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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 ANTHONY FERREIRO,
12 Plaintiff,
13 vs.
14 CVS PHARMACY, INC.,
15 Defendant.

Case No.:

RG20068754

COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF

(Violation of Health & Safety Code § 25249.5 et seq.)

16 Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the following
17 cause of action in the public interest of the citizens of the State of California.

18 **BACKGROUND OF THE CASE**

19 1. Plaintiff brings this representative action on behalf of all California citizens to
20 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
21 the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,
22 "[n]o person in the course of doing business shall knowingly and intentionally expose any
23 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
24 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

25 2. This complaint is a representative action brought by Plaintiff in the public interest
26 of the citizens of the State of California to enforce the People's right to be informed of the health
27 hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in CVS
28 Health blood pressure monitors sold and/or distributed by defendant CVS Pharmacy, Inc. ("CVS"
or the "Defendant") in California.

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1 3. DEHP is a harmful chemical known to the State of California to cause cancer and
2 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical known
3 to the State to cause cancer and it has come under the purview of Proposition 65 regulations since
4 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
5 On October 24, 2003, the State of California listed DEHP as a chemical known to cause
6 reproductive toxicity.

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

12 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
13 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
14 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
15 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
16 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
17 25249.7.

18 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
19 without a requisite exposure warning, CVS Health blood pressure monitors (the “Products”) that
20 expose persons to DEHP.

21 7. Defendant’s failure to warn consumers and other individuals in California of the
22 health hazards associated with exposure to DEHP in conjunction with the sale and/or distribution
23 of the Products is a violation of Proposition 65 and subjects Defendant to the enjoinder and civil
24 penalties described herein.

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

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
28 Defendant to provide purchasers or users of the Products with required warnings related to the

1 dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety Code
2 § 25249.7(a).

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

4 **PARTIES**

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

9 12. Defendant CVS, through its business, effectively imports, distributes, sells, and/or
10 offers the Products for sale or use in the State of California, or it implies by its conduct that it
11 imports, distributes, sells, and/or offers the Products for sale or use in the State of California.

12 13. Plaintiff alleges that defendant CVS is a "person" in the course of doing business
13 within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

15 14. Venue is proper in the County of Alameda because one or more of the instances of
16 wrongful conduct occurred, and continue to occur in this county and/or because Defendant
17 conducted, and continues to conduct, business in the County of Alameda with respect to the
18 Products.

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

24 16. This Court has jurisdiction over Defendant because Defendant is either a citizen of
25 the State of California, has sufficient minimum contacts with the State of California, is registered
26 with the California Secretary of State as foreign corporations authorized to do business in the State
27 of California, and/or has otherwise purposefully availed itself of the California market. Such
28

1 purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
2 permissible with traditional notions of fair play and substantial justice.

3 STATUTORY BACKGROUND

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

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

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

13 19. An exposure to a chemical in a consumer product is one “which results from a
14 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a
15 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §
16 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...
17 shall provide a warning to any person to whom the product is sold or transferred unless the product
18 is packaged or labeled with a clear and reasonable warning.”

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

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

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

25
26
27 ¹ Alternatively, a person in the course of doing business may elect to comply with the warning
28 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 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
2 prominently placed upon a product's labels or other labeling or displayed at the retail outlet
3 with such conspicuousness, as compared with other words, statements, designs, or devices
4 in the label, labeling or display as to render it likely to be read and understood by an
5 ordinary individual under customary conditions of purchase or use.

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

8 21. Proposition 65 provides that any "person who violates or threatens to violate" the
9 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
10 "threaten to violate" is defined to mean creating "a condition in which there is a substantial
11 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
12 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
13 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

14 **FACTUAL BACKGROUND**

15 22. On January 1, 1988, the State of California listed DEHP as a chemical known to
16 the State to cause cancer and it has come under the purview of Proposition 65 regulations since
17 that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).
18 On October 24, 2003, the State of California listed DEHP as a chemical known to cause
19 reproductive toxicity. In summary, the Listed Chemical was listed under Proposition 65 as a
20 chemical known to the State to cause cancer and reproductive toxicity.

21 23. The consumer exposures that are the subject of this Complaint result from through
22 dermal absorption. Dermal absorption of DEHP can occur through direct skin contact when the
23 Products are contacted with bare hands or if the Products are held directly against bare skin. If the
24 Products are stored in the carrying case, articles placed in the case can absorb DEHP that can
25 subsequently be handled, mouthed, or ingested by the user resulting in exposure to DEHP. Finally,
26 while mouthing of the Products does not seem likely, some amount of exposure through ingestion
27 can occur by touching the Products with subsequent touching of the user's hand to mouth.

1 24. Defendant has supplied, processed, marketed, distributed, offered to sell and/or sold
2 the Products in California since at least March 5, 2020. The Products continue to be distributed
3 and sold in California without the requisite warning information.

4 25. At all times relevant to this action, Defendant has knowingly and intentionally
5 exposed users, consumers and/or patients to the Products and the Listed Chemical without first
6 giving a clear and reasonable exposure warning to such individuals.

7 26. As a proximate result of acts by Defendant, as a person in the course of doing
8 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
9 California, including in Alameda County, have been exposed to the Listed Chemical without a
10 clear and reasonable warning on the Products. The individuals subject to the violative exposures
11 include normal and foreseeable users, consumers and patients that use the Products, as well as all
12 others exposed to the Products.

13 SATISFACTION OF NOTICE REQUIREMENTS

14 27. On March 5, 2020, Plaintiff gave notice of alleged violation of Health and Safety
15 Code § 25249.6 (the “Notice”) to Defendant concerning the exposure of California citizens to
16 DEHP contained in the Products without proper warning, subject to a private action to Defendant
17 and to the California Attorney General’s office and the offices of the County District attorneys and
18 City Attorneys for each city with a population greater than 750,000 persons wherein the herein
19 violations allegedly occurred.

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

25 29. After receiving the Notice, and to Plaintiff’s best information and belief, none of
26 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a
27 cause of action against Defendant under Proposition 65 to enforce the alleged violations which are
28 the subject of the Notice.

1 38. Defendant has knowledge that the normal and reasonably foreseeable use of the
2 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur
3 by its deliberate, non-accidental participation in the importation, distribution, sale and offering of
4 the Products to consumers in California

5 39. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
6 Complaint.

7 40. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
8 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

9 41. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
10 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff demands judgment against Defendant and requests the following
13 relief:

14 A. That the court assess civil penalties against each Defendant in the amount of \$2,500
15 per day for each violation for up to 365 days (up to a maximum civil penalty amount per
16 violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);

17 B. That the court preliminarily and permanently enjoin Defendant mandating
18 Proposition 65 compliant warnings on the Products;

19 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the
20 amount of \$50,000.00.

21 D. That the court grant any further relief as may be just and proper.

22 Dated: July 24, 2020

BRODSKY & SMITH, LLC

23 By:  _____

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