1 2 3 4	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		ELECTRONICALLY FILED Superior Court of California, County of San Francisco 09/20/2023 Clerk of the Court
5	Attorneys for Plaintiff		BY: AUSTIN LAM Deputy Clerk
6	SUPERIOR COURT OF THE STATE OF CALIFORNIA		
7	COUNTY OF SAN FRANCISCO		
8 9 10	PRECILA BALABBO, Plaintiff,	Case No.: COMPLAINT FOR CIVIL INJUNCTIVE RELIEF	CGC-23-609212 PENALTIES AND
11	VS.	(Violation of Health & Safet	y Code § 25249.5 et
12	CVS PHARMACY, INC.,	seq.)	
13	Defendant.		
14	Plaintiff Precila Balabbo ("Plaintiff"), by and through her attorneys, alleges the following		
15	cause of action in the public interest of the citizens of the State of California.		
16	BACKGROUND OF THE CASE		
17	1. Plaintiff brings this representative action on behalf of all California citizens to		
18	enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at		
19	the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,		
20	"[n]o person in the course of doing business shall knowingly and intentionally expose any		
21	individual to a chemical known to the state to cause cancer or reproductive toxicity without first		
22	giving clear and reasonable warning to such individual". Health & Safety Code § 25249.6.		
23	2. This complaint is a representat	ive action brought by Plaintiff	in the public interest
24	of the citizens of the State of California to end	force the People's right to be in	formed of the health
25	hazards caused by exposure to lead, a toxic	chemical found in Precious	Moments® mugs, #
26	893342001084, sold and/or distributed by defe	endant CVS Pharmacy, Inc. ("C	VS" or "Defendant")
27	in California.		
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	COMPLAINT FOR CIVIL PENALTIES A	AND INJUNCTIVE RELIEF	VIOLATION OF

LAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATIO HEALTH & SAFETY CODE §25249.5 3. Lead is a harmful chemical known to the State of California to cause cancer and
 birth defects or other reproductive harm. On October 1, 1992, the state of California listed lead as
 a chemical known to cause cancer and it 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). On February 27, 1987, the State of California listed lead as a chemical known to
 cause birth defects or other reproductive harm.

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 that will create an exposure above safe harbor levels 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.

19 6. Plaintiff alleges that Defendant distributes and/or offers for sale in California,
20 without a requisite exposure warning, *Precious Moments*® mugs, # 893342001084, (the
21 "Products") that expose persons to lead when used for their intended purpose.

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

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

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

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

PARTIES

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

11 12. Defendant CVS, 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.

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

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VENUE AND JURISDICTION

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

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

16. This Court has jurisdiction over Defendant because Defendant is either a citizen of
the State of California, has sufficient minimum contacts with the State of California, is registered
with the California Secretary of State as foreign corporations authorized to do business in the State

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1	of California, and/or has otherwise purposefully availed itself of the California market. Such
2	purposeful availment has rendered the exercise of jurisdiction by California courts consistent and
3	permissible with traditional notions of fair play and substantial justice.

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STATUTORY BACKGROUND

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

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

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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...

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

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20. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or
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a. A warning that appears on a product's label or other labeling.

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¹ 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.

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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).

FACTUAL BACKGROUND

22. On October 1, 1992, the state of California listed lead as a chemical known to cause
cancer and it 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). On February 27,
1987, the State of California listed lead as a chemical known to cause birth defects or other
reproductive harm. In summary, lead was listed under Proposition 65 as a chemical known to the
State to cause cancer and birth defects or other reproductive harm.

24 23. The exposures that are the subject of the Notice result from the purchase,
acquisition, handling and recommended use of the Product. The primary route of exposure to the
is through dermal absorption directly through the skin when consumers use, touch, or handle the
Products. Exposure through ingestion will occur by touching the Product with subsequent touching

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of the user's hand to mouth. No clear and reasonable warning is provided with the Products
 regarding the health hazards of exposure.

3 24. Defendant has processed, marketed, distributed, offered to sell and/or sold the
4 Products in California since at least September 28, 2022. The Products continue to be distributed
5 and sold in California without the requisite warning information.

6 25. At all times relevant to this action, Defendant has knowingly and intentionally
7 exposed users and/or consumers of the Products to lead without first giving a clear and reasonable
8 exposure warning to such individuals.

