

## Amazon Must Face Dangerous Diet Drug Suit, 2nd Circ. Told

By **Dani Meyer**

Law360, New York (August 24, 2015, 4:12 PM ET) -- A proposed class urged the Second Circuit on Friday to revive their suit accusing Amazon.com Inc. of not doing enough to stop sales on its site of supplements containing a dangerous and prohibited ingredient, arguing the retail giant didn't give sufficient notice of its arbitration provision.

Dean Nicosia said the district court erred when finding him **bound by an arbitration provision** in Amazon's terms and conditions, saying the "conditions of use" font was too tiny to constitute sufficient notice and rejecting Amazon's argument that he knowingly agreed to arbitrate his claims.

"Amazon relies on a miniscule phrase on its website screen to support its claim that it provides reasonable notice to compel arbitration. No mention of arbitration exists anywhere on that website screen and the consumer is neither provided with the terms of the agreement nor is requested to provide his consent," Nicosia said in his reply brief.

Nicosia further argued that the district court mistakenly relied on Amazon's representation that Nicosia clicked his consent to its terms and conditions, saying the court improperly considered it a "clickwrap" case, in which customers click to accept the terms and conditions, rather than a "browsewrap" case where the terms and conditions are posted through a hyperlink.

"The act of completing a purchase on Amazon's website order screen by clicking 'Place your order' accomplishes only just what it says. It does not provide notice or form a valid agreement to arbitrate using clickwrap," Nicosia said.

Nicosia added that the district court erred when refusing to rule on whether a contract for the sale of illegal sibutramine — a controlled substance only available by prescription that has been linked to serious heart events — even validly existed and when finding Nicosia lacked standing to pursue injunctive relief since he didn't allege he would buy sibutramine-laced products again from Amazon's website.

Amazon argued in its July brief that the district court was right to send the suit to arbitration, saying that its order page contained language notifying Nicosia that "by placing this order, you agree to Amazon.com's privacy notice and conditions of use" and requiring him to affirmatively click on "Place your order."

A district court judge tossed the suit in February, saying Nicosia had agreed to be bound by Amazon's terms and conditions, which included the arbitration provision, each time he purchased a weight-loss supplement known as "1 Day Diet" that contained hidden amounts of sibutramine.

Nicosia purchased 1 Day Diet from a third-party seller on Amazon.com in January and April 2013 and is accusing Amazon of profiting off its failure to perform due diligence to ensure drugs

containing the ingredient aren't sold on its site

He also alleged that Amazon's failure to warn or reimburse consumers once it has detected and pulled an offending product is a violation of the Consumer Product Safety Act as well as several Washington state laws.

A representative for Nicosia declined to comment Monday, while representatives for Amazon didn't immediately respond to a request for comment.

Nicosia is represented by Joseph S. Tusa of Tusa PC, Peter D. St. Phillip Jr. and Scott V. Papp of Lowey Dannenberg Cohen & Hart PC, Gregory Duncan of the Law Offices of Gregory S. Duncan and Timothy G. Blood and Paula M. Roach of Blood Hurst & O'Reardon LLP.

Amazon is represented by Gregory T. Parks, Ezra D. Church, Regina Schaffer-Goldman and M. Claire Dekar of Morgan Lewis & Bockius LLP.

The case is Nicosia v. Amazon.com Inc., case number 15-0423, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Caroline Simson and Jessica Corso. Editing by Patricia K. Cole.

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