

1 JAMES M. BIRKELUND (SBN 206328)
2 Law Offices of James Birkelund
3 548 Market St., # 11200
4 San Francisco, CA 94105
5 Telephone: (415) 602.6223
6 Fax: (415) 789.4556
7 Email: james@birkelundlaw.com

8 RACHEL S. DOUGHTY (SBN 255904)
9 Greenfire Law
10 1202 Oregon St.
11 Berkeley, CA 94702
12 Telephone: (828) 424.2005
13 Email: rdoughty@greenfirelaw.com

14 Attorneys for Plaintiff
15 LARRY LEE

16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

LARRY LEE,

Plaintiff,

v.

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

Defendants.

Case No. RG14738130

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

ENDORSED
FILED
ALAMEDA COUNTY

NOV 05 2014

CLERK **Donnan Pharr** DEPUTY CLERK

NATURE OF THE ACTION

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

2. This case involves skin lightening creams so laden with toxic mercury that they qualify as hazardous waste.

3. More generally, this is a representative action in the public interest of the citizens of the State of California to humans, and particularly children and women of child-bearing age, from highly toxic mercury present in consumer beauty products marketed to lighten skin.

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

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

21 C.F.R. § 700.13(b).

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

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

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

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

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

PARTIES

10. Plaintiff LARRY LEE is dedicated to protecting the health of Californians through the elimination or reduction of toxic exposures from consumer products. He brings this action as a private attorney general in the public interest pursuant to Health and Safety Code section 25249.7, subdivision (d).

¹ In addition, the products containing mercury sold by the Defendants are likely subject to federal regulation outside of the scope of this action. The FDA “concludes that any product containing mercury as a skin-bleaching agent and offered for sale as skin-bleaching, beauty, or facial 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.

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

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

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

VENUE AND JURISDICTION

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

15. The California Superior Court has jurisdiction over Defendants based on Plaintiff's information and good faith belief that each of the Defendants is a person, firm, corporation, or association that is a citizen of the State of California, has sufficient minimum contacts in the State of California, and/or otherwise purposefully avails itself of the California market. Defendants' purposeful availment of California as a marketplace for the PRODUCTS

1 renders the exercise of personal jurisdiction by California courts over Defendants consistent
2 with traditional notions of fair play and substantial justice.

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

8 NOTICE REQUIREMENTS

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

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

25 19. Each NOTICE included a certificate of merit executed by Plaintiff's attorney
26 stating that the person executing the certificate had consulted with one or more persons with
27 relevant and appropriate experience or expertise who has reviewed the facts, studies or other
28

1 data regarding exposure to the listed chemical that is the subject of the notice, and that, based on
2 that information, the person executing the certificate believes there is a reasonable and
3 meritorious case for this private action. Factual information sufficient to establish the basis of
4 the certificate of merit was attached to the certificate of merit served on the California Attorney
5 General.

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

9 **STATUTORY AND REGULATORY BACKGROUND**

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

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

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

17 Health and Safety Code § 25249.6.

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

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

10 27 CCR § 25102(n). This knowledge may be actual or constructive. *See, e.g.*, Final Statement of
11 Reasons Revised (November 4, 1988) for former 22 CCR § 12201.

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

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

16 FACTS

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

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

20 30. Over time mercury escapes from the PRODUCTS and causes exposures when it is
21 directly absorbed through skin; volatilizes and is inhaled and absorbed; and when it is ingested
22 after hand-to-mouth behavior. Persons exposed include the primary user and other members of
23 the primary user's household.

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

26 32. DEFENDANTS have failed to provide a clear and reasonable warning as required
27 by Health and Safety Code sections 25249.6 and 25249.11, subdivision (f) to users of their
28 PRODUCTS. As a direct result of Defendants' acts and omissions, the general public in

1 California is being regularly, unlawfully, and involuntarily exposed to mercury, a known
2 reproductive toxin.

3 **FIRST CAUSE OF ACTION**

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

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

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

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

12 36. DEFENDANTS knew or should have known that the skin lightening creams they
13 manufacture, import, distribute, sell, and offer for sale or use in California contain mercury.

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

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

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

25 40. As a consequence of the above-described acts, Health and Safety Code
26 section 25249.7, subdivision (a) also specifically authorizes the Court to grant injunctive relief
27 against DEFENDANTS.
28

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

A. Grant civil penalties pursuant to Health and Safety Code section 25249.7, subdivision (b)(1) against Defendants in the amount of \$2,500 per day for each violation;

B. Enter such injunctions or other orders as are necessary pursuant to Health and Safety Code section 25249.7, subdivision (a) to prevent DEFENDANTS from exposing persons within the State of California to the reproductive toxin mercury caused by the reasonably foreseeable use of their PRODUCTS without providing clear and reasonable warnings;

C. Award Plaintiff reasonable attorneys' fees and costs pursuant to Code of Civil Procedure, section 1021.5 and as otherwise appropriate; and

D. Grant such other and further relief as may be just and proper.

RESPECTFULLY SUBMITTED,

Rachel Doughty
Attorney for Larry Lee

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

PROOF OF SERVICE

I am a citizen of the United States and employed in Alameda County. I am over 18 years of age and not a party to this action. My business address is 1202 Oregon Street, Berkeley, California 94702.

On November 5, 2014, I caused to be served the following document(s), described as:

FIRST AMENDED COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

XXXXXX by transmitting via e-mail or other electronic transmission the document listed above to the persons at the e-mail addresses set forth below.

Jeffrey B. Margulies

Attorneys for Defendant Amazon.com, Inc.

Matthew M. Gurvitz

Fulbright & Jaworski LLP

555 South Flower St., 41st Floor

Los Angeles, CA 90071

Email: jeff.margulies@nortonrosefulbright.com

Email: matthew.gurvitz@nortonrosefulbright.com

Executed this 5th day of November, 2014, at Berkeley, California, I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.


Rachel Doughty