

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

FILED BY                      DKT

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CASE NO. 03-61369-Civ. (HUCK/TURNOFF)

CLARENCE B. MEDOX  
CLERK U.S. DIST. CT.  
S.D. OF FL.-MIAMI

KILEY BECHLER, as personal representative of  
and Executrix of the Estate of STEVEN SCOTT  
BECHLER,

Plaintiff,

vs.

JURY TRIAL DEMANDED

CYTODYNE TECHNOLOGIES, INC., ROBERT  
CHINERY, PHOENIX LABORATORIES, INC.,  
GENERAL NUTRITION COMPANIES, INC.,  
EVERGOOD PRODUCTS CORPORATION,  
CYTODYNE, LLC, f/k/a EVERRICH, LLC,  
CYTODYNE I, LLC, f/k/a EVERMEL, LLC,  
MEL RICH, STEVEN STERN, and RTC RESEARCH  
& DEVELOPMENT, LLC,

Defendants.



SECOND AMENDED COMPLAINT

Plaintiff Kiley Bechler, as personal representative of and Executrix of the Estate of Steven Scott Bechler, by her attorneys, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. and Meiselman, Denlea, Packman & Eberz P.C., as and for her second amended complaint, brings this action for wrongful death pursuant to the Florida Wrongful Death Act and alleges, with personal knowledge as to her own actions, and upon information and belief as to those of others, as follows:

Nature of the Case

1. This case arises out the death of 23-year-old Steve Bechler, a promising young pitcher for the Baltimore Orioles. Steve Bechler died after ingesting Xenadrine RFA-1. Defendants' manufacture, distribution, and/or sale of Xenadrine RFA-1, which

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/AT

is an inherently and unreasonably dangerous ephedra-based product, prematurely cut short the life of a Major League Baseball player and stripped forever from the Bechler family a loving husband and expectant father.

#### Jurisdiction and Venue

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 in that plaintiff and defendants are citizens of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a).

4. Defendants are subject to the jurisdiction of this Court because they have (i) committed a tortious act within the state, FSA §48.193(1)(b), (ii) caused injury to Steve Bechler within the state arising out of acts or omissions outside the state in connection with their manufacture, distribution, and/or sale of Xenadrine RFA-1, which was used and consumed within the state in the ordinary course of commerce, trade, or use, FSA §48.193(1)(f)(2), and (iii) are engaged in "substantial and not isolated activity within [the] state." FSA §48.193(2). Defendants' contacts also satisfy the requirements of due process.

#### Parties

5. Plaintiff Kiley Bechler ("Kiley") is a citizen and resident of the State of Oregon who currently resides in Central Point, Oregon. Kiley was Steve Bechler's wife and is the personal representative and Executrix of his Estate, to whom Letters of Administration were granted on April 7, 2003. Kiley is also the parent and natural guardian of the Bechlers' daughter Hailie, who was born on April 22, 2003.

6. Defendant Cytodyne Technologies, Inc. ("Cytodyne"), now known as Nutraquest, Inc., is incorporated under the laws of the State of New Jersey with its principal place of business located in Manasquan, New Jersey.<sup>1</sup>

7. Defendant Robert Chinery is the President and CEO of defendant Cytodyne and its sole shareholder. Chinery is a citizen and resident of the State of New Jersey.

8. Defendant Phoenix Laboratories, Inc. ("Phoenix") is incorporated under the laws of the State of New York with its principal place of business located in Hicksville, New York.<sup>2</sup>

9. Defendant Evergood Products Corporation ("Evergood") is incorporated under the laws of the State of Delaware with its principal place of business located in Hicksville, New York. Phoenix is a wholly owned subsidiary of Evergood.

10. Defendant Cytodyne, LLC, formerly known as Evarrich, LLC, is a limited liability company established under the laws of the State of New York with its principal place of business located in Hicksville, New York. Evergood owns an 87.5% interest in

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<sup>1</sup> Cytodyne recently filed a Chapter 11 petition in bankruptcy, which operates as an automatic stay upon this litigation proceeding as against Cytodyne. The allegations below, and throughout this amended pleading, do not assert any additional claims against Cytodyne, and plaintiff is not proceeding against Cytodyne on any of its claims at this time. However, in the event that the stay is lifted, or the bankruptcy filing dismissed, plaintiff reserves her right to proceed against Cytodyne and amend the complaint further so as assert such additional claims against Cytodyne as may be warranted.

