

1 KAMALA D. HARRIS  
Attorney General of California  
2 KAREN LEAF  
Senior Assistant Attorney General  
3 BARRY D. ALVES  
Deputy Attorney General  
4 State Bar No. 232971  
1300 I Street, Suite 125  
5 P.O. Box 944255  
Sacramento, CA 94244-2550  
6 Telephone: (916) 445-8212  
Fax: (916) 323-0813  
7 E-mail: Barry.Alves@doj.ca.gov  
*Attorneys for the People of California*

**FILED**

**SEP - 8 2015**

CLERK OF THE SUPERIOR COURT  
BY: G. HOYT, DEPUTY CLERK

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SHASTA

13 **PEOPLE OF THE STATE OF**  
14 **CALIFORNIA, ex rel. Kamala D. Harris,**  
15 **Attorney General of the State of California,**

16 Plaintiff,

17 v.

18 **DARREN PAUL ROSE, individually, and**  
19 **doing business as BURNING ARROW I and**  
20 **BURNING ARROW II, and Does 1 through**  
21 **20,**

22 Defendants.

Case No. 176689

**NOTICE OF ENTRY OF STATEMENT  
OF DECISION**

Dept.: 10  
Judge: The Honorable Bradley L.  
Boeckman

Trial Date: July 7, 2015  
Action Filed: February 14, 2013

23 **PLEASE TAKE NOTICE** that on August 28, 2015, the Honorable Bradley L. Boeckman  
24 of the Shasta Superior Court issued a Statement of Decision in the above-entitled action.

25  
26 ///

27 ///

28 ///

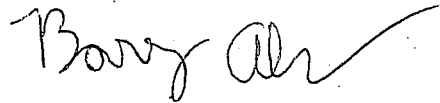
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

A true and correct copy of the Statement of Decision is attached hereto as Exhibit A.

Dated: September 4, 2015

Respectfully Submitted,

KAMALA D. HARRIS  
Attorney General of California



BARRY D. ALVES  
Deputy Attorney General  
*Attorneys for the People of the State of  
California*

SA2012307519  
32204903.doc



**EXHIBIT A**

1 KAMALA D. HARRIS  
Attorney General of California  
2 KAREN LEAF  
Senior Assistant Attorney General  
3 BARRY ALVES, State Bar No. 232971  
Deputy Attorneys General  
4 1300 I Street, Suite 125  
P.O. Box 944255  
5 Sacramento, CA 94244-2550  
Telephone: (916) 445-8212  
6 Fax: (916) 323-0813  
E-mail: Barry.Alves@doj.ca.gov  
7 *Attorneys for the People of the State of California*

**FILED**

AUG 28 2015

CLERK OF THE SUPERIOR COURT  
BY: G. HOYT, DEPUTY CLERK

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SHASTA

10  
11  
12  
13 **PEOPLE OF THE STATE OF**  
**CALIFORNIA, ex rel. Kamala D. Harris,**  
14 **Attorney General of the State of California,**

15 Plaintiff,

16 v.

17 **DARREN PAUL ROSE, individually, and**  
18 **doing business as BURNING ARROW I and**  
19 **BURNING ARROW II, and Does 1 through**  
20 **20,**

21 Defendants.

Case No. 176689

BLB

**[PROPOSED] STATEMENT OF**  
**DECISION**

Dept: 10  
Judge: The Honorable Bradley L.  
Boeckman

22 This matter came on regularly for trial on July 7, 2015, in Department 10 of the above  
23 entitled court, the Honorable Bradley L. Boeckman presiding, sitting without a jury. Plaintiff, the  
24 People of the State of California, appeared by its attorney Barry Alves. Defendant, Darren Rose,  
25 was present during trial and appeared by his attorney Michael Robinson. This matter was tried  
26 between July 7, 2015, and July 9, 2015. The parties introduced oral, video, physical, and  
27 documentary evidence and the case was argued and submitted for decision on July 9, 2015.  
28 Plaintiff submitted a trial brief and a post-trial brief. Defendant submitted a post-trial brief. The

1 Court, having considered the evidence and heard the arguments of counsel, issues the following  
2 statement of decision.

