

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

ROB BONTA
Attorney General of California
CHRISTIE VOSBURG, SBN 267033
Supervising Deputy Attorney General
ERIN GANAHL, SBN 248472
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-0262
Fax: (510) 622-2270
E-mail: Erin.Ganahl@doj.ca.gov
Attorneys for the People of the State of California

**EXEMPT FROM FILING FEES
GOVERNMENT CODE § 6103**

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

MCWANE, INC., individually and doing business under the fictitious name of AB&I, and DOES 1-50,

Defendants.

Case No.
COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

[Verified Answer Required Pursuant to California Code of Civil Procedure Section 446]

1 Plaintiff, the People of the State of California by and through Rob Bonta, Attorney General
2 of the State of California, hereby alleges:

3 **I. INTRODUCTION**

4 1. This Complaint seeks to remedy the failure of Defendant McWane, Inc., individually
5 and doing business under the fictitious name of AB&I (hereinafter individually referred to as
6 “McWane,” “AB&I,” or, collectively, “Defendants”), to protect the East Oakland community and
7 the environment from highly toxic chemicals emitted from its metal foundry (“AB&I Foundry”),
8 and failure to provide warnings to the surrounding community about the risks posed by exposure
9 to those chemicals. The emissions include primarily, but are not limited to, hexavalent chromium
10 in excess of state regulatory levels. Hexavalent chromium is listed as a carcinogen and
11 developmental and reproductive toxicant by the Office of Environmental Health Hazard
12 Assessment (“OEHHA”) under the Safe Drinking Water and Toxic Enforcement Act of 1986
13 (Health & Saf. Code, § 25249.5 et seq.) (“Proposition 65”).

14 2. The East Oakland community surrounding AB&I is a community that already suffers
15 from extremely high rates of adverse health conditions, like asthma and cardiovascular disease,
16 which are linked to the high levels of pollution in the area. According to CalEnviroScreen 4.0, a
17 screening tool created by OEHHA to help identify communities disproportionately burdened by
18 pollution and with population characteristics that make them more sensitive to pollution, the East
19 Oakland community near AB&I Foundry is adversely affected by pollution to a greater extent
20 than 91% of the State.¹ Indeed, the community has more asthma-related emergency department
21 visits than any other census tract in the State. The East Oakland community is also a low-income
22 community, with 85% of households living under the poverty line, and a community of color,
23 with a population that is 66% Latinx and 21% African American.

24 3. Human health impacts associated with exposure to hexavalent chromium have been
25 well documented. When hexavalent chromium is inhaled, it is a potent carcinogen, 5,000 times
26 more potent than benzene; it can cause lung cancer and other forms of cancer.

27
28

¹ See <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40>.

1 Defendant McWane is a business subject to Proposition 65 as it employs ten or more persons and
2 has employed ten or more persons at all times relevant to this action.

3 10. Defendants DOES 1 through 50 are named herein under fictitious names, as their true
4 names and capacities are unknown to Plaintiff. Plaintiff is informed and believes, and thereon
5 alleges, that each of said Does is responsible, in some actionable manner, for the events and
6 happenings hereinafter referred to, either through said Does' conduct, or through the conduct of
7 their agents, servants, or employees, or in some other manner, causing the harms alleged by
8 Plaintiff in this Complaint. When said true names and capacities of Does are ascertained,
9 Plaintiff will seek leave to amend this Complaint to set forth the same.

10 III. JURISDICTION

11 11. This Court has jurisdiction pursuant to California Constitution Article VI, which
12 grants the Superior Court original jurisdiction in all causes except those given by statute to other
13 trial courts, because the statute under which this action is brought does not specify any other basis
14 for jurisdiction.

15 12. This Court has jurisdiction over Defendants because they conduct sufficient business
16 operations in California to render the exercise of jurisdiction over them by California courts
17 consistent with traditional notions of fair play and substantial justice.

18 13. This Court is the proper venue for the action because the causes of action have arisen
19 in the County of Alameda where the violations of law have occurred, and will continue to occur,
20 unless Defendants take appropriate actions to comply with State law. Further, venue is proper in
21 this Court under Code of Civil Procedure section 395.5 and Health and Safety Code section
22 25249.7.

23 IV. STATUTORY BACKGROUND

24 A. Proposition 65

25 14. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute
26 passed as "Proposition 65" by a vote of the People in November of 1986.