<sup>2</sup> On November 18, 2003, three trade creditors of Phoenix filed a involuntary petition for bankruptcy against Phoenix, thus automatically staying this litigation as against Phoenix. The allegations below, and throughout this amended pleading, do not assert any additional claims against Phoenix, and plaintiff is not proceeding against Phoenix on any of its claims at this time. However, in the event that the stay is lifted, or the bankruptcy filing dismissed, plaintiff reserves her right to proceed against Phoenix and amend the complaint further so as assert such additional claims against Phoenix as may be warranted.



Cytodyne, LLC, and Chinery owns the remaining 12.5% interest (through an entity completely owned and controlled by Chinery). Cytodyne, LLC is thus completely dominated and controlled by Chinery, Phoenix and Evergood, and Phoenix and Evergood's controlling shareholders, defendants Mel Rich and Steven Stern.

11. Defendant Cytodyne I, LLC, formerly known as Evermel, LLC, is a limited liability company established under the laws of the State of New York with its principal place of business located in Hicksville, New York. As with Cytodyne, LLC, Evergood owns an 87.5% interest in Cytodyne I, LLC, and Chinery owns the remaining 12.5% interest (through yet another entity completely owned and controlled by Chinery). Cytodyne I, LLC is thus too completely dominated and controlled by Chinery, Phoenix, Evergood, Mel Rich, and Steven Stern.

12. Defendant Mel Rich is the President and CEO of Evergood and Phoenix, and, together with Steven Stern, the controlling shareholder of Evergood, Phoenix, Cytodyne, LLC, and Cytodyne I, LLC. Rich is a citizen and resident of the State of New York.

13. Defendant Steven Stern is, among other positions, the Executive Vice President, Chief Operating Officer, and Chief Financial Officer of Evergood and Phoenix, and, together with Mel Rich, the controlling shareholder of Evergood, Phoenix, Cytodyne, LLC, and Cytodyne I, LLC. Stern is a citizen and resident of the State of New York.

14. Defendant RTC Research & Development, LLC ("RTC"), is a limited liability company established under the laws of the State of New Jersey with its principal place of business located in Manasquan, New Jersey. RTC is dominated and

controlled by Chinery, and owned in its entirety by Chinery or members of his family.

15. Defendant General Nutrition Companies, Inc. ("GNC") is incorporated under the laws of Delaware with its principal place of business located in Pittsburgh, Pennsylvania.

Chinery's Personal Liability

16. Defendant Chinery is personally liable in this action because (i) his complete dominion and control over Cytodyne and misuse of the corporate form renders the "corporate shield" a nullity and (ii) he personally engaged in specific tortious acts that led to Steve Bechler's death.

(i) The Corporate Veil of Cytodyne Must Be Pierced

17. Chinery, who, as stated above, is the President, CEO, and sole shareholder of Cytodyne, exercises complete dominion and control over Cytodyne such that it is his alter ego, a sham, a facade, and a mere instrumentality for his personal benefit, and has disregarded and abused Cytodyne's corporate form and structure.

18. Chinery has purposefully misused the corporate form of defendant Cytodyne to commit an intentional fraud upon the public, and in an effort to defeat the ends of justice and otherwise evade the law.

19. Cytodyne is merely one in a string of alter ego corporations that Chinery has improperly utilized, including a Chinery company known as "Prosource," which metamorphosized into Cytodyne, and defendant RTC.

20. Cytodyne has only nine employees, including Chinery and his wife. Cytodyne does not conduct any normal or regular board meetings, and does not keep standard corporate records.

21. Chinery has total control over all of Cytodyne's operations. For instance, it is Chinery who personally formulated the combination of ingredients contained in Xenadrine RFA-1, came up with the amounts and ratios of the active ingredients contained in the product, and decided the dosage and suggested uses of his product. It is Chinery who personally drafted the advertisements used to sell the product and determined where they would run, to whom models reported and who took their actual photographs, and who made the decisions as to how the labels on bottles of Xenadrine RFA-1 should read.

22. Chinery has further failed to maintain Cytodyne's purported corporate identity by commingling his (and his wife's) personal assets with those of Cytodyne, transferring assets of Cytodyne without consideration and in disregard of purported corporate form (including through fraudulent "licensing" arrangements with entities affiliated with Phoenix, for which arrangements he also fraudulently utilized RTC), and manipulating assets and liabilities of Cytodyne. Indeed, from 1999-2002, Chinery caused to be paid to himself distributions and "loan repayments" in excess of \$150 million in an effort fraudulently to deplete the assets of Cytodyne. Such wrongful activities caused Cytodyne to be undercapitalized and have purportedly rendered the company insolvent.