### 3 ISSUES PRESENTED AT TRIAL

4 The People bring this enforcement action to address all of Defendant's unlawful cigarette  
5 sales between November 26, 2011 and approximately January 2014, which violated the: (1)  
6 Tobacco Directory Law (Rev. & Tax. Code, § 30165.1); (2) California's Cigarette Fire Safety and  
7 Firefighter Protection Act ("Fire-Safe Act") Act (Health & Saf. Code, §§ 14950-14960); and (3)  
8 the California's Unfair Competition Law ("UCL") (Bus. & Prof. Code, § 17200, et seq).

9 Plaintiff's UCL claim is based upon predicate violations of the California Tobacco Directory  
10 Law, Fire-Safe Act (for injunctive relief only), and state cigarette excise tax laws. The People  
11 seek civil penalties and a permanent injunction through the UCL.

12 On July 22, 2013, the Court granted Plaintiff's motion for a preliminary injunction, which  
13 prohibits Defendant and Defendant's directors, employees, and agents from selling any off-  
14 Directory, non-Fire-Safe Act certified, or state excise tax-evaded cigarettes to non-Native  
15 Americans. (Order Granting Preliminary Injunction.) Plaintiff did not serve or file a notice of  
16 entry of order until May 5, 2014, which is after Defendant stopped operating his stores in  
17 approximately January 2014. Thus, the preliminary injunction was not effective while  
18 Defendant's stores were operating. Defendant did not attempt to comply with the preliminary  
19 injunction before September 20, 2013. On the third day of trial, Defendant: (1) testified that he  
20 became aware of the Preliminary Injunction order during an unspecified time after September 21,  
21 2013; but (2) did not present any admissible evidence that his stores sold any cigarettes to Native  
22 Americans in compliance with the Court's preliminary injunction between September 21, 2013,  
23 and January 2014. Therefore, this case does not concern any sales to Native Americans that:  
24 violated the laws addressed by this suit, but were in compliance with the Court's preliminary  
25 injunction.

26 On April 4, 2014, the Court granted summary adjudication on Plaintiff's Tobacco Directory  
27 Law and Fire-Safe Act claims, but denied the remainder of the People's motion for summary  
28 adjudication and the parties' cross-motions for summary judgment based upon factual disputes in

1 the record. The Court found that Plaintiff established their entitlement to summary adjudication  
2 of their claims that would support the issuance of a permanent injunction on the Directory Law  
3 and Fire Safe Act claims but did not grant permanent injunctive relief. Accordingly, the primary  
4 issues for trial were: (1) whether Defendant violated the UCL; (2) the number of UCL violations  
5 committed by Defendant and the amount of civil penalties imposed based upon the predicate  
6 violations of Tobacco Directory Law and state cigarette excise tax laws; (3) the scope and  
7 issuance of a permanent injunction under the UCL prohibiting Defendant from violating the  
8 Directory Law, Fire-Safe Act, or state cigarette excise tax laws.

### 9 FACTUAL FINDINGS

10 This decision is based on the following factual findings:

#### 11 General Factual Findings Regarding Defendant's Stores

12 1. Between November 26, 2011, and approximately January 2014, Defendant  
13 individually owned and operated Burning Arrow I which sold cigarettes. Defendant primarily  
14 sold Couture, Heron, King Mountain, Opal, Sands, Sky Dancer, and Seneca brand cigarettes at  
15 Burning Arrow I.

16 2. Between November 26, 2011, and approximately May of 2013, Defendant  
17 individually owned and operated Burning Arrow II which sold cigarettes. Defendant primarily  
18 sold Couture, Heron, King Mountain, Opal, Sands, Sky Dancer, and Seneca brand cigarettes at  
19 Burning Arrow II.

