

1 CAROL BROPHY, SBN 155767
2 **STEPTOE & JOHNSON LLP**
3 One Market Plaza
4 Spear Tower, Suite 3900
5 San Francisco, California 94105
6 Telephone: 415-365-6700
7 Facsimile: 415-365-6699

8 MELANIE AYERH, SBN 303211
9 **STEPTOE & JOHNSON LLP**
10 633 West 5th Street, Suite 1900
11 Los Angeles, CA 90071
12 Telephone: 213.439.9400
13 Facsimile: 213.439.9599

14 Attorneys for Defendant,
15 CVS PHARMACY, INC.

16 UNITED STATES DISTRICT COURT
17
18 CENTRAL DISTRICT OF CALIFORNIA

19 JOSEPH MIER, individually and on behalf of
20 all others similarly situated,

21 Plaintiff,

22 v.

23 CVS HEALTH, Rhode Island corporation; and
24 DOES 1 to 100, inclusive,

25 Defendants.

Case No.

NOTICE OF REMOVAL

[Originally Orange County Superior Court
Case No. 30-2020-01141024-CU-FR-CXC]

1 **TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE**
2 **CENTRAL DISTRICT OF CALIFORNIA, AND TO THE CLERK OF THAT COURT:**

3 **PLEASE TAKE NOTICE THAT** Defendant CVS Pharmacy, Inc. (erroneously sued as
4 “CVS Health”) (“Defendant” or “CVS”), pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453,
5 hereby removes the above-captioned action from the Superior Court of California, County of
6 Orange to the United States District Court for the Central District of California.

7 **I. INTRODUCTION**

8 1. This Action is properly removed to this Court pursuant to 28 U.S.C. § 1441
9 because this Court has jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d), in
10 that this Action is a civil action in which the alleged amount in controversy exceeds the sum of
11 \$5,000,000, exclusive of costs and interest, has more than 100 members in the proposed putative
12 class, and is between citizens of different states.

13 **II. BACKGROUND**

14 2. On May 26, 2020, Plaintiff Joseph Mier, purportedly on behalf of himself and all
15 others similarly situated, filed a civil action in the Orange County Superior Court entitled *Mier v.*
16 *CVS Health, et al.* Orange County Superior Court Case No. Case No. 30-2020-01141024-CU-
17 FR-CXC. (See Exhibit A, which includes the Summons, Complaint and all of the documents
18 served on CVS.)

19 3. The Complaint, which is styled as a class action, purports to bring claims under
20 California’s False Advertising Law (“FAL”), Business & Professions Code § 17500, et seq.;
21 California’s Unfair Competition Law (“UCL”), Business & Professions Code § 17200, et seq.;
22 and common law. (See Complaint ¶¶32-68.) Plaintiff’s Complaint arises from a purported
23 transaction at a CVS Store in Santa Ana, California. (*Id.* ¶7.)

24 4. The proposed putative class consists of “[a]ll persons residing in the State of
25 California who purchased CVS brand hand-sanitizer during the period beginning four years from
26 the date of the filing of this Complaint to the date of class certification (the “Class”). (Complaint
27 ¶ 24.)

28 5. Plaintiff served CVS with the Complaint by personal service on September 10,
2020. (See Exhibit B.)

1 6. Nothing in this Notice of Removal should be interpreted as a concession of
2 liability, the appropriateness of venue, the appropriateness of class treatment, Plaintiff’s class
3 definition, or the validity of Plaintiff’s claim for relief. CVS reserves the right to supplement and
4 amend this Notice of Removal.

5 **III. REQUIREMENTS FOR REMOVAL UNDER CAFA**

6 7. This Court has original jurisdiction over this action under the Class Action
7 Fairness Act of 2005 (“CAFA”), codified in part at 28 U.S.C. §§ 1332 and 1453. Under CAFA, a
8 district court shall have original jurisdiction over any putative civil class action in which: (1)
9 there are at least 100 members in all proposed plaintiff classes; (2) “the matter in controversy
10 exceeds the sum or value of \$5,000,000, exclusive of interest and costs”; and (3) “any member of
11 a class of plaintiffs is a citizen of a state different from any defendant.” 28 U.S.C. § 1332(d)(2,
12 5). Because this action meets each of CAFA’s requirements, it may be removed to federal court.
13 28 U.S.C. § 1441(a) (“[A]ny civil action brought in a State Court of which the district courts of
14 the United States have original jurisdiction, may be removed by the defendant.”).