23. Chinery's improper actions with respect to Cytodyne and Xenadrine RFA-1, the inherently and unreasonably dangerous product that Chinery personally formulated, marketed, distributed, and sold were a proximate cause of Steve Bechler's death.



(ii) Chinery Personally Engaged in Tortious Acts that Led to Steve Bechler's Death

24. Chinery's intentional tortious acts and personal participation in the wrongful conduct that caused Steve Bechler's death within this state additionally deprive him of any protection he might otherwise have for his personal liability under the corporate shield doctrine or otherwise.

25. Chinery is the individual responsible for formulating the combination of ingredients that are contained in Xenadrine RFA-1, and their respective concentrations, amounts, and ratios.

26. Chinery personally decided the dosage and suggested uses of Xenadrine RFA-1, including selling it not only as a weight loss product but also as a nasal decongestant.

27. Chinery personally decided not to subject Xenadrine RFA-1 to sufficient product-specific scientific or medical testing prior to its initial sale to the public.

28. Chinery personally decided to market Xenadrine RFA-1 without the development of any actual written quality control standards.

29. Chinery, who has a high school education, undertook the mixing of the chemical compounds that comprise Xenadrine RFA-1 without any training whatsoever in chemistry, toxicology, or pharmacology.

30. Chinery was personally aware of consumer health-related complaints and injuries occasioned by the use of Xenadrine RFA-1 prior to Steve Bechler's demise, and it was Chinery himself who personally directed how consumer complaints should be handled, yet he took no action whatsoever to prevent such injuries.

31. Chinery personally manipulated "scientific" data and research that was conducted in an effort to cast a false and misleading light on the efficacy of Xenadrine RFA-1.

32. Chinery tried to influence the researchers, including Jeffrey Armstrong of Eastern Michigan University, who were engaged to test the safety of Xenadrine RFA -1, to rewrite the results of their investigative studies in a misleading and deceptive manner so as falsely to portray Xenadrine RFA-1 as a safe and effective product.

Liability of Evergood, Cytodyne, LLC, Cytodyne I, LLC, Rich, Stern, and RTQ<sup>3</sup>

33. Rich and Stern exercise complete dominion and control over Phoenix, Evergood, Cytodyne, LLC, and Cytodyne I, LLC such that these companies are their alter egos, shams, facades, and mere instrumentalities for their personal benefit, and have disregarded and abused the corporate form and structure of such companies.

34. Stern and Rich have purposely misused the corporate form of Phoenix, Evergood, Cytodyne, LLC, and Cytodyne I, LLC to commit an intentional fraud upon the public, and in an effort to defeat the ends of justice and otherwise evade the law.

35. The operations, business, ownership, management, books and records, financial statements, public statements and filings, and assets of Phoenix, Evergood, Cytodyne, LLC, and Cytodyne I, LLC are so completely commingled, and there is such

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<sup>3</sup> The interrelationship between the various defendant corporate entities and their principals is tangled and complex, deliberately so. In order that, among other things, such interrelationships be further explained and justified by defendants, plaintiff noticed the deposition of Steven Stern for November 20, so that the information from that deposition about the concealed and convoluted interactions among the defendants could be utilized in this amended pleading. However, plaintiff was prevented from going forward with that deposition as a result of the Phoenix bankruptcy petition, which was supposedly served on Phoenix on the very morning that the deposition of Mr. Stern was to take place.



a unity of interest, operations, and ownership between and among them, that any corporate distinctions between and among them are meaningless and cannot shield any one of those entities from liability for the acts of the others.

36. Phoenix, Evergood, Cytodyne, LLC, and Cytodyne I, LLC are all dominated and controlled by their majority shareholders, defendants Rich and Stern. Rich and Stern operate them with no regard for and in abuse of any purported corporate distinctions between them. Each of these entities has the same officers, directors, and shareholders, and each operates out of the same location. Each utilizes the same telephone number. They share employees, equipment, and customers, as well as facilities. Additionally, as the companies' own filings, including with the Securities and Exchange Commission, reveal, there is noted, deliberate ambiguity about the manner and capacity in which the various companies and their respective representatives act.

37. Assets of Phoenix, Evergood, Cytodyne, LLC, and Cytodyne I, LLC have been transferred between and among those entities, without consideration and in disregard of purported corporate form.