20 3. Between November 26, 2011, and approximately January 2014, Defendant's Burning  
21 Arrow I and Burning Arrow II stores sold approximately 51,579 cartons of Couture, Heron, King  
22 Mountain, Opal, Sands, Sky Dancer, and Seneca brand cigarettes. This figure reflects the  
23 difference between: (A) the cartons of Couture, Heron, King Mountain, Opal, Sands, Sky  
24 Dancer, and Seneca brand cigarettes delivered for sale at Burning Arrow I and Burning Arrow II;  
25 and (B) the unsold cartons of Couture, Heron, King Mountain, Opal, Sands, Sky Dancer, and  
26 Seneca brand cigarettes at Burning Arrow I and Burning Arrow II that Defendant returned to his  
27 distributor.

1           4.     Between November 26, 2011, and September 19, 2013, Defendant's Burning Arrow I  
2 and Burning Arrow II stores sold, at least, 50,733 cartons of Couture, Heron, King Mountain,  
3 Opal, Sands, Sky Dancer, and Seneca brand cigarettes. This figure is based on: (A) the 37,314  
4 cartons of Couture, Heron, King Mountain, Opal, Sands, Sky Dancer, and Seneca brand cigarettes  
5 delivered for sale at Burning Arrow I; plus (B) the 13,649 cartons of Couture, Heron, King  
6 Mountain, Opal, Sands, Sky Dancer, and Seneca brand cigarettes delivered for sale at Burning  
7 Arrow II before September 19, 2013; (C) minus any unsold cartons of Couture, Heron, King  
8 Mountain, Opal, Sands, Sky Dancer, and Seneca brand cigarettes at Burning Arrow I and Burning  
9 Arrow II that Defendant returned to his distributor; and (D) minus Defendant's remaining  
10 inventory of approximately 230 cartons of Couture, Heron, King Mountain, Opal, Sands, Sky  
11 Dancer, and Seneca brand cigarettes on September 19, 2013.

12           5.     Furthermore, Defendant also sold additional cartons of Couture, Heron, King  
13 Mountain, Opal, Sands, Sky Dancer, and Seneca brand cigarettes that were already in the  
14 inventory of the Burning Arrow I and Burning Arrow II stores when Defendant acquired the  
15 active smoke shops on November 26, 2011. Defendant's sales of Burning Arrow I and Burning  
16 Arrow II's existing inventories are not reflected in paragraphs three and four above.

17           6.     The log of sales at Burning Arrow I reflects that Defendant sold over 24,881 cartons  
18 of Couture, Heron, King Mountain, Opal, Sands, Sky Dancer, and Seneca brand cigarettes over  
19 375 days, which is an average of over 66.35 cartons per day. (Pl.'s Ex. H.) There were at least  
20 225 days where: (A) Burning Arrow I was open and Defendant's employees sold cigarettes; but  
21 (B) Defendant's employees failed to reflect their sales on the log.

22           7.     Defendant's stores sold cigarettes by the pack (20 cigarettes), carton (200 cigarettes),  
23 half-case (6,000 cigarettes), and case (12,000 cigarettes). Defendant's stores primarily sold  
24 cigarettes by the carton. For example, Defendant's Burning Arrow I logs reflect that his stores  
25 sold: 179 cartons on December 1, 2011; 134 cartons on January 28, 2012; 165 cartons on  
26 February 3, 2012; 169 cartons on March 2, 2012; 208 cartons on May 24, 2012; 200 cartons on  
27 June 1, 2012; 136 cartons on October 1, 2012; 126 cartons on June 14, 2013; and 103 cartons on  
28 July 19, 2013.

1 8. Burning Arrow I sold cigarettes to customers that drove to Yreka, California from  
2 Southern California to purchase cigarettes by the case.