15 **VI. THE REQUIREMENTS FOR REMOVAL UNDER CAFA ARE**
16 **SATISFIED**

17 **A. The Number of Proposed Class Members Exceeds 100**

18 8. The Complaint alleges that members of the putative class are “so numerous that
19 joinder of all members is impracticable,” but does not identify the number of class members.
20 (Complaint ¶ 26.) That said, Plaintiff alleges “it stands to reason that the number of Class
21 Members is **at least in the thousands.**” (*Id.*) (emphasis added.)

22 **B. The Amount in Controversy Exceeds \$5 Million**

23 9. Defendant denies Plaintiff’s substantive allegations, the appropriateness of class
24 treatment, and that Plaintiff is entitled to any of the relief sought in his Complaint, and does not
25 waive any defense with respect to any of Plaintiff’s claims. Nonetheless, the amount in
26 controversy is determined by accepting Plaintiff’s allegations as true. See *Cain v. Hartford Life*
27 *& Accident Ins. Co.*, 890 F. Supp. 2d 1246, 1249 (C.D. Cal. 2012) (“In measuring the amount in
28 controversy, a court must assume that the allegations of the complaint are true and assume that a

1 jury will return a verdict for the plaintiff on all claims made in the complaint.”). Here, taking
2 Plaintiff’s allegations as true, the amount in controversy in this action (including attorney’s fees)
3 exceeds \$5,000,000.

4 10. Case law is clear that “the amount-in-controversy allegation of a defendant
5 seeking federal-court adjudication should be accepted when not contested by the plaintiff or
6 questioned by the court.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 87
7 (2014) (citations omitted); *see also* Schwarzer, Tashima, et al., California Practice Guide:
8 Federal Civil Procedure Before Trial (2016) § 2:2395, at 2D-30 (“[D]efendant may simply allege
9 in its notice of removal that the jurisdictional threshold has been met and discovery may be taken
10 with regard to that question.”); *id.* § 2:3435, at 2D-172 – 173 (“Defendant’s notice of removal
11 ‘need include only a plausible allegation that the amount in controversy exceeds the
12 jurisdictional threshold.’”). Further, CAFA’s legislative history indicates that even if the Court
13 “is uncertain about whether all matters in controversy in a purported class action do not in the
14 aggregate exceed the sum or value of \$5,000,000, the court should err in favor of exercising
15 jurisdiction over the case.” Senate Report on the Class Action Fairness Act of 2005 Dates of
16 Consideration and Passage, S. Rep. 109-14.

17 11. Plaintiff seeks restitution associated with CVS’s allegedly unfair business
18 practices during the relevant statutory time period. (Prayer for Relief ¶¶ 2-3.) Given the number
19 of CVS locations (nearly 1,200 in California alone)¹, the volume of sales in each store, and the
20 number of potential class members who made purchases at those stores over the four-year
21 period, the amount in controversy exceeds \$5,000,000.

22 12. Plaintiff further seeks statutory damages, each of which are properly included in
23 the calculation for determining the amount in controversy. The UCL provides for statutory
24 penalties of up to \$2,500 per violation. Cal. Bus. & Prof. Code § 17206(a). Similarly, the FAL
25 provides for a penalty of up to \$2,500. Cal. Bus. & Prof. Code § 17500.

26
27
28 _____
¹ See <https://www.cvs.com/store-locator/cvs-pharmacy-locations/California>.

1 13. Plaintiff also seeks injunctive relief. (Prayer for Relief ¶ 3.) The potential cost of
2 compliance with a request for injunctive relief may be considered when calculating the amount
3 put in controversy under CAFA. *Tompkins v. Basic Research LLC*, No. 5-08-244, 2008 WL
4 71808316, at *4 & n9 (E.D. Cal. Apr. 22, 2008) (noting that under CAFA, the amount put in
5 controversy includes defendants’ potential cost of compliance with a request for injunctive
6 relief); *see also* James Wm. Moore et al., *Moore’s Federal Practice’s* 102.26(c)(iii) (3d ed. 2010)
7 (“The amount in controversy in CAFA cases may be determined on the basis of the aggregate
8 value to either the plaintiff class members or to the defendants”). The costs to comply with an
9 injunction could potentially be significant and Plaintiff’s request for injunctive relief further
10 takes the amount in controversy over the statutory threshold. *See* 28 U.S.C. § 1332(d)(2).

11 14. While Plaintiff’s claim for restitution, in itself, puts the amount in controversy
12 above \$5,000,000, the actual, punitive and statutory damages; and injunctive relief requested by
13 Plaintiff make clear that this requirement is satisfied.