38. In order to escape scrutiny of such intermingled operations, Evergood went so far as to terminate its registration with the Securities and Exchange Commission last year, on the ground that it had so few actual shareholders that it need not be registered.

39. Rich and Stern have also commingled the assets of their companies with their own personal assets, transferring corporate assets without consideration and in disregard of purported corporate form. For instance, they have caused themselves to

be paid extremely high salaries and fees, and given to themselves personal "perquisites," including expensive automobiles and other amenities. In addition, Stern has caused millions of dollars to be paid to his own law firm out of corporate coffers.

40. As a consequence of such failures to observe the prerequisites for maintaining separate corporate entities, any purported corporate distinctions are a mere sham and facade, and each of the entities is an alter-ego of the other and of Rich and Stern.

41. Such intentional misuse of the corporate form of Phoenix, Evergood, Cytodyne, LLC, and Cytodyne I, LLC is designed to commit an intentional fraud upon the public, and is an effort to defeat the ends of justice and otherwise evade the law, including with respect to the manufacture of Xenadrine RFA-1.

42. Such misuse has rendered Phoenix and/or Evergood -- which purports to be a "holding company" for Phoenix -- undercapitalized and is further evidenced by their deliberate efforts to underinsure their business affairs.

43. In addition, Chinery and the Rich/Stern/Phoenix/Evergood/Cytodyne, LLC/Cytodyne I, LLC agglomeration have engaged in fraudulent "licensing" arrangements with respect to Cytodyne, in which the vast bulk of the assets of Cytodyne, including all of its inventory and accounts receivable, as well as the exclusive rights to distribute, market, advertise, and sell all Cytodyne brand products, were fraudulently transferred, to Cytodyne, LLC and Cytodyne I, LLC, without adequate consideration. Cytodyne, LLC -- which was initially named Everrich, LLC -- and Cytodyne I, LLC -- which was initially named Evermal, LLC -- are, as noted above, entirely owned and controlled by Phoenix, Evergood, Rich, and Stern. Cytodyne, LLC

and Cytodyne I, LLC, moreover, were established for the specific purpose of being the Chinery/Rich/Phoenix/Evergood transferees of such assets. RTC was utilized by Chinery as one of the other parties to such fraudulent "licensing" arrangements, specifically, as an entity to which "intellectual property" payments were made, as a further part of the design of stripping Cytodyne, Evergood, and Phoenix of assets.

44. Furthermore, Evergood has admitted, on behalf of both itself and its subsidiaries, that, while it supposedly conducts "quality control testing" on its products, it neither conducts nor sponsors any clinical studies relating to such products, including Xenadrine RFA-1. Additionally, according to no less than Chinery himself, Mel Rich played a significant role in the formulation of Xenadrine RFA-1. Thus, Evergood and its officers/directors/controlling shareholders personally engaged in tortious acts that led directly to Steve Bechler's death.

#### Operative Facts

45. Born in the small town of Medford, Oregon, Steve attended South Medford High School. Steve was actively courted during his senior year by professional baseball clubs who saw his promise as a major league baseball player. The Baltimore Orioles thought so highly of Steve's skills and his future contribution to their organization that, in 1998, they drafted Steve straight out of high school, and paid him a signing bonus of \$225,000.

46. Following the draft, Steve rose steadily and rapidly through the Orioles organization. In September, 2002, at the age of only 22, he was "called up" to the major leagues, where he joined the Orioles' 40-man roster, made his major league debut, and remained with the club through the end of the season. The following month,



on October 22, 2002, Steve and Kiley were wed.

47. The 2003 baseball season offered even greater opportunities. Indeed, Steve was told that he had an excellent probability of spending most, if not all, of the 2003 season in the big leagues.

48. Steve reported to the Orioles' spring training camp in Fort Lauderdale, Florida on February 14, 2003. Unfortunately, the season that began with such promise for Steve and Kiley quickly turned tragic. Steve purchased, over-the-counter and without the necessity of a prescription, a bottle of the dietary supplement Xenadrine RFA-1 -- manufactured by Phoenix and marketed and distributed by Cytodyne -- at a GNC store in Laurel Centre, Maryland.

49. Unaware of the devastating physiological impact that Xenadrine RFA-1 can have on the human body, Steve used the product based simply on its promises of "Lose Weight Fast" and "Rapid Fat Loss Catalyst™," and its proclamation of having been "Clinically Proven." Unbeknownst to Steve, however, ephedra is a substance that has profound sympathomimetic effects on the cardiovascular and central nervous systems.