1 15. Proposition 65 establishes a procedure by which California, through its Governor or
2 his or her designee, develops and maintains a list of chemicals "known to the State to cause
3 cancer or reproductive toxicity." (Health & Saf. Code, § 25249.8.)

4 16. OEHHA is the lead agency in charge of the implementation of Proposition 65, and is
5 in charge of listing chemicals under Proposition 65. OEHHA issues regulations that govern
6 Proposition 65, including regulations relating to warnings required to comply with the statute.
7 These warning regulations are found at Title 27 of the California Code of Regulations, Article 6.

8 17. The Proposition 65 regulations define "expose" as "to cause to ingest, inhale, contact
9 via body surfaces or otherwise come into contact with a listed chemical." (Cal. Code Regs., tit.
10 27, § 25102, subd. (i).) An individual may come into contact with a listed chemical through
11 water, air, food, consumer products and any other environmental exposure as well as occupational
12 exposures." (Cal. Code Regs., tit. 27, § 25102, subd. (i).) In this case, the exposures are
13 environmental exposures. An environmental exposure is "an exposure that occurs as the result of
14 contact with an environmental source, such as ambient air, indoor air, ... through inhalation,
15 ingestion, or skin or other contact with the body. All exposures that are not consumer product
16 exposures or occupational exposures are environmental exposures." (Cal. Code Regs. tit. 27, §
17 25600.1, subd. (f).)

18 18. The warning requirement of Proposition 65 is contained in Health and Safety Code
19 section 25249.6, which provides:

20 No person in the course of doing business shall knowingly and intentionally expose
21 any individual to a chemical known to the state to cause cancer or reproductive
22 toxicity without first giving clear and reasonable warning to such individual, except
23 as provided in Section 25249.10.

24 19. OEHHA's Proposition 65 regulations establish, among other things, methods of
25 transmission and content of warnings deemed to comply with Proposition 65. Warnings
26 concerning an exposure to a listed chemical must be provided beginning one year after the
27 chemical first appears on the Proposition 65 list. (Health & Safety Code, § 25249.10, subd. (b).)

28 20. OEHHA listed chromium (hexavalent compounds) under Proposition 65 as a chemical
known to cause cancer on February 27, 1987. (Cal. Code Regs., tit. 27, § 27001, subd. (b).)

1 OEHHA listed chromium (hexavalent compounds) under Proposition 65 as a chemical known to
2 cause developmental toxicity in the fetus and male and female reproductive toxicity on December
3 19, 2008. (*Id.*, § 27001, subd. (c).)

4 21. By regulation, OEHHA set a No Significant Risk Level (“NSRL”) for exposure to
5 hexavalent chromium of 0.001 micrograms per day. (Cal. Code Regs., tit. 27, §25705, subd. (b).)
6 This NSRL, sometimes called a “safe harbor” level, represents the level at which an exposure will
7 not be held to violate Proposition 65. The NSRL for hexavalent chromium is the second-lowest
8 NSRL for a listed carcinogen, with only dioxin having a lower level.

9 22. Proposition 65 regulations provide that environmental exposure warnings “must be
10 provided in a conspicuous manner and under such conditions as to make the warning likely to be
11 seen, read, and understood by an ordinary individual in the course of normal daily activity.” (Cal.
12 Code Regs. tit. 27, § 25601, subd. (d).) Such a warning would be “a warning provided in a notice
13 mailed, sent electronically, or otherwise delivered to each occupant in the affected area.” (*Id.* at §
14 25604, subd. (a)(2).) The warning must clearly identify the source of the exposure, include a map
15 that clearly identifies the affected area, be provided at least every three months, and be provided
16 in English and in any other language ordinarily used by the facility to communicate with the
17 public. (*Ibid.*)

18 23. Actions to enforce Proposition 65 may be brought by the Attorney General in the
19 name of the People of the State of California, or by any district attorney or certain city attorneys.
20 (Health & Saf. Code, § 25249.7, subd. (c).) Proposition 65 provides that any person “violating or
21 threatening to violate” the statute may be enjoined in any court of competent jurisdiction. (*Id.*, §
22 25249.7, subd. (a).) Violators are liable for civil penalties of up to \$2,500 per day for each
23 violation. (*Id.*, § 25249.7, subd. (b).) In an action by the Attorney General, the Attorney General
24 may “seek and recover costs and attorney's fees on behalf of any party who provides a notice
25 pursuant to subdivision (d) and who renders assistance in that action.” (Health & Saf. Code, §
26 25249.7, subd. (j).)