14 **C. Minimum Diversity Exists**

15 15. The minimal diversity standard of CAFA is met as long as any one defendant is a
16 citizen of a different state than any of the named plaintiffs. 28 U.S.C. § 1332(d)(2)(A). Plaintiff
17 is a resident of California. (Complaint ¶ 7.)

18 16. For purposes of diversity, a corporation is deemed to be a citizen of (1) the state
19 under whose laws it is organized; and (2) the state of its “principal place of business.” 28 U.S.C.
20 § 1332(c)(1). CVS is a Rhode Island corporation. (Complaint ¶ 8.)

21 17. Thus, minimal diversity is satisfied because Plaintiff is a citizen of a state
22 (California) different from CVS (Rhode Island).

23 **D. No CAFA Exceptions Apply**

24 18. The Action does not fall within any of exclusion to removal jurisdiction
25 recognized by 28 U.S.C. § 1332(d), and Plaintiff has the burden of proving otherwise. *See*
26 *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th Cir. 2007) (“[T]he party seeking remand
27 bears the burden to prove an exception to CAFA’s jurisdiction”).
28

1 **V. THE OTHER PROCEDURAL REQUISITES FOR REMOVAL ARE**
2 **SATISFIED**

3 19. Removal to this judicial district and division is proper under 28 U.S.C. §§
4 1441(a), 1446(a), because the Superior Court of the State of California for the County of Orange
5 is located within the Central District of California.

6 20. This Notice of Removal is timely because it was filed within thirty days of
7 September 10, 2020, the date on which CVS was served with the Summons and Complaint. 28
8 U.S.C. § 1446(b). Thirty days after September 10, 2020 was Saturday, October 10, 2020, the
9 next day a Sunday, and the following day, October 12, 2020, was a court holiday. FRCP, Rule
10 6(a)(1)(c); 5 U.S. § 6103.

11 21. Pursuant to 28 U.S.C. § 1446(a), a copy of the Summons, Complaint, and all other
12 documents served on CVS are attached as Exhibit A.

13 22. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal and all
14 documents in support thereof and concurrently therewith are being filed with the Clerk of the
15 Superior Court for the County of Orange. Written notice of the filing of this Notice of Removal
16 is being served upon counsel for Plaintiff.

17 **CONCLUSION**

18 CVS respectfully submits that this action is removed properly pursuant to the Class
19 Action Fairness Act.

20
21 DATED: October 13, 2020

STEPTOE & JOHNSON LLP

22
23
24 By: /s/ Melanie Ayerh
25 Carol R. Brophy
26 Melanie Ayerh
27 Attorneys for Defendant, CVS PHARMACY,
28 INC.

1 Bobby Saadian (SBN 250377)
bobby@wilshirelawfirm.com
2 Justin F. Marquez (SBN 262417)
justin@wilshirelawfirm.com
3 Thiago Coelho (SBN 324715)
thiago@wilshirelawfirm.com
4 Robert Dart (SBN 264060)
RDart@wilshirelawfirm.com
5 **WILSHIRE LAW FIRM, PLC**
6 3055 Wilshire Blvd., 12th Floor
7 Los Angeles, California 90010
8 Telephone: (213) 381-9988
9 Facsimile: (213) 381-9989

9 *Attorneys for Plaintiff*
10 *and the Putative Class*

11 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
12 **COUNTY OF ORANGE**

13 JOSEPH MIER, individually and on behalf
14 of all others similarly situated,

15 Plaintiff,

16 vs.

17 CVS HEALTH, Rhode Island corporation;
18 and DOES 1 to 100, inclusive,

19 Defendants.

CASE NO.: 30-2020-01141024-CU-FR-CXC
Assigned for all purposes to: Judge Randall J. Sherman
Dept: CX105

CLASS ACTION

COMPLAINT

DEMAND FOR JURY TRIAL

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

1 Plaintiff Josphe Mier (“Plaintiff”), individually and on behalf of all others similarly
2 situated, bring this action based upon personal knowledge as to themselves and their own acts,
3 and as to all other matters upon information and belief, based upon, *inter alia*, the investigation
4 of their attorneys.

5 **NATURE OF THE ACTION**

6 1. Defendant CVS Health (“CVS”) is a Rhode Island corporation headquartered in
7 Woonsocket, Rhode Island, that, among other things, produces health products.

8 2. Defendant sells at its stores and elsewhere certain items from its own brand, such
9 as alcohol-based hand-sanitizer. Defendant includes, printed on the bottles which contain its
10 hand-sanitizer, a statement that the product kills 99.99% of germs. CVS’s Original Scent
11 Moisturizing Hand Sanitizer and all similar CVS brand hand sanitizers state on their bottles,
12 “Kills 99.99% of Germs.”