50. On the morning of February 16, 2003 while at practice, Steve suddenly collapsed during his workout. He could not stand up. He lay on his back, breathing extremely rapidly. Steve's condition soon worsened drastically. His body temperature, heart rate, blood pressure, and respiratory rate all began to soar.

51. A rescue team was summoned, and transported Steve to the hospital. While en route, Steve vomited large amounts and was suctioned. His body

temperature continued to rise, reaching over 108°. He began, among other things, to experience apparent seizures, gastro-intestinal bleeding, respiratory insufficiency, renal failure, abnormal liver function, and shock. Despite the intervention of numerous specialists, little could be done to reverse the irreparable damage that Steve had sustained.

52. The next morning, February 17, Steve went into cardiac arrest. He was initially resuscitated, but went back into cardiac arrest, which this time proved irreversible. Steve was dead, at age 23.

53. The Broward County Medical Examiner conducted a comprehensive investigation into Steve's death, including detailed analysis of Steve's clinical history, the circumstances preceding his death, autopsy findings, toxicology findings, final anatomic-pathological diagnoses, and made a conclusive determination of the cause and manner of Steve's death. The Medical Examiner's report lists ephedra as "a significant factor" in Steve's death, and the Medical Examiner determined the cause and manner of Steve's death to be directly linked to the Xenadrine RFA-1:

In conclusion, based on the circumstances of the collapse, and the clinical, pathological and toxicological findings, it is my determination within a reasonable degree of medical certainty that the cause(s) of death of Mr. Steve Bechler were:

1. Multi-organ Failure  
Due to
2. Exertional heat stroke (EHS)  
Due to
3. Multiple risk factors, including Ephedra toxicity.

(emphasis supplied)

54. Ephedra has been linked to over 100 deaths and countless serious adverse health consequences in the last few years alone. It has been specifically tied to heatstroke, hypertension, heart palpitations, heart attacks, strokes, seizures, psychiatric problems, gastrointestinal effects, and permanent impairments. The ephedra-caffeine-aspirin-related (willow bark) "stack," together with other ingredients, created, marketed and/or sold by defendants is especially lethal in its combination and concentration of substances. This combination of substances raises the heart rate, elevates blood pressure and body temperature, and when combined with exercise (as recommended by defendants on their label), often results in stroke and heart attack.

55. Following Steve's death, defendants have stopped selling ephedra based products and have sought instead to sell a nearly identically packaged product, known as "Xenadrine EFX," that highlights in capital letters that it is "EPHEDRINE FREE."

56. Because defendants' belated concession of Xenadrine RFA-1's inherent dangerousness cannot resuscitate Steve Bechler, defendants must now be held accountable for the devastating financial loss that their actions have caused.

57. Through their conduct herein defendants wrongfully caused the death of Steve Bechler.

58. Beneficiaries, identified herein pursuant to F.S.A. § 768.21, include plaintiff Kiley Bechler, Steve Bechler's spouse and the parent and natural guardian of the Bechlers' born daughter Hailie Bechler, and Hailie Bechler. Other potential beneficiaries are Steve Bechler's parents, Ernest and Patricia Bechler.



Count I  
Wrongful Death – Strict Liability in Tort – Inherent, Unreasonable Dangerousness  
(Against All Defendants)

59. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 - 58 above as if fully set forth herein.

60. Xenadrine RFA-1 – which Phoenix is in the business of manufacturing; Cytodyne and Chinery are in the business of distributing, marketing, and selling; and GNC is in the business of marketing and selling – is an inherently, unreasonably dangerous product. Its ingredients, including ephedra, alone and in conjunction with its other ingredients, including caffeine, synephrine, and salicin, cause a panoply of serious health problems, including heatstroke, hypertension, heart palpitations, heart attacks, strokes, seizures, psychiatric problems, gastrointestinal effects, and permanent impairments. Over 100 deaths have been linked to ephedra.

61. Steve Bechler's use of Xenadrine RFA-1 killed him.

62. As a consequence of defendants' wrongful actions, which resulted in Steve Bechler's death, defendants are, pursuant to F.S.A. § 768.21, jointly and severally liable to plaintiff (in her various capacities set forth above) for the damages suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000. Such damages include, but are not necessarily limited to, (1) the value of Steve Bechler's lost support and services; (2) the loss of Steve's spousal companionship and protection; (3) the loss of Steve Bechler's parental companionship, instruction, and guidance; (4) the mental pain and suffering sustained by Kiley Bechler; (5) medical and funeral expenses; and (6) lost earnings, including but not limited to loss of prospective net accumulations

which might reasonably have been expected.