9 26. As a proximate result of acts by Defendant, as a person in the course of doing 10 business within the meaning of H&S Code § 25249.11, individuals throughout the State of 11 California, including in San Francisco County, have been exposed to lead without a clear and 12 reasonable warning on the Products. The individuals subject to the violative exposures include 13 normal and foreseeable users and consumers that use the Products, as well as all others exposed to 14 the Products.

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SATISFACTION OF NOTICE REQUIREMNTS

16 27. Plaintiff purchased the Product from CVS. At the time of purchase, Defendant did
17 not provide a Proposition 65 exposure warning for lead or any other Proposition 65 listed chemical
18 in a manner consistent with H&S Code § 25603.1 as described *supra*.

19 28. The Product was sent to a testing laboratory to determine if, and what amount of
20 lead would migrate and/or leach from the Product.

21 29. The laboratory provided the results of its analysis. Results of this test determined
22 the Product exposes users to lead (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 lead 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.

31. On September 28, 2022, Plaintiff received from the analytical chemist an exposure
 assessment report which concluded that persons in California who use the Products will be exposed
 to levels of lead that require a Proposition 65 exposure warning.

32. On September 28, 2022, Plaintiff gave notice of alleged violation of Health and
Safety Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens
to lead contained in the Products without proper warning, subject to a private action to Defendant
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.

33. The Notice complied with all procedural requirements of Proposition 65 including
the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
least one person with relevant and appropriate expertise who reviewed relevant data regarding lead
exposure, and that counsel believed there was meritorious and reasonable cause for a private
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 Defendant under Proposition 65 to enforce the alleged violations which are
the subject of the Notice.

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

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FIRST CAUSE OF ACTION

(By Plaintiff against Defendant for the Violation of Proposition 65)

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

25 37. Defendant has, at all times mentioned herein, acted as distributer, and/or retailer of
26 the Product.

38. Use of the Products will exposed users to lead, a hazardous chemical found on the
Proposition 65 list of chemicals known to be hazardous to human health.

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39. The Product does not comply with the Proposition 65 warning requirements.

2 40. Plaintiff, based on her best information and belief, avers that at all relevant times herein, and at least since September 28, 2022, continuing until the present, that Defendant has 3 continued to knowingly and intentionally expose California users and consumers of the Product to 4 lead without providing required warnings under Proposition 65.

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6 41. The exposures that are the subject of the Notice result from the purchase, acquisition, handling and recommended use of the Product. The primary route of exposure to the 7 8 is through dermal absorption directly through the skin when consumers use, touch, or handle the 9 Products. Exposure through ingestion will occur by touching the Product with subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided with the Products 10 regarding the health hazards of exposure. 11

12 42. Plaintiff, based on her best information and belief, avers that such exposures will 13 continue every day until clear and reasonable warnings are provided to purchasers and users or 14 until this known toxic chemical is removed from the Products.

43. Defendant has knowledge that the normal and reasonably foreseeable use of the 15 Products exposes individuals to lead, and Defendant intends that exposures to lead will occur by 16 17 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the Products to consumers in California 18

19 44. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this Complaint. 20

21 45. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation. 22

23 46. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically authorized to grant injunctive relief in favor of Plaintiff and against Defendant. 24

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1	PRAYER FOR RELIEF
2	WHEREFORE, Plaintiff demands judgment against Defendant and requests the following
3	relief:
4	A. That the court assess civil penalties against each Defendant in the amount of \$2,500
5	per day for each violation for up to 365 days (up to a maximum civil penalty amount per
6	violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);
7	B. That the court preliminarily and permanently enjoin Defendant mandating
8	Proposition 65 compliant warnings on the Products;
9	C. That the court grant Plaintiff reasonable attorney's fees and costs of suit, in the
10	amount of \$50,000.00.
11	D. That the court grant any further relief as may be just and proper.
12	Dated: September 20, 2023 BRODSKY SMITH
13	By: Evan J. Smith (SBN242352)
14	Ryan P. Cardona (SBN302113)
15	9595 Wilshire Boulevard, Suite 900 Beverly Hills, CA 90212
16	Telephone: (877) 534-2590 Facsimile: (310) 247-0160
17	Attorneys for Plaintiff
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	COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF HEALTH & SAFETY CODE §25249.5

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