13 3. These statements, in that they are made with a degree of certainty to the
14 hundredth digit, necessarily imply that a scientific study proves that the product in fact kills
15 99.99% of germs. Accordingly, they are each false statements, as no scientific study supports
16 them.

17 4. In fact, it is scientifically proven that alcohol-based hand-sanitizer does not kill
18 many types of germs. It does not kill many non-enveloped viruses, such as norovirus.
19 "Norovirus is the leading cause of foodborne illness in the United States. It causes 58% of
20 foodborne illnesses acquired in the United States." [https://www.cdc.gov/norovirus/trends-](https://www.cdc.gov/norovirus/trends-outbreaks/burden-US.html)
21 [outbreaks/burden-US.html](https://www.cdc.gov/norovirus/trends-outbreaks/burden-US.html). It is hard to believe that Defendant’s hand-sanitizer kills 99.99% of
22 all germs, while excluding the family of viruses that causes more than half of all food borne
23 illnesses in the country. It also does not kill bacterial spores, protozoan cysts, some parasites
24 like Giardia, and the diarrhea-causing bacterium *Clostridium difficile*. Moreover, studies have
25 shown that some bacteria are becoming alcohol-resistant. For these reasons, no scientific study
26 proves with any degree of certainty the overall percentage of germs which alcohol-based hand-
27 sanitizer kills.
28

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1 5. Defendant was aware that no scientific study supported its 99.99% claims, yet it
 2 proceeded to make those claims on the product labels, creating the clear impression that it had
 3 been scientifically proven. The product labels are therefore materially misleading, in that they
 4 plainly state, in a manner giving the impression that it has been scientifically proven, that the
 5 product kills 99.99% of germs, when studies show that it does not kill many types of germs.
 6 Hundreds of thousands of consumers have purchased these products, particularly during the
 7 ongoing COVID-19 pandemic, in the false belief that they have been proven to kill 99.99% of
 8 germs. It has not been so proven. They have been misled.

9 6. As a result of Defendants’ deceptive and misleading practices, Plaintiff and the
 10 Class Members were induced to purchase hand-sanitizer which does not perform as advertised.
 11 Defendant has made millions of dollars in fraudulent sales to individuals who Defendant told
 12 were receiving a product which had been proven, with a high degree of certitude, to kill almost
 13 every germ. Defendant’s customers did not receive the benefit of their bargain. The products
 14 do not kill many types of germs.

THE PARTIES

15
 16 7. Plaintiff Joseph Mier (“Plaintiff Mier”) is a California citizen residing in Orange
 17 County, California. On or about August 1, 2019, Plaintiff Mier purchased a bottle of CVS’
 18 Advanced Formula Hand Sanitizer, an alcohol-based hand-sanitizer, from a CVS store located
 19 at the intersection of Main Street and Warner Avenue, in Santa Ana, CA.

20 8. Defendant CVS is a Rhode Island corporation with its principal offices located in
 21 Woonsocket, Rhode Island. CVS does substantial business, including selling its health
 22 products, in California, and in Orange County specifically.

23 9. Plaintiff is unaware of the true names, identities, and capacities of the defendants
 24 sued herein as DOES 1 to 100. Plaintiff will seek leave to amend this complaint to allege the
 25 true names and capacities of DOES 1 to 100 if and when ascertained. Plaintiff is informed and
 26 believes, and thereupon alleges, that each of the defendants sued herein as a DOE is legally
 27 responsible in some manner for the events and happenings alleged herein and that each of the
 28

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 Los Angeles, CA 90010-1137

1 defendants sued herein as a DOE proximately caused injuries and damages to Plaintiff and
2 Class Members as set forth below.

3 10. As used herein, “Defendants” shall refer to CVS and Does 1 to 100, collectively.

4 **JURISDICTION AND VENUE**

5 11. This Court has subject matter jurisdiction over this action pursuant to Section
6 410.10 of the California Code of Civil Procedure.

7 12. The Court has personal jurisdiction over Defendants because Plaintiff’s and
8 Class Members’ claims arise out Defendants’ business activities conducted in the State of
9 California.

10 13. Venue is appropriate in Orange County because, among other things: (a) Plaintiff
11 purchased the products from Defendants’ stores in Orange County; and (b) many of the acts and
12 omissions that give rise to the claims for relief alleged in this action took place in Orange
13 County.

14 **FACTUAL ALLEGATIONS**

15 14. Plaintiff is an individual who purchased CVS brand alcohol-based hand-sanitizer
16 from one of Defendants’ stores. When Plaintiff purchased the hand-sanitizer, the label on the
17 bottle of hand-sanitizer stated prominently that the product would “kill[] 99.99% of germs.”