3 **Factual Findings Regarding Predicate Directory Law Claim**

4 9. The State of California pays millions of dollars each year for healthcare programs to  
5 provide medical assistance to eligible persons for health conditions associated with cigarette  
6 smoking. (Health & Saf. Code, § 104555, subd. (b) & (c).) Accordingly, it is the public policy of  
7 the State of California that the financial burdens imposed on the State by cigarette smoking be  
8 borne by tobacco product manufacturers. (*Id.* at subd. (d).)

9 10. Tobacco manufacturers that are signatory to the tobacco Master Settlement  
10 Agreement (MSA) (i.e., a Participating Manufacturer) are obligated to pay substantial sums each  
11 year to California, based on their sales volume, to compensate California for smoking-related  
12 health care costs. (*Id.* at subd. (e).) Tobacco manufacturers that are not signatory to the tobacco  
13 Master Settlement Agreement (i.e., a Non-Participating Manufacturer) are obligated to make  
14 deposits into an escrow account for their sales in California; deposited funds provide a source of  
15 recovery for the state for unreleased liabilities and prevent these manufacturers from deriving  
16 large, short-term profits and then becoming judgment proof before liability may arise. (*Id.* at  
17 subd. (f).)

18 11. To effectuate this public policy, California's Tobacco Directory Law (Rev. & Tax.  
19 Code, § 30165.1) compels the Attorney General to create and maintain a directory of the tobacco  
20 product manufacturers and their cigarette brands that are lawful for sale in California and post the  
21 Directory on her Internet website. (Rev. & Tax. Code, § 30165.1, subd. (c).) To be listed on the  
22 Directory, a tobacco product manufacturer must certify annually to the Attorney General that it is  
23 either a Participating Manufacturer that is compliant with its financial obligations under the MSA  
24 or a Non-Participating Manufacturer that is in compliance with its escrow obligations under  
25 California's Reserve Fund Statute. (Health & Saf. Code, §§ 104555-104557; Rev. & Tax. Code,  
26 § 30165.1, subds. (b)-(c).) It is unlawful to sell off-Directory cigarettes. (Rev. & Tax. Code, §  
27 30165.1, subd. (e)(3).)



1           12. At all times relevant to this suit, the Attorney General maintained the California  
2 Tobacco Directory, which is a public list of cigarette manufacturers and their brands that are  
3 lawful for sale in California. At all times relevant to this suit, the Directory was accessible at  
4 <https://oag.ca.gov/tobacco/directory>.

5           13. At all times relevant to this suit, Defendant selected the cigarette brands that were  
6 offered for sale and sold at his Burning Arrow I and Burning Arrow II stores.

7           14. Since 2010, Defendant was aware of the California Tobacco Directory, and  
8 Defendant knew "there is a list that may contain a list of legal cigarettes that can be sold in  
9 California."

10           15. In early December 2012, Defendant reviewed a cease and desist letter from the  
11 Attorney General's Office that notified him that he was violating the Directory law and provided  
12 him with the website address for the Tobacco Directory. The letter explains that Defendant's  
13 conduct of selling off-Directory cigarette violated the UCL, which could subject him to a civil  
14 penalty of \$2,500 for each violation. The letter also advised Defendant that an individual Native  
15 American was recently found by a California court to have violated the state's tobacco Directory  
16 Law and UCL based upon similar conduct resulting in a \$3.5 million dollar judgment for civil  
17 penalties against him.

18           16. Defendant never determined whether the cigarettes sold at Burning Arrow I or  
19 Burning Arrow II were listed on the Directory.

20           17. None of the Couture, Heron, King Mountain, Opal, Sands, Sky Dancer, and Seneca  
21 brand cigarettes that Defendant sold is, or has ever been, listed on the Directory of compliant  
22 cigarette brand families.

23           18. The manufacturers of the Couture, Heron, King Mountain, Opal, Sands, Sky Dancer,  
24 and Seneca brands are Non-Participating Manufacturers, who have never deposited escrow for  
25 any of their California cigarette sales.