27 24. Private parties have authority to enforce Proposition 65 “in the public interest” if the
28 private party first provides written notice of a violation to the alleged violator, the Attorney

1 General, and other designated public prosecutors in whose jurisdiction the alleged violation
2 occurs. (Health & Saf. Code, § 25249.7, subd. (d).) If no public prosecutor commences
3 enforcement within 60 days, then the private party may sue. (*Id.*)

4 **B. The Unfair Competition Law**

5 25. California Business and Professions Code section 17200 provides that “unfair
6 competition shall mean and include any unlawful, unfair or fraudulent business act or practice....”
7 Section 17203 of the Business and Professions Code provides that “[a]ny person who engages,
8 has engaged or proposes to engage in unfair competition may be enjoined in any court of
9 competent jurisdiction.” Actions for relief under the Unfair Competition Law may be prosecuted
10 by the Attorney General in “a court of competent jurisdiction....” (Bus. & Prof. Code, § 17204.)

11 26. Section 17206, subdivision (a), of the Business and Professions Code provides that
12 “[a]ny person who engages, has engaged, or proposes to engage in unfair competition shall be
13 liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each
14 violation, which shall be assessed and recovered in a civil action brought in the name of the
15 people of the State of California by the Attorney General, [or] by any district attorney”
16 These penalties are “cumulative to each other and to the remedies or penalties available under all
17 other laws of this state.” (*Id.*, § 17205.)

18 **C. Government Code Section 12607**

19 27. Government Code Section 12607 provides the Attorney General with authority to
20 “maintain an action for equitable relief in the name of the people of the State of California against
21 any person for the protection of the natural resources of the state from pollution, impairment, or
22 destruction.” “Natural resources” includes the air. (Gov. Code, § 12605.)

23 **V. FACTS**

24 28. Founded in 1906, the AB&I Foundry in East Oakland is a significant industrial source
25 of air pollution in the City of Oakland. In 1993, the People of the State of California filed a
26 complaint seeking civil penalties and injunctive relief against AB&I Foundry for violation of
27 Proposition 65, on the grounds that its lead emissions were exposing a large area of the
28 community to lead. A Consent Judgment entered by the Alameda County Superior Court

1 required the company to adopt pollution control measures to reduce lead emissions and
2 exposures, and to provide Proposition 65-compliant warnings.

3 29. AB&I is the largest emitter of hexavalent chromium in Alameda County, and one of
4 the top ten largest emitters within the BAAQMD region, comprising nine Bay Area counties.

5 30. For many years, Defendants' operations have produced and released hexavalent
6 chromium into the air, causing residents and workers at varying locations to be exposed to this
7 chemical at levels exceeding the NSRL, therefore requiring a warning. These people have been,
8 and continue to be, exposed to hexavalent chromium without any knowledge that they are being
9 exposed to this very dangerous chemical—knowledge that could enable them to take steps to
10 protect themselves.

11 31. In April 2021, the BAAQMD released a draft Health Risk Assessment (“HRA”) that
12 identified a substantial cancer risk from AB&I Foundry, with a cancer risk of 22 in a million for
13 residents. The largest contributing toxic air contaminant identified was hexavalent chromium,
14 emitted by AB&I Foundry's pipe casting machines. These sources have no emission controls;
15 emissions are released directly to the atmosphere through roof vents. The draft HRA discloses
16 that the pipe casting machines produce 1.17 pounds per year of hexavalent chromium emissions,
17 the molding operations produce 0.13 pounds per year, and the facility as a whole produces 1.41
18 pounds per year from all sources.

19 32. The AB&I Foundry is located in a densely populated East Oakland community where
20 many people live and work. Homes are located near the AB&I Foundry to the north, east, and
21 south. There are approximately ten schools located within a mile of the AB&I Foundry, the
22 closest being Acorn Woodland Elementary School and Encompass Academy to the east of the
23 facility, with a large grass area where children play on the side of the Acorn Woodland
24 Elementary closest to the AB&I Foundry. There are numerous unhoused individuals living
25 within a quarter mile of the foundry, some of whom live along the foundry's fenceline. There are
26 also many businesses in the immediate area. There is therefore likely to be pedestrian traffic in
27 the area immediately surrounding the AB&I Foundry, and there is heavy pedestrian traffic
28

1 roughly 1,000 feet northwest of the facility, in the vicinity of the Oakland Bay Area Rapid Transit
2 station and the Oakland Athletics' (RingCentral) coliseum.