18 15. On the product label, there is an asterisk next to the above statements, which
19 leads to the following statement written in a much smaller font, or a statement similar to the
20 following statement, on the back label: “Effective at eliminating 99.99% of many common
21 harmful germs and bacteria in as little as 15 seconds.” Plaintiff did not read this disclaimer.
22 Further, a reasonable consumer who read this language would not understand it to take back the
23 promise on the front of the bottle, to kill 99.99% of all germs.

24 16. Plaintiff read these statements on the product labels and relied on them when
25 purchasing the products. Plaintiff believed that this statement meant that a scientific study
26 proved that the product would kill 99.99% of all known germs. That is because the statement
27 included an exact figure for the percentage of germs that would be killed—99.99%. The
28

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Los Angeles, CA 90010-1137

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Los Angeles, CA 90010-1137

1 statement did not read, “kills most germs,” it read “kills 99.99% of germs,” which indicates that
2 some evidence supports the figure 99.99%.

3 17. The statement created a false impression. No scientific study indicates that
4 alcohol-based hand-sanitizers kill 99.99% of germs. In fact, many scientific studies show that
5 hand-sanitizers do not kill many prominent and harmful germs, and that they are less effective
6 than washing one’s hands.

7 18. First of all, studies show that some types of bacteria are becoming alcohol-
8 resistant due to the use of hand-sanitizers. For instance, the bacterium *Enterococcus faecium*
9 has been found to have become ten times more alcohol tolerant in the years after 2010 than it
10 was in the years before 2010. [https://www.forbes.com/sites/brucelee/2018/08/04/how-this-
11 bacteria-may-becoming-more-resistant-to-hand-sanitizer/#138e8d1722dd](https://www.forbes.com/sites/brucelee/2018/08/04/how-this-bacteria-may-becoming-more-resistant-to-hand-sanitizer/#138e8d1722dd).

12 19. Further, it is known that alcohol-based hand sanitizers do not kill many non-
13 enveloped viruses, such as norovirus. See [https://www.medicalnewstoday.com/articles/
14 232708#1](https://www.medicalnewstoday.com/articles/232708#1). As noted above, norovirus accounts for over half of the food-borne illnesses in the
15 country.

16 20. Third, it is known that alcohol-based hand sanitizers do not kill bacterial spores,
17 which are a leading cause of illness. ([https://www.researchgate.net/publication/
18 43353621_Effectiveness_of_Alcohol-Based_Hand_Rubs_for_Removal_of_Clostridium
19 _difficile_Spores_from_Hands](https://www.researchgate.net/publication/43353621_Effectiveness_of_Alcohol-Based_Hand_Rubs_for_Removal_of_Clostridium_difficile_Spores_from_Hands))

20 21. Fourth, it has been shown that alcohol-based hand sanitizers do not kill
21 protozoan cysts, which grow to become invasive parasites, such as *Giardia*.
22 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4510183/>

23 22. In light of the fact that evidence shows that many types of germs are not killed
24 by alcohol-based hand-sanitizers, it appears extremely doubtful that these sanitizers in fact kill
25 99.99% of all germs. Certainly, no study shows that the sanitizers kill any given amount of
26 germs such that an exact percentage of germs killed could be stated. Yet that is exactly what
27 Defendants have done. Defendants made false statements.
28

1 23. Plaintiff purchased the hand-sanitizer in reliance on these representations,
2 believing that it had in fact been scientifically proven that the hand-sanitizer killed 99.99% of
3 all germs. Plaintiff received a product that was not in fact proven to kill 99.99% of germs.
4 Plaintiff did not get the product that was advertised.

5 **CLASS ACTION ALLEGATIONS**

6 24. Plaintiff brings this action on his own behalf and pursuant to California Code of
7 Civil Procedure § 382. Plaintiff intends to seek certification of a class defined as follows:

8 All persons residing in the State of California who purchased CVS brand
9 hand-sanitizer during the period beginning four years from the date of the
10 filing of this Complaint to the date of class certification (the “Class”).

11 25. Excluded from the Class are: (a) Defendants, including any entity in which any
12 of the Defendants has a controlling interest, is a parent or a subsidiary of, or which is controlled
13 by any of the Defendants; (b) the officers, directors, and legal representatives of Defendants;
14 and (c) the judge and the court personnel in this case as well as any members of their immediate
15 families. Plaintiff reserves the right to amend the definition of the Class if discovery, further
16 investigation and/or rulings by the Court dictate that it should be modified.

