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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF ALAMEDA
13 UNLIMITED CIVIL JURISDICTION

14
15 LARRY LEE,

16 Plaintiff,

17 v.

18
19 AMAZON.COM, INC.; and DOES 1-150,
inclusive,

20 Defendants.
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Case No.

RG 14738 130

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code section 25249.6 *et seq.*)

ENDORSED
FILED
ALAMEDA COUNTY

AUG 25 2014
Frances Wilson
CLERK OF THE SUPERIOR COURT

1 NATURE OF THE ACTION

2 1. California's Safe Drinking Water and Toxic Enforcement Act ("Proposition 65" or
3 "the Act"), Health & Safety Code § 25249.5, *et seq.*, prohibits any person in the course of doing
4 business from knowingly and intentionally exposing any individual to a chemical known to the
5 State of California to be a reproductive toxin, without first giving clear and reasonable warning
6 of such exposure. Health & Safety Code § 25249.6. This prohibition applies with equal force
7 against business entities that manufacture, distribute, or sell consumer products, where the
8 reasonable intended use of such products would result in an exposure to a known reproductive
9 toxin.

10 2. This case involves facial cream so laden with toxic mercury that it qualifies as
11 hazardous waste. The public health hazards of this facial cream are extreme. Consumers have
12 been applying this cream to their faces.

13 3. More generally, this is a representative action in the public interest of the citizens
14 of the State of California to humans, and particularly children and women of child-bearing age,
15 from highly toxic inorganic mercury present in consumer beauty products marketed to lighten
16 skin, fade freckles and age spots, remove wrinkles, and treat acne.

17 4. Inorganic mercury in a skin cream may enter the body through three routes: oral,
18 transdermal absorption, and inhalation. Since 1973, the Food and Drug Administration has
19 warned against the use of mercury in cosmetics, detailing its harms:

20 It is well known that mercury compounds are readily absorbed
21 through the unbroken skin as well as through the lungs by
22 inhalation and by intestinal absorption after ingestion. Mercury is
23 absorbed from topical application and is accumulated in the body,
24 giving rise to numerous adverse effects. . . . Cosmetic preparations
25 containing mercury compounds are often applied with regularity
26 and frequency for prolonged periods. Such chronic use of mercury-
27 containing skin-bleaching preparations has resulted in the
28 accumulation of mercury in the body and the occurrence of severe
reactions.

21 C.F.R. § 700.13(b).

1 5. Furthermore, parents who use mercury-laden cosmetics expose their children. In
2 2012 the Center for Disease Control (CDC) reported that in homes with at least one routine user
3 of mercury face creams, mercury exposure is documented in both users and nonusers.

4 6. On January 9, 2014, the California Department of Public Health issued a warning
5 that certain skin-lightening creams, including at least one of the products sold by the
6 Defendants, contain “high levels” of mercury.

7 7. Human exposures to mercury and mercury compounds result from the reasonably
8 foreseeable use of commercially marketed skin-lightening creams containing mercury and
9 mercury compounds. The citizens of California have the right to be informed of the presence of
10 mercury found in face creams containing inorganic mercury manufactured, distributed, and sold
11 or otherwise offered for use in California by Defendants (“PRODUCTS”).

12 8. Each Defendant has failed to provide a clear and reasonable warning that the use
13 of the face creams containing mercury and mercury compounds that they have manufactured,
14 distributed, or sold will result in exposure to mercury both of the user and of household
15 members. Mercury is a chemical known to the State of California to cause reproductive toxicity.

16 9. Accordingly, by this Complaint, plaintiff seeks an order requiring Defendants
17 either discontinue any manufacture, distribution, or sale of the PRODUCTS containing mercury
18 or provide a clear and reasonable warning that use of the PRODUCTS will result in exposure to
19 a chemical known to the State of California to cause reproductive toxicity.¹ Plaintiff also seeks
20 civil penalties as provided for under the Act and other appropriate relief.

21 **PARTIES**

22 10. Plaintiff LARRY LEE is dedicated to protecting the health of Californians
23 through the elimination or reduction of toxic exposures from consumer products. He brings this
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25 ¹ In addition, the products containing mercury sold by the Defendants are likely subject to federal
26 regulation outside of the scope of this action. The FDA “concludes that any product containing
27 mercury as a skin-bleaching agent and offered for sale as skin-bleaching, beauty, or facial
28 preparation . . . will be the subject of regulatory action.” 21 C.F.R. § 700.13(d)(1). Therefore, it
may be that providing a Proposition 65 warning of the presence of mercury in the PRODUCTS,
without more, will be legally insufficient.