63. The defendants' conduct was intentional, wanton, willful, malicious, and in blatant disregard of, or grossly negligent and reckless with respect to, Steve Bechler's life, health, well-being, and rights. Defendants are therefore additionally liable for punitive damages, in an amount to be determined at trial.

Count II  
Wrongful Death – Strict Liability in Tort – Failure to Warn  
(Against All Defendants)

64. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 - 63 above as if fully set forth herein.

65. Defendants had a duty to warn Steve Bechler of the serious health risks that ephedra and Xenadrine RFA-1 pose. They failed properly and adequately to provide such warning. For instance, nowhere on the product's label does it warn that use of ephedra or Xenadrine RFA-1 can result in death. Similarly, nowhere on the label does it warn that use of ephedra or Xenadrine RFA-1 can result in heatstroke, hypertension, heart palpitations, seizures, psychiatric problems, gastrointestinal effects, and permanent impairments. Nowhere on the label does this product warn of the exponential danger of mixing ephedra, caffeine, willow-bark synephrine, salicin, and other ingredients. Nowhere does it warn on the label that reducing food intake or engaging in exercise while also consuming ephedra or Xenadrine RFA-1 can be harmful or even fatal; to the contrary, the label encourages use of the product in conjunction with dieting and exercise. Defendants' advertising and/or marketing -- including their advertisements, promotions, and statements in various media and/or on the Internet -- are similarly flawed.

66. As a consequence of defendants' wrongful actions, which resulted in Steve Bechler's death, defendants are, pursuant to F.S.A. § 768.21, jointly and severally liable to plaintiff for the damages suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000. Such damages include, but are not necessarily limited to, (1) the value of Steve Bechler's lost support and services; (2) the loss of Steve's spousal companionship and protection; (3) the loss of Steve Bechler's parental companionship, instruction, and guidance; (4) the mental pain and suffering sustained by Kiley Bechler; (5) medical and funeral expenses; and (6) lost earnings, including but not limited to loss of prospective net accumulations which might reasonably have been expected.

67. The conduct of the defendants was intentional, wanton, willful, malicious, and in blatant disregard of, or grossly negligent and reckless with respect to, Steve Bechler's life, health, well-being, and rights. Defendants are therefore additionally liable for punitive damages, in an amount to be determined at trial.

Count III  
Wrongful Death – Strict Liability in Tort -- Misrepresentations  
(Against All Defendants)

68. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 - 67 above as if fully set forth herein.

69. Defendants misrepresented the safety and efficacy of Xenadrine RFA-1. For instance, in addition to the misrepresentations described above – in the form of failure to warn of known dangers – the label additionally misrepresents the product as "clinically proven." In fact, what has been proven is that ephedra and Xenadrine RFA-1 are deadly, facts which defendants knew or should have known prior to authorizing the



sale of their product. It was also misrepresented that the amount of ma huang has been "standardized" to 20 mg. ephedrine. In truth, the amount of ephedrine varies from pill to pill.

70. Steve Bechler relied, reasonably, justifiably, and in good faith, on defendants' misrepresentations concerning Xenadrine RFA-1.

71. As a consequence of defendants' wrongful actions, which resulted in Steve Bechler's death, defendants are, pursuant to F.S.A. § 768.21, jointly and severally liable to plaintiff for the damages suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000. Such damages include, but are not necessarily limited to, (1) the value of Steve Bechler's lost support and services; (2) the loss of Steve's spousal companionship and protection; (3) the loss of Steve Bechler's parental companionship, instruction, and guidance; (4) the mental pain and suffering sustained by Kiley Bechler; (5) medical and funeral expenses; and (6) lost earnings, including but not limited to loss of prospective net accumulations which might reasonably have been expected.

72. The defendants' conduct was intentional, wanton, willful, malicious, and in blatant disregard of, or grossly negligent and reckless with respect to, Steve Bechler's life, health, well-being, and rights. Defendants are therefore additionally liable for punitive damages, in an amount to be determined at trial.