17 26. *Numerosity.* The members of the Class are so numerous that the joinder of all
18 Class Members is impractical. While the exact number of Class Members is unknown to
19 Plaintiff at this time, given the amount of Defendants’ brand hand-sanitizer sold in California, it
20 stands to reason that the number of Class Members is at least in the thousands. Class Members
21 are readily identifiable from information and records in Defendants’ possession, custody, or
22 control, such as account information and sales records.

23 27. *Commonality and Predominance.* There are questions of law and fact common to
24 Class Members, which predominate over any questions affecting only individual Class
25 Members. These common questions of law and fact include, without limitation:

- 26 a. Whether Defendants’ brand hand-sanitizers contains the statement, on the
27 product labels, that it kills 99.99% of germs;
28

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- b. Whether Defendants’ product labeling created the impression among their customers that their product would kill 99.99% of all germs.
- c. Whether a reasonable person would have read the statement “kills 99.99% of germs” and any accompanying language to mean that the hand-sanitizer had been scientifically proven to kill at least that exact percentage of germs;
- d. Whether the hand-sanitizer kills 99.99% of germs;
- e. Whether it has been scientifically proven that the hand-sanitizer kills 99.99% of germs;
- f. Whether Defendants knew or should have known that it had not been scientifically proven that the hand-sanitizer kills 99.99% of germs;
- g. Whether Defendant knew or should have known that the hand-sanitizer does not kill 99.99% of germs;
- h. The nature of the relief, including equitable relief, to which Plaintiff and Class Members are entitled; and
- i. Whether Plaintiff and Class Members are entitled to damages, civil penalties and/or injunctive relief.

28. *Typicality*. Plaintiff’s claims are typical of those of other Class Members because Plaintiff, like the other Class Members, purchased CVS brand hand-sanitizer which included a statement that it would kill 99.99% of germs, but would not in fact kill that percentage of germs.

29. *Adequacy of Representation*. Plaintiff will fairly and adequately represent and protect the interests of the Class Members. Plaintiff have retained competent counsel experienced in litigation of class actions, including consumer class actions, and Plaintiff intends to prosecute this action vigorously. Plaintiff and Class Members have a unified and non-conflicting interest in pursuing the same claims and obtaining the same relief. Therefore, all Class Members will be fairly and adequately represented by Plaintiff and his counsel.

30. *Superiority of Class Action*. A class action is superior to other available methods for the fair and efficient adjudication of the claims alleged in this action. The adjudication of this controversy through a class action will avoid the possibility of inconsistent and potentially

1 conflicting adjudications of the asserted claims. There will be no difficulty in the management
2 of this action as a class action, and the disposition of the claims of the Class Members in a
3 single action will provide substantial benefits to all parties and to the Court. Damages for any
4 individual Class Member are likely insufficient to justify the cost of individual litigation so that,
5 in the absence of class treatment, Defendants' violations of law inflicting substantial damages in
6 the aggregate would go un-remedied.

7 31. Class certification is also appropriate because Defendants have acted or refused
8 to act on grounds generally applicable to the Class Members, such that final injunctive relief or
9 corresponding declaratory relief is appropriate as to the Class as a whole.

10 **FIRST CAUSE OF ACTION**

11 (Intentional Misrepresentation)

12 32. Plaintiff repeats and incorporates herein by reference each and every allegation
13 contained in paragraphs 1 through 31, inclusive, of this Complaint as if set forth fully herein.

14 33. Defendants represented to Plaintiff and the Class Members that CVS brand hand-
15 sanitizer would kill 99.99% of germs. Specifically, Defendants placed an advertisement, or
16 caused to be placed an advertisement, on its product label, which stated, "kills 99.99% of
17 germs."

18 34. This statement, inclusive of any disclaimer, would lead a reasonable person to
19 conclude that the hand-sanitizer had been proven through a scientific study to kill 99.99% of
20 germs. That is because the statement included an exact figure for the percentage which went to
21 the hundredth decimal point. Such an exact number would lead a reasonable person to conclude
22 that a specific number had been calculated, and not that it had been picked out of clean air.

23 35. These representations were false. It has not been proven in any scientific study
24 that the hand-sanitizer kills 99.99% of germs. In fact, it has been scientifically proven that
25 alcohol-based hand-sanitizer does not kill many types of germs.

26 36. Defendants knew that the representations at issue were false when they made
27 them, and/or made the representations recklessly and without regard for their truth. Defendants
28 understood, or should have understood, that no scientific study proved that any specific

1 percentage of all germs would be killed by the hand-sanitizer. Defendants also understood, or
2 should have understood, that alcohol-based hand-sanitizer does not kill many types of germs.

