1 2 3 4 5 6	Evan J. Smith, Esquire (SBN 242352) Ryan P. Cardona, Esquire (SBN 302113) BRODSKY & SMITH 9595 Wilshire Blvd., Ste. 900 Beverly Hills, CA 90212 Telephone: (877) 534-2590 Facsimile: (310) 247-0160 <i>Attorneys for Plaintiff</i>	ELECTRONICALLY FILED Superior Court of California, County of San Francisco 03/07/2022 Clerk of the Court BY: KAREN VALDES Deputy Clerk			
7	SUPERIOR COURT OF THE STATE OF CALIFORNIA				
8	COUNTY OF SAN FRANCISCO				
9		Case No.:			
10 11	ANTHONY FERREIRO, Plaintiff,	CGC-22-598547 COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF			
12	vs.	(Violation of Health & Safety Code § 25249.5 et			
13 14 15	AIRGAS, INC., AIRGAS SAFETY, INC., HD SUPPLY, INC., HDS IP HOLDING, LLC, HD SUPPLY HOLDINGS, INC.,	seq.)			
16	Defendants.				
17	Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the following				
18	cause of action in the public interest of the citizens of the State of California.				
19	BACKGROUND OF THE CASE				
20	1. Plaintiff brings this representative action on behalf of all California citizens to				
21	enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at				
22	the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,				
23	"[n]o person in the course of doing business shall knowingly and intentionally expose any				
24	individual to a chemical known to the state to cause cancer or reproductive toxicity without first				
25	giving clear and reasonable warning to such individual". Health & Safety Code § 25249.6.				
26	2. This complaint is a representative action brought by Plaintiff in the public interest				
27	of the citizens of the State of California against defendants Airgas, Inc., Airgas Safety, Inc.				
28	(collectively, "Airgas") and HD Supply, Inc., HDS IP Holding, LLC, HD Supply Holdings, Inc., - 1 -				
	COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF				

(collectively, "HD Supply") (collectively with Airgas, the "Defendants") to enforce the People's
 right to be informed of the health hazards caused by exposure to Bisphenol A (BPA) from the use
 of Radnor glasses, UPC# 639890512159, that are manufactured by Airgas and distributed, offered
 for sale and/or sold by HD Supply in California.

3. BPA is a harmful chemical known to the State of California to cause female
reproductive toxicity. On May 11, 2015, the State of California listed BPA as a chemical known
to the State to cause reproductive toxicity and BPA has come under the purview of Proposition 65
regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8
& 25249.10(b).

4. Proposition 65 requires all businesses with ten (10) or more employees that operate
 within California or sell products therein to comply with Proposition 65 regulations. Included in
 such regulations is the requirement that businesses must label any product containing a Proposition
 65-listed chemical with a "clear and reasonable" warning before "knowingly and intentionally"
 exposing any person to any such listed chemical.

5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
\$ 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
actions of a defendant which "violate or threaten to violate" the statute. Health & Safety Code \$
25249.7.

6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
without a requisite Proposition 65 exposure warning, Radnor glasses, UPC# 639890512159, (the
"Products") that expose persons to BPA when used as intended and/or for its intended purpose.

7. Defendants' failure to warn consumers and other individuals in California of the
health hazards associated with exposure to BPA from use of the Products in conjunction with the
sale and/or distribution of the Products is a violation of Proposition 65 and subjects Defendants to
the enjoinment and civil penalties described herein.

8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition
65 in accordance with Health and Safety Code § 25249.7(b).

9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
Defendants to provide purchasers or users of the Products with required warnings related to the
dangers and health hazards associated with exposure to BPA from use of the Products pursuant to
Health and Safety Code § 25249.7(a).

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Plaintiff further seeks a reasonable award of attorney's fees and costs.

### PARTIES

9 11. Plaintiff is a citizen of the State of California acting in the interest of the general
10 public to promote awareness of exposures to toxic chemicals in products sold in California and to
11 improve human health by reducing hazardous substances contained in such items. He brings this
12 action in the public interest pursuant to Health and Safety Code § 25249.7(d).

12. Defendant Airgas, through its business, effectively imports, distributes, sells and/or
offers the Products for sale or use in the State of California, or it implies by its conduct that it
imports, distributes, sells and/or offers the Products for sale or use in the State of California.
Plaintiff alleges that defendant Airgas is a "person" in the course of doing business within the
meaning of Health & Safety Code sections 25249.6 and 25249.11.

18 13. Defendant HD Supply, through its business, effectively imports, distributes, sells
and/or offers the Products for sale or use in the State of California, or it implies by its conduct that
it imports, distributes, sells and/or offers the Products for sale or use in the State of California.
Plaintiff alleges that defendant HD Supply is a "person" in the course of doing business within the
meaning of Health & Safety Code sections 25249.6 and 25249.11.