Count IV  
Negligence  
(Against All Defendants)

73. Plaintiff repeats and realleges the allegations contained in Paragraphs 1- 72 above as if fully set forth herein.

74. Defendants owe a duty of care to users of Xenadrine RFA-1.

75. To the extent that defendants' misrepresentations and omissions with respect to ephedra and Xenadrine RFA-1 were made without knowledge of their falsity and without a conscious intent to deceive, then such misrepresentations and omissions were made negligently and/or recklessly.

76. To the extent that defendants were not consciously aware of the inherent, unreasonable dangerousness of Xenadrine RFA-1, defendants acted with gross negligence and recklessness with respect to their testing, manufacture, distribution, marketing, and sale of Xenadrine RFA-1.

77. Steve Bechler's injuries and death were a direct and proximate result of such misrepresentations and omissions and the inherent, unreasonable dangerousness of Xenadrine RFA-1.

78. As a consequence of defendants' wrongful actions, which resulted in Steve Bechler's death, defendants are, pursuant to F.S.A. § 768.21, jointly and severally liable to plaintiff for the damages suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000. Such damages include, but are not necessarily limited to, (1) the value of Steve Bechler's lost support and services; (2) the loss of Steve's spousal companionship and protection; (3) the loss of Steve Bechler's parental companionship, instruction, and guidance; (4) the mental pain and suffering sustained by Kiley Bechler; (5) medical and funeral expenses; and (6) lost earnings, including but not limited to loss of prospective net accumulations which might reasonably have been expected.

79. Defendants' conduct was intentional, wanton, willful, malicious, and in blatant disregard of, or grossly negligent and reckless with respect to, Steve Bechler's life, health, well-being, and rights. Defendants are therefore additionally liable for punitive damages, in an amount to be determined at trial.

Count V  
Wrongful Death – Breach of Express Warranty – F.S.A. § 672.313  
(Against All Defendants Except for Cytodyne and Phoenix)<sup>4</sup>

80. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 - 79 above as if fully set forth herein.

81. Defendants breached express warranties on the label of, and/or advertising for, the product Xenadrine RFA-1 about its safety and efficacy, including but not limited to warranties that it is "clinically proven," that it contained only precise, delineated amounts of ephedrine per "serving," and that the product worked "best" when used in conjunction with a diet and exercise program.

82. As a direct and proximate result of such breaches, Steve Bechler died.

83. As a consequence of the foregoing, which resulted in Steve Bechler's death, defendants are, pursuant to F.S.A. § 768.21, jointly and severally liable to plaintiff for the damages suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000. Such damages include, but are not necessarily limited to, (1) the value of Steve Bechler's lost support and services; (2) the loss of Steve's spousal companionship and protection; (3)

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<sup>4</sup> Without prejudice to her other rights, plaintiff specifically reserves her right to amend the complaint further so as additionally to include Cytodyne and/or Phoenix as defendants on this Count, and Count VII, in the event that the bankruptcy stay is lifted, or the bankruptcy filing dismissed.



the loss of Steve Bechler's parental companionship, instruction, and guidance; (4) the mental pain and suffering sustained by Kiley Bechler; (5) medical and funeral expenses; and (6) lost earnings, including but not limited to loss of prospective net accumulations which might reasonably have been expected.

Count VI  
Breach of Implied Warranty – F.S.A. § 672.314  
(Against Defendant GNC)

84. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 - 83 above as if fully set forth herein.

85. Through its conduct as described above, defendant GNC breached an implied warranty that Xenadrine RFA-1 is safe and fit for its ordinary and intended use as a dietary supplement and weight loss "catalyst."

86. As a direct and proximate result of such breaches, Steve Bechler sustained injuries and died.

87. As a consequence of the foregoing, which resulted in Steve Bechler's death, defendant GNC is, pursuant to F.S.A. § 768.21, liable to plaintiff for the damages suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000. Such damages include, but are not necessarily limited to, (1) the value of Steve Bechler's lost support and services; (2) the loss of Steve's spousal companionship and protection; (3) the loss of Steve Bechler's parental companionship, instruction, and guidance; (4) the mental pain and suffering sustained by Kiley Bechler; (5) medical and funeral expenses; and (6) lost earnings, including but not limited to loss of prospective net accumulations which might reasonably have been expected.

Count VII  
Fraudulent Transfers – F.S.A. § 726.101 et seq.  
(Against All Defendants Except for Cytodyne, Phoenix, and GNC)

88. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 - 87 above as if fully set forth herein.