3 37. Defendants intended that Plaintiff and the Class Members rely on the
4 representations. The advertisement was placed on product packaging and on the product itself
5 for the sole purpose of inducing customers to purchase the product. Defendants understood, or
6 should have understood, that a reasonable person would read the “99.99%” promise to indicate
7 that a scientific study supported this number.

8 38. Plaintiff and the Class Members reasonably relied on the representations.
9 Plaintiff and the Class Members believed that a scientific study proved that the hand-sanitizer
10 would kill 99.99% of germs. Based on that belief, and because of it, desiring to be protected
11 from 99.99% of germs, Plaintiff and the Class Members purchased the product.

12 39. As a result, Plaintiff and the Class Members were harmed when they purchased
13 hand-sanitizer that has not actually been proven to kill 99.99% of germs. Plaintiff and the Class
14 members were not protected from many types of germs. Plaintiff and the Class members also
15 paid for a product that they would not otherwise have purchased.

16 40. Plaintiff and the Class Members’ reliance on Defendants’ representations was a
17 substantial factor in causing this harm. Had Plaintiff and the Class Members known that it had
18 not been proven that the hand-sanitizer killed 99.99% of germs, Plaintiff and the Class Members
19 would not have purchased the product.

20 41. As a direct and proximate result of Defendants’ intentional misrepresentation,
21 Plaintiff and Class Members have suffered injury and are entitled to damages in an amount to be
22 proven at trial but in excess of the minimum jurisdictional requirement of this Court.

23 **SECOND CAUSE OF ACTION**

24 (Negligent Misrepresentation)

25 42. Plaintiff repeats and incorporates herein by reference each and every allegation
26 contained in paragraphs 1 through 41, inclusive, of this Complaint as if set forth fully herein.

27 43. Defendants represented to Plaintiff and the Class Members that their brand hand-
28 sanitizer would kill 99.99% of germs. Specifically, Defendants placed an advertisement, or

1 caused to be placed an advertisement, on its product label, which stated, “kills 99.99% of
2 germs.”

3 44. This statement, inclusive of any disclaimer, would lead a reasonable person to
4 conclude that the hand-sanitizer had been proven through a scientific study to kill 99.99% of
5 germs. That is because the statement included an exact figure for the percentage which went to
6 the hundredth decimal point. Such an exact number would lead a reasonable person to conclude
7 that a specific number had been calculated, and not that it had been picked out of clean air.

8 45. These representations were false. It has not been proven in any scientific study
9 that the hand-sanitizer kills 99.99% of germs. In fact, it has been scientifically proven that
10 alcohol-based hand-sanitizer does not kill many types of germs.

11 46. Defendants had no reasonable grounds for believing that the representations were
12 true when they made them. No study proves that alcohol-based hand-sanitizer kills 99.99% of
13 all germs. In fact, many studies prove that hand-sanitizer does not kill many types of germs.

14 47. Defendants intended that Plaintiff and the Class Members rely on the
15 representations. The advertisement was placed on product packaging and on the product itself
16 for the sole purpose of inducing customers to purchase the product. Defendants understood, or
17 should have understood, that a reasonable person would read the “99.99%” promise to indicate
18 that a scientific study supported this number.

19 48. Plaintiff and the Class Members reasonably relied on the representations.
20 Plaintiff and the Class Members believed that a scientific study proved that the hand-sanitizer
21 would kill 99.99% of germs. Based on that belief, and because of it, desiring to be protected
22 from 99.99% of germs, Plaintiff and the Class Members purchased the product.

23 49. As a result, Plaintiff and the Class Members were harmed when they purchased
24 hand-sanitizer that has not actually been proven to kill 99.99% of germs. Plaintiff and the Class
25 members were not protected from many types of germs. Plaintiff and the Class members also
26 paid for a product that they would not otherwise have purchased.

27 50. Plaintiff and the Class Members’ reliance on Defendants’ representations was a
28 substantial factor in causing this harm. Had Plaintiff and the Class Members known that it had

1 not been proven that the hand-sanitizer killed 99.99% of germs, Plaintiff and the Class Members
2 would not have purchased the product.

3 51. As a direct and proximate result of Defendants' intentional misrepresentation,
4 Plaintiff and Class Members have suffered injury and are entitled to damages in an amount to be
5 proven at trial but in excess of the minimum jurisdictional requirement of this Court.

6 **THIRD CAUSE OF ACTION**

7 (Violation of California False Advertising Law, Cal. Bus. & Prof. Code § 17500 et. seq.)