1 action as a private attorney general in the public interest pursuant to Health and Safety Code
2 section 25249.7, subdivision (d).

3 11. Defendant AMAZON.COM, INC. (“AMAZON”) is a business entity with ten or
4 more employees doing business within the scope of Proposition 65. Health and Safety Code
5 section 25249.11. AMAZON manufactures, distributes, imports, sells, and/or offers for sale in
6 skin lightening creams containing mercury, including the Monsepa Express Peeling Night Face
7 Cream containing mercury.

8 12. Each of Defendants DOES 1-150 is a person in the course of doing business
9 within the meaning of Health and Safety Code section 25249.11(b), which manufactures,
10 distributes, sells, and/or offers PRODUCTS for sale in the State of California. At this time, the
11 true names and capacities of defendants DOES 1 through 150, inclusive, are unknown to
12 Plaintiff, who, therefore, sues said Defendants by their fictitious names pursuant to Code of
13 Civil Procedure section 474. Plaintiff is informed and believes, and on that basis alleges, that
14 each of the fictitiously named Defendants is responsible for the acts and occurrences alleged
15 herein. Plaintiff will amend this Complaint and include these Doe Defendants’ true names and
16 capacities when they are ascertained.

17 13. AMAZON and Defendants DOES 1-150 are collectively referred to herein as
18 “Defendants.”

19 **VENUE AND JURISDICTION**

20 14. The Court has jurisdiction over this action pursuant to Health and Safety Code
21 section 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant
22 to California Constitution, article VI, section 10, because this case does not present a cause
23 given by statute to other trial courts.

24 15. The California Superior Court has jurisdiction over Defendants based on
25 Plaintiff’s information and good faith belief that each of the Defendants is a person, firm,
26 corporation, or association that is a citizen of the State of California, has sufficient minimum
27 contacts in the State of California, and/or otherwise purposefully avails itself of the California
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1 market. Defendants' purposeful availment of California as a marketplace for the PRODUCTS
2 renders the exercise of personal jurisdiction by California courts over Defendants consistent
3 with traditional notions of fair play and substantial justice.

4 16. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
5 Procedure sections 393 and 395 because this Court is a court of competent jurisdiction, because
6 Plaintiff seeks civil penalties against Defendants, because one or more instances of wrongful
7 conduct occurred, and continue to occur, in Alameda County, and/or because Defendants
8 conducted, and continue to conduct, business in this county with respect to the PRODUCTS.

9 NOTICE REQUIREMENTS

10 17. On May 22, 2014, Plaintiff's sixty-day notice of violation ("NOTICE") was
11 provided to AMAZON, Aztopsel, and to each of those public enforcement agencies to which
12 Proposition 65 requires notice be given stating that, as a result of AMAZON's sales of the
13 PRODUCTS, purchasers and users in the State of California were being exposed to mercury
14 resulting from their reasonably foreseeable use of these PRODUCTS, without the individual
15 purchasers and users first having been provided with a "clear and reasonable warning"
16 regarding such toxic exposures, as required by Proposition 65.

17 18. The NOTICE included, *inter alia*, the following information: the name, address,
18 and telephone number of the noticing individual; the name of the alleged violator; the statute
19 violated; the approximate time period during which violations occurred; and descriptions of the
20 violations, including the chemical involved, the routes of toxic exposure, and the specific
21 products and type of products causing the violations. The named Defendants and the California
22 Attorney General were provided copies of the 60-Day Notice by mail. Additionally, the named
23 Defendants were each provided with a copy of a document entitled "The Safe Drinking Water
24 and Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is also known as
25 Appendix A to title 27 of California Code of Regulations ("CCR") § 25903.

26 19. Each NOTICE included a certificate of merit executed by Plaintiff's attorney
27 stating that the person executing the certificate had consulted with one or more persons with
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1 relevant and appropriate experience or expertise who has reviewed the facts, studies or other
2 data regarding exposure to the listed chemical that is the subject of the notice, and that, based on
3 that information, the person executing the certificate believes there is a reasonable and
4 meritorious case for this private action. Factual information sufficient to establish the basis of
5 the certificate of merit was attached to the certificate of merit served on the California Attorney
6 General.

7 20. No public prosecutors has commenced and is diligently prosecuting an action
8 against the violations at issue herein, although the notice period provided in Health & Safety
9 Code section 25249.7 has elapsed.

10 STATUTORY AND REGULATORY BACKGROUND

11 21. In 1986, the voters of California overwhelmingly enacted Proposition 65.

