By: _____
23 James Kawahito
24 Attorneys for Plaintiff
25 ENVIROPROTECT, LLC
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