8 52. Plaintiff repeats and incorporates herein by reference each and every allegation
9 contained in paragraphs 1 through 51, inclusive, of this Complaint as if set forth fully herein.

10 53. Defendants' statements on the product labels that the product would kill 99.99%
11 of germs were false. No scientific study proves that alcohol-based hand-sanitizer kills 99.99%
12 of germs and, in fact, studies prove that alcohol-based hand-sanitizer does not kill many types
13 of germs. These advertisements were made, in Defendants' stores, to California residents.

14 54. Alternatively, the statements that the product would kill 99.99% of germs,
15 combined with the disclaimer on the back of the packaging, created the false impression that the
16 product would in fact kill 99.99% or more than 99.99% of all germs, because the statement, on
17 the front of the bottle, gave the impression that it had been scientifically proven to kill 99.99%
18 of all germs due to the adoption of an exact percentage, and because the disclaimer, on the back
19 of the product and in a smaller font, did not detract from that impression in that it merely
20 provided a corollary statement which was not inconsistent with the overall claim that the
21 product killed 99.99% or more than 99.99% of all germs.

22 55. To the extent that it exists at all, the statement on the back of the bottle, in
23 smaller font, that the product is "[e]ffective at eliminating 99.99% of many common harmful
24 germs and bacteria in as little as 15 seconds" is consistent with, and does not detract from, the
25 promise on the front of the bottle that the product kills 99.99% of germs, or more than 99.99%
26 of germs. A reasonable consumer would believe, after reading both statements, that the product
27 will in fact kill 99.99% of all germs. Therefore, the advertising is both actually misleading and
28 has a capacity, likelihood or tendency to deceive or confuse the public.

1 and the Class Members has been described. Defendants can have no possible justification for
2 including a false inducement to purchase its product. Plaintiff and the Class Members could not
3 reasonably have avoided this injury because they relied on Defendants' advertisement as to the
4 quality and characteristics of the products being sold, as all consumers who rely on the verity of
5 product advertising must do.

6 62. Defendants' false advertisement is violative of public policy as expressed in the
7 False Advertising Law. Each of these statutes strictly forbids false advertisement such as
8 Defendants have disseminated and/or caused to be disseminated, and represent expressions of
9 public policy against this practice.

10 63. Defendants' business practices are also unfair because they significantly threaten
11 or harm competition. Competition is fostered by an environment in which information can be
12 relied upon, so that consumers can make wise decisions, and so that products which accurately
13 reflect the consumers' wishes can flourish.

14 64. As shown above, Defendants' business practices are also unlawful because they
15 violate the False Advertising Law.

16 65. Defendants' business practices are also fraudulent under the UCL because they
17 constitute representations to the public which are likely to deceive the public. The
18 representations indicate that it has been proven that the product will kill 99.99% of germs, when
19 in fact it has not been so proven, and, instead, it has been proven that the product will not kill
20 many types of germs. The public, receiving these representations, is likely to believe that it has
21 been proven that the product will kill 99.99% of germs, and is so deceived.

22 66. Defendants' representations are likely to deceive the public because they are
23 untrue and because they create the impression that the product has been proven to kill 99.99%
24 of germs. A reasonable consumer would be likely to believe that, if Defendants state their
25 product kills a very exact percentage of germs, that it has in fact been proven to kill all of those
26 germs.

27 67. Plaintiff and the Class Members relied on these representations when they
28 purchased the CVS hand-sanitizer, which they would not have otherwise purchased.

1 68. Plaintiff has suffered monetary injury in fact as a direct and proximate result of
2 the acts of unfair competition committed by Defendants as alleged herein in an amount to be
3 proven at trial but in excess of the minimum jurisdictional amount of this Court.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for relief as
6 follows:

- 7 (1) For compensatory damages in an amount to be proven at trial;
- 8 (2) For restitutionary damages in an amount to be proven at trial;
- 9 (3) For affirmative injunctive relief mandating that Defendants remove the false
10 advertisements from their product and product packaging;
- 11 (4) For costs of suit and litigation expenses;
- 12 (5) For such other and further relief as this Court may deem just and proper.

13 **DEMAND FOR JURY TRIAL**

14 Plaintiff, on behalf of himself and all others similarly situated, hereby demands a jury
15 trial for all claims so triable.

16
17 Dated: May 21, 2020

WILSHIRE LAW FIRM

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19 By 
20 Thiago M. Coelho
21 *Attorneys for Plaintiff and the*
22 *Proposed Class*
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24
25
26
27
28

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137