3 33. A private enforcer, Communities for a Better Environment, sent a Proposition 65
4 notice to Defendants pursuant to Health and Safety Code section 25249.7, subdivision (d)(1), on
5 October 6, 2021, alleging that emissions from AB&I Foundry expose individuals to hexavalent
6 chromium in violation of Proposition 65.

7 34. Defendants know and have known that the AB&I Foundry's operations cause
8 hexavalent chromium to be produced and emitted into the atmosphere, exposing the surrounding
9 community.

10 35. At all times relevant hereto, Defendants are and have been aware that a significant
11 number of residents, school children, and workers from other businesses are situated near
12 Defendants' facility and Defendants have knowingly and intentionally exposed these persons to
13 hexavalent chromium without providing a clear and reasonable warning.

14 36. Defendants are, and at all relevant times have been, aware that there are methods
15 available and pollution control technology to reduce hexavalent chromium emissions, yet
16 Defendants have failed to take all appropriate measures to eliminate exposures to the surrounding
17 community.

18 **FIRST CAUSE OF ACTION**

19 **FAILURE TO WARN**

20 **(Violation of Health and Safety Code section 25249.6,**

21 **Failure to Provide Clear and Reasonable Warning under Proposition 65)**

22 37. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 36 above
23 as though set forth herein.

24 38. Defendants employ ten or more persons.

25 39. Defendants each are a "[p]erson in the course of doing business," as that term is used
26 in Health and Safety Code section 25249.6 and 25249.11, subdivision (b).

27 40. By committing the acts alleged above, Defendants have, in the course of doing
28 business, knowingly and intentionally exposed individuals to hexavalent chromium-a chemical

1 known to the State of California to cause cancer and developmental harm-without first giving a
2 clear and reasonable warning to such individuals within the meaning of Health and Safety Code
3 section 25249.6.

4 41. Said violations render each defendant liable to Plaintiff for civil penalties of up to
5 \$2,500 per day for each violation, and provide the basis for other remedies, including as
6 predicates for violations of Business and Professions Code 17200.

7 **SECOND CAUSE OF ACTION**

8 **UNFAIR BUSINESS PRACTICES**

9 **(Violations of Business and Professions Code section 17200 et seq.)**

10 42. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 36 above
11 as though set forth herein.

12 43. Defendants have engaged, and continues to engage, in acts or practices that are
13 unlawful, unfair, and/or fraudulent, and which constitute unfair competition within the meaning
14 of section 17200 of the Business and Professions Code. These acts or practices include, but are
15 not limited to, violating Proposition 65 as alleged in the First Cause of Action.

16 44. By committing the acts alleged above, Defendants are liable to Plaintiff for civil
17 penalties of up to \$2,500 for each violation.

18 **THIRD CAUSE OF ACTION**

19 **HARM TO NATURAL RESOURCES**

20 **(Violations of Government Code section 12607)**

21 45. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 36 above
22 as though set forth herein.

23 46. Defendants, by emitting hexavalent chromium into the environment, have harmed and
24 continue to harm the natural resources of the State.

25 47. By committing the acts above, Defendants may be enjoined from committing any
26 further such acts and may be liable for attorneys' fees under Code of Civil Procedure section
27 1021.8.

28

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court:

(1) Pursuant to the First and Second Causes of Action, grant civil penalties for each and every violation according to proof;

(2) Pursuant to the First and Third Causes of Action, as well as Health and Safety Code section 25249.7, Government Code 12607, and other applicable laws, enter such preliminary injunctions, permanent injunctions, or other orders as Plaintiff shall specify in further application to the court prohibiting Defendants, and their successors, agents, representatives, employees and all persons who act in concert with Defendants, from exposing persons within the State of California to hexavalent chromium without providing clear and reasonable warnings;

(3) Pursuant to the Second Cause of Action, enter such orders as may be necessary to prevent the use or enjoyment by Defendants of any practice which constitutes unfair competition, and restore to any person in interest any money or other property which may have acquired by means of these unlawful acts, as provided in Business and Professions Code section 17203 and other applicable laws;

(4) Award Plaintiff its reasonable attorneys' fees pursuant to Code of Civil Procedure section 1021.8, and its cost of suit; and

(5) Grant such other and further relief as the court deems just and proper.

Dated: February 15, 2022

Respectfully Submitted,

ROB BONTA
Attorney General of California
CHRISTIE VOSBURG
Supervising Deputy Attorney General



ERIN GANAHL
Deputy Attorney General
Attorneys for the People of the State of California