89. The fraudulent transactions described above, including but not limited to commingling of corporate, inter-corporate, and personal assets, transferring of corporate assets with no or inadequate consideration and in disregard of purported corporate form, and fraudulent "licensing" arrangements, were made with actual intent to hinder, delay, and defraud creditors, including plaintiff.

90. Such fraudulent transactions were entered into without the receipt of reasonably equivalent value in exchange for the transfer or obligation made or incurred, and left the transferees with remaining assets that were unreasonably small in relation to the transferees' business and were intended to leave the transferees with debts beyond their ability to pay.

91. Such fraudulent transactions, moreover, involved transfers to or among insiders, the retention of possession or control by the transferor notwithstanding the transfer, attempts to conceal the transactions, and the transfer of substantially all of the transferees' assets, and purportedly caused certain of the transferees to be insolvent.

92. Such fraudulent transactions additionally included transactions after the transferees had been sued or threatened with suit, and after a substantial debt had been incurred.

93. Such fraudulent transactions therefore violate the Uniform Fraudulent Transfer Act, F.S.A. § 726.101 et seq.

94. As a consequence of the foregoing, defendants (except for Cytodyne, Phoenix, and GNC) are, pursuant to F.S.A. § 726.101 et seq., jointly and severally liable to plaintiff for the damages suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000. Such damages include, but are not necessarily limited to, (1) the value of Steve Bechler's lost support and services; (2) the loss of Steve's spousal companionship and protection; (3) the loss of Steve Bechler's parental companionship, instruction, and guidance; (4) the mental pain and suffering sustained by Kiley Bechler; (5) medical and funeral expenses; and (6) lost earnings, including but not limited to loss of prospective net accumulations which might reasonably have been expected. Plaintiff is additionally entitled (subject to any restrictions imposed by the bankruptcy stays with respect to the estates of Cytodyne and Phoenix), to avoidance of the fraudulent transactions to the extent necessary to satisfy her claims in this action, as well as appointment of a receiver to take charge of any and all assets transferred.

WHEREFORE, plaintiff respectfully requests that the Court enter judgment against defendants, jointly and severally, as follows:

1. On plaintiff's First Count, awarding against defendants, jointly and severally, the damages that plaintiff and the survivors suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000, plus punitive damages in an amount to be determined at trial.

2. On plaintiff's Second Count, awarding against defendants, jointly and severally, the damages that plaintiff and the survivors suffered as a result of



defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000, plus punitive damages in an amount to be determined at trial.

3. On plaintiff's Third Count, awarding against defendants, jointly and severally, the damages that plaintiff and the survivors suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000, plus punitive damages in an amount to be determined at trial.

4. On plaintiff's Fourth Count, awarding against defendants, jointly and severally, the damages that plaintiff and the survivors suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000, plus punitive damages in an amount to be determined at trial.

5. On plaintiff's Fifth Count, awarding against defendants (except for Cytodyne and Phoenix), jointly and severally, the damages that plaintiff and the survivors suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000.

6. On plaintiff's Sixth Count, awarding against defendant GNC the damages that plaintiff and the survivors suffered as a result of defendants' actions, the amount of such damages to be determined at trial, but in any event no less than \$100,000,000.

7. On plaintiff's Seventh Count, awarding against defendants (except for Cytodyne, Phoenix, and GNC), jointly and severally, the damages that plaintiff and the survivors suffered as a result of defendants' actions, the amount of such damages to be

determined at trial, but in any event no less than \$100,000,000, and, additionally (subject to any restrictions imposed by the bankruptcy stays with respect to the estates of Cytodyne and Phoenix), setting aside the fraudulent transactions in which defendants engaged to the extent necessary to satisfy plaintiff's claims in this action and appointing a receiver to take charge of any and all assets transferred.


8. Awarding plaintiff interest, costs, and such other and further relief as this Court deems just and proper,

Plaintiff demands a jury trial as to all issues so triable.

Dated: November 24, 2003

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CERTIFICATE OF SERVICE


WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via overnight delivery this 24<sup>th</sup> day of November, 2003, to all counsel on the attached service list.

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By: \_\_\_\_\_

  
Jeffrey I. Carton  
Admitted Pro Hac Vice

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SERVICE LIST

Kiley Bechler, as personal representative of and Executrix of the Estate of Steven Scott Bechler vs. Cytodyne Technologies, Inc., Robert Chinery, Phoenix Laboratories, Inc. and XYX Corporation

United States District Court, Southern District of Florida

Case No. 03-61369-CIV-HUCK/TURNOFF

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