12 22. Proposition 65 declares the People's right to be "informed about exposures to
13 chemicals that cause cancer, birth defects, or other reproductive harm." Health & Safety Code
14 Div. 20, Ch. 6.6 Note, section 1(b). Under Proposition 65:

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

18 Health and Safety Code § 25249.6.

19 23. Pursuant to Proposition 65, on July 1, 1990, California identified and listed
20 mercury and mercury compounds as chemicals known to the State of California to cause
21 reproductive toxicity. Mercury and mercury compounds became subject to Proposition 65's
22 "clear and reasonable warning" requirement one year later on July 1, 1991. Health & Safety
23 Code §§ 25249.8 & 25249.10(b); 27 CCR § 27001(c).

24 24. An exposure to a chemical in a consumer product is one "which results from a
25 person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a
26 consumer good, or any exposure that results from receiving a consumer service." 27 CCR §
27 25602(b).

1 25. Proposition 65 provides that any person “violating or threatening to violate” the
2 statute may be enjoined in any court of competent jurisdiction. Health & Safety Code
3 § 25249.7. “Threaten to violate” is defined to mean “to create a condition in which there is a
4 substantial probability that a violation will occur.” *Id.* at § 25249.11(e).

5 26. Under Proposition 65, an exposure is “knowing” where the party responsible for
6 such exposure has:

7 “knowledge of the fact that a discharge of, release of, or exposure to
8 a chemical listed pursuant to Section 25249.8(a) of the Act is
9 occurring. No knowledge that the discharge, release or exposure is
10 unlawful is required.”

11 27 CCR § 25102(n). This knowledge may be actual or constructive. *See, e.g.*, Final Statement of
12 Reasons Revised (November 4, 1988) for former 22 CCR § 12201.

13 27. Violators of Proposition 65 are liable for civil penalties of up to \$2,500.00 per
14 day per violation, recoverable in a civil action. Healthy & Safety Code § 25249.7(b).

15 26. Private parties are entitled to bring an action in the public interest to enforce the
16 Act under Health and Safety Code, section 25249.7, subdivision (d).

17 FACTS

18 28. The PRODUCTS are used by consumers and contain mercury.

19 29. Defendants and each of them manufacture, distribute, and/or sale or offer the
20 PRODUCTS for sale or promotional purposes in California.

21 30. Over time mercury and mercury compounds escape from the PRODUCTS and
22 cause exposures when they are directly absorbed through skin; volatilize and are inhaled and
23 absorbed; and when they are ingested after hand-to-mouth behavior. Persons exposed include
24 the primary user and other members of the primary user’s household.

25 31. DEFENDANTS, in the course of doing business, know and intend that
26 individuals will purchase and use their PRODUCTS, thus exposing them to mercury and
27 mercury compounds.

28 32. DEFENDANTS have failed to provide a clear and reasonable warning as required
by Health and Safety Code sections 25249.6 and 25249.11, subdivision (f) to users of their

1 PRODUCTS. As a direct result of Defendants' acts and omissions, the general public in
2 California is being regularly, unlawfully, and involuntarily exposed to mercury and mercury
3 compounds, known reproductive toxins.

4 **FIRST CAUSE OF ACTION**

5 **(Violation of Proposition 65 - Against All Defendants)**

6 33. Plaintiff realleges and incorporates each and every allegation contained in the
7 preceding paragraphs as though fully set forth herein.

8 34. Mercury and mercury compounds are present in the DEFENDANTS'
9 PRODUCTS in such a way as to expose individuals in California to mercury and mercury
10 compounds, as such exposures are defined by California Code of Regulations title 27, section
11 25602, subdivision (b).

12 35. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
13 or use in California require a "clear and reasonable" warning under Proposition 65.

14 36. Defendants knew or should have known that the skin lightening creams they
15 manufacture, import, distribute, sell, and offer for sale or use in California contain mercury
16 and/or mercury compounds.

17 37. Defendants intended that such exposures to mercury and/or mercury compounds
18 from the reasonably foreseeable uses of skin lightening creams would occur by Defendants'
19 deliberate, non-accidental participation in the manufacture, importation, distribution, sale, and
20 offering of the skin lightening creams for sale or use to individuals in the State of California.

21 38. Defendants failed to provide a "clear and reasonable warning" to those consumers
22 and other individuals in the State of California who were or who would become exposed to
23 mercury and/or mercury compounds through dermal contact, ingestion, and/or inhalation during
24 the reasonably foreseeable uses of the PRODUCTS.

25 39. Pursuant to Health and Safety Code section 25249.7, subdivision (b), as a
26 consequence of the above-described acts, Defendants are liable for a maximum civil penalty of
27 \$2,500 per day for each violation.
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