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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

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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 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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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

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

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

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

26 30. *Superiority of Class Action*. A class action is superior to other available methods
27 for the fair and efficient adjudication of the claims alleged in this action. The adjudication of
28 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 56. Plaintiff and the Class Members relied on the advertisements by purchasing
2 hand-sanitizer that they believed had been proven to kill 99.99% of germs. The representation
3 that the hand-sanitizer would kill 99.99% of germs contributed materially to Plaintiff's and the
4 Class Members' decisions to purchase the hand-sanitizer.

5 57. As a result, Plaintiff and the Class Members were damaged. Plaintiff and the
6 Class Members did not receive the benefits of their bargains and used hand-sanitizer which had
7 not been proven to kill 99.99% of germs and, in fact, did not kill many types of germs. Plaintiff
8 and the Class Members paid for a product that they would not have purchased had they known
9 the truth.

10 58. Plaintiff have suffered monetary injury in fact as a direct and proximate result of
11 the violations of the False Advertising Law committed by Defendants as alleged herein in an
12 amount to be proven at trial but in excess of the minimum jurisdictional amount of this Court.

13 **FOURTH CAUSE OF ACTION**

14 (Violation of the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.)

15 59. Plaintiff repeats and incorporates herein by reference each and every allegation
16 contained in paragraph 1 through 58, inclusive, of this Complaint as if set forth fully herein.

17 60. By their actions and conduct as alleged herein, Defendants have committed one
18 or more acts of unfair competition within the meaning of California Business and Professions
19 Code § 17200 ("UCL") that constitute unfair, unlawful and/or fraudulent business practices as
20 those terms are defined under California law.

21 61. Defendants' business practices are unfair under the UCL because Defendants
22 have acted in a manner that is immoral, unethical, oppressive, unscrupulous and/or substantially
23 injurious to Plaintiff and the Class Members. These business practices, described above,
24 include creating false advertisements on product packaging and directly on the product itself.
25 The false advertisements are substantially injurious because they induce consumers to make
26 purchases that they would not otherwise make, in expectation of receiving benefits that they do
27 not receive. Further, the impact of the practice against Plaintiff and the Class Members far
28 outweighs any possible justification or motive on the part of Defendant. The impact on Plaintiff

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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

18
19 By 
20 Thiago M. Coelho
21 *Attorneys for Plaintiff and the*
22 *Proposed Class*

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