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### VENUE AND JURISDICTION

14. Venue is proper in the County of San Francisco because one or more of the
instances of wrongful conduct occurred and continues to occur in this county and/or because
Defendants conducted, and continue to conduct, business in the County of San Francisco with
respect to the Products.

1 15. This Court has jurisdiction over this action pursuant to California Constitution
 2 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
 3 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement
 4 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has
 5 jurisdiction over this lawsuit.

6 16. This Court has jurisdiction over Defendants because each Defendant is either a
7 citizen of the State of California, has sufficient minimum contacts with the State of California, is
8 registered with the California Secretary of State as foreign corporations authorized to do business
9 in the State of California and/or has otherwise purposefully availed itself of the California market.
10 Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent
11 and permissible with traditional notions of fair play and substantial justice.

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# **STATUTORY BACKGROUND**

13 17. The people of the State of California declared in Proposition 65 their right "[t]o be
14 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
15 harm." (Section 1(b) of Initiative Measure, Proposition 65.)

16 18. To effect this goal, Proposition 65 requires that individuals be provided with a
17 "clear and reasonable warning" before being exposed to substances listed by the State of California
18 as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent part:

No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual...

19. An exposure to a chemical in a consumer product is one "which results from a person's acquisition, purchase, storage, consumption or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service." (27 CCR § 25602, para (b).) H&S Code § 25603(c) states that "a person in the course of doing business ... shall provide a warning to any person to whom the product is sold or transferred unless the product is packaged or labeled with a clear and reasonable warning."

20. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or more of the following methods individually or in combination:<sup>1</sup>

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A warning that appears on a product's label or other labeling.

 b. Identification of the product at the retail outlet in a manner which provides a warning. Identification may be through shelf labeling, signs, menus, or a combination thereof.

c. The warnings provided pursuant to subparagraphs (a) and (b) shall be prominently placed upon a product's labels or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

d. A system of signs, public advertising identifying the system and toll-free information services, or any other system that provides clear and reasonable warnings.

Proposition 65 provides that any "person who violates or threatens to violate" the
statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
"threaten to violate" is defined to mean creating "a condition in which there is a substantial
probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

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## FACTUAL BACKGROUND

21 22. On May 11, 2015, the State of California listed BPA as a chemical known to the
22 State to cause female reproductive toxicity and BPA has come under the purview of Proposition
23 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
24 25249.8 & 25249.10(b).

 <sup>&</sup>lt;sup>1</sup> Alternatively, a person in the course of doing business may elect to comply with the warning requirements set out in the amended version of 27 CCR 25601, *et.seq.*. as amended on August 30, 2016, and operative on August 30, 2018.

1 23. The exposures that are the subject of this complaint result from the purchase, 2 acquisition, handling and recommend use of the Products. The primary route of exposure to BPA 3 from use of the Products is dermal exposure. Dermal exposure to BPA is possible when the user 4 handles the Products, or the Products are placed in contact with exposed areas of the user's skin. 5 If the Products are placed in contact with the user's mouth during a phone call, ingestion of BPA 6 can occur resulting in oral exposure to BPA. Additionally, exposure through ingestion will occur 7 by touching the Products with subsequent touching of the user's hand to mouth.

8 24. Defendants have distributed, offered to sell and/or sold the Products in California
9 since at least March 8, 2021. The Products continue to be distributed and sold in California without
10 a requisite Proposition 65 compliant BPA exposure warning.

11 25. At all times relevant to this action, Defendants have knowingly and intentionally
12 exposed users, consumers and/or purchasers of the Products to BPA without first providing a clear
13 and reasonable exposure warning to such individuals.

As a proximate result of Defendants' actions, and as persons in the course of doing
business within the meaning of H&S Code § 25249.11, individuals throughout the State of
California, including in San Francisco County, have been exposed to BPA from use of the Products
without having first been provided a clear and reasonable exposure warning. The individuals
subject to the violative exposures include normal and foreseeable users and consumers that use the
Products.

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### SATISFACTION OF NOTICE REQUIREMNTS

21 27. On February 12, 2021, Plaintiff purchased the Product from HD Supply. At the
22 time of purchase, Defendants did not provide a Proposition 65 exposure warning for BPA or any
23 other Proposition 65 listed chemical in a manner consistent with H&S Code § 25603.1 as described
24 *supra*.

25 28. The Product was sent to a testing laboratory to determine the concentration of BPA
26 present on the surface of the Product.

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29. On March 3, 2021, the laboratory provided the results of its analysis. Surface BPA
 was collected using a wipe test. Results of this test concluded the presence of BPA at the surface
 of the product (the "Chemical Test Report").

30. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
to determine if, based on the findings of the Chemical Test Report and the reasonable and
foreseeable use of the Product, exposure to BPA will occur at levels that require Proposition 65
warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California
Code of Regulations.

9 31. On March 8, 2021 Plaintiff received from the analytical chemist an exposure
10 assessment report which concluded that persons in California who use the Products will be exposed
11 to levels of BPA that require a Proposition 65 exposure warning.

32. On March 8, 2021, Plaintiff gave notice of alleged violation of Health and Safety
Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
BPA from use of the Products without proper warning, subject to a private action to Defendants
and to the California Attorney General's office and the offices of the County District attorneys and
City Attorneys for each city with a population greater than 750,000 persons wherein the herein
violations allegedly occurred.

18 33. The Notice complied with all procedural requirements of Proposition 65 including
19 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
20 least one person with relevant and appropriate expertise who reviewed relevant data regarding
21 BPA exposure, and that counsel believed there was meritorious and reasonable cause for a private
22 action.

34. After receiving the Notice, and to Plaintiff's best information and belief, none of
the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
cause of action against Defendants under Proposition 65 to enforce the alleged violations which
are the subject of the Notice.

27 35. Plaintiff is commencing this action more than sixty (60) days from the date of the
28 Notice to Defendants, as required by law.

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### FIRST CAUSE OF ACTION

#### (By Plaintiff against Defendant for its Violation of Proposition 65)

36. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 35 of 4 this Complaint as though fully set forth herein.

5 37. Defendants have, at all times mentioned herein, acted as distributers and/or retailers of the Products. 6

7 38. Use of the Products will expose users and consumers thereof to BPA, a hazardous 8 chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.

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39.

The Products do not comply with the Proposition 65 warning requirements.

10 40. Plaintiff, based on his best information and belief, avers that at all relevant times 11 herein, and at least sinc March 8, 2021, continuing until the present, that Defendants have continued to knowingly and intentionally expose California users and consumers of the Products 12 13 to BPA without providing required warnings under Proposition 65.

14 41. The exposures that are the subject of the Notice result from the purchase, 15 acquisition, handling, and recommended use of the Products. The primary route of exposure to BPA from use of the Products is dermal exposure. Dermal exposure to BPA is possible when the 16 user handles the Products, or the Products are placed in contact with exposed areas of the user's 17 18 skin. If the Products contact hard water and/or soaps at elevated pH, higher extraction rates of BPA 19 and accumulation of BPA at the surface of the Products will result. Additionally, exposure through ingestion will occur by touching the Products with subsequent touching of the user's hand to 20 21 mouth.

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42. Plaintiff, based on his best information and belief, avers that such exposures will continue every day until clear and reasonable warnings are provided to purchasers and users or 24 until BPA is removed from the Products.

25 Defendants had knowledge that the normal and reasonably foreseeable use of the 43. 26 Product exposes individuals to BPA, and Defendants intend those exposures to BPA will occur by their deliberate, non-accidental participation in the importation, distribution, sale and offering of 27 28 the Products to consumers in California.

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1	11 Dispitiff has successed in the state of the second seco			
2	44. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to the filing of the Complaint			
	filing of the Complaint.			
3	45. Pursuant to Health and Safety Code § 25249.7(b), because of the above-desc			
4	acts, Defendants are each liable for a maximum civil penalty of \$2,500 per day per violation.			
5	46. Pursuant to Health and Safety Code § 25249.7(a), this Court is specified	cally		
6	authorized to grant injunctive relief in favor of Plaintiff and against Defendants.			
7	PRAYER FOR RELIEF			
8	WHEREFORE, Plaintiff demands judgment against Defendants and requests the following			
9	P relief:			
10	A. That the court assess civil penalties against each Defendant in the amount of \$2	2,500		
11	per day for each violation for up to 365 days (up to a maximum civil penalty amoun	t per		
12	violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);			
13	B. That the Court preliminarily and permanently enjoin Defendants mand	ating		
14	Proposition 65 compliant warnings on the Products;			
15	C. That the Court grant Plaintiff reasonable attorney's fees and costs of suit, in	the		
16	amount of \$50,000.00.			
17	D. That the Court grant any further relief as may be just and proper.			
18	Dated: March 7, 2022 BRODSKY & SMITH			
19	By: Eff			
20 21	Evan J. Smith (SBN242352) Ryan P. Cardona (SBN302113) 9595 Wilshira Baulaward, Swite, 000			
22	9595 Wilshire Boulevard, Suite 900 Beverly Hills, CA 90212			
22	Telephone: (877) 534-2590 Facsimile: (310) 247-0160			
23	Attorneys for Plaintiff			
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28	- 9 -			
-	COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF HEALTH & SAFETY CODE §25249.5			