26           19. The inflation-adjusted escrow rate under section 104557 of the Health and Safety  
27 Code for each Non-Participating Manufacturer brand cigarette sold by Defendant in: 2011 was  
28 \$5.65 per carton; 2012 was \$5.82 per carton; and 2013 was \$6 per carton.

1                    **Factual Findings Regarding Predicate Fire-Safe Act Claim**

2                    20. The Fire-Safe Act governs the ignition propensity of cigarettes sold in California.  
3 (Health & Saf. Code, §§ 14950-14960) To be lawful for sale, cigarettes must both: meet the  
4 marking and reduced ignition propensity requirements of the Fire Safe Act; and have been  
5 certified by their manufacturers to the State Fire Marshal as meeting the requirements of the Fire  
6 Safe Act. (Health & Saf. Code, § 14951, subd. (a).)

7                    21. In early December 2012, Defendant received a cease and desist letter from the  
8 Attorney General's Office that notified him that he was violating the Fire-Safe Act.

9                    22. Between November 25, 2011, and January 31, 2014, none of the Couture, King  
10 Mountain, Opal, Sands, Sky Dancer, and Seneca brand cigarettes sold at Burning Arrow I and  
11 Burning Arrow II were certified by their manufacturers to the California State Fire Marshal as  
12 meeting the testing, certification and marking requirements of the California's Cigarette Fire  
13 Safety and Firefighter Protection Act (Health & Saf. Code, §§ 14950-14960).

14                    23. Defendant sold, at least, 49,500 cartons of Couture, King Mountain, Opal, Sands, Sky  
15 Dancer, and Seneca brand cigarettes that violated the Safety and Firefighter Protection Act.  
16 Defendant sold less than 1,500 cartons of Heron brand cigarettes, which complied with the Fire-  
17 Safe Act. The 1,500 carton difference is not material because the People seek only injunctive  
18 relief on the California's Cigarette Fire Safety and Firefighter Protection Act claim.

19                    **Facts Regarding Predicate State Cigarette Excise Tax Laws**

20                    24. At all times relevant to this suit, the state excise tax on a carton of cigarettes was  
21 \$8.70 per carton and \$0.87 per pack. (Rev. & Tax. Code, §§ 30101, 30123, & 30131.2.)

22                    25. None of the cigarettes sold at Burning Arrow I or Burning Arrow II bore California  
23 cigarette tax stamps, and Defendant did not collect and remit any state cigarette excise taxes to  
24 California based upon any sales at either Burning Arrow I or Burning Arrow II.

25                    26. Before Defendant acquired the smoke shops on November 26, 2011, the Alturas  
26 Indian Rancheria ("AIR") owned and operated the Burning Arrow I and Burning Arrow II smoke  
27 shops. Between 2009 and November 25, 2011, Defendant assisted with the management and  
28 operation of the Burning Arrow I and Burning Arrow II smoke shops for AIR.

1           27. In March 2009, Defendant received a letter from the federal Bureau of Indian Affairs  
2 (“BIA”) demanding that he cease and desist his tax-free cigarette business on the ground that  
3 federal courts have held California has the authority require Defendant to collect and remit the  
4 excise taxes on his sales to non-Native Americans. BIA’s letter warns Defendant that his  
5 unlawful tax evasion may subject him to penalties levied by the State.

6           28. In May 2010, Defendant received a second cease and desist letter from BIA advising  
7 him that his unlawful cigarette business could make him liable for back taxes and other penalties  
8 levied by California. (Pl.’s Ex. S.) The BIA’s May 2010 letter provided Defendant with a copy  
9 of *Chemehuevi Indian Tribe v. California State Board of Equalization* (9th Cir.1986) 800 F.2d  
10 1446, which holds that California has the authority to collect excise taxes on a tribe’s cigarettes  
11 sales to non-Native Americans.

12           29. In early December 2012, Defendant received a cease and desist letter from the  
13 Attorney’s General’s Office that notified him that he was violating the state’s cigarette excise tax  
14 laws. The letter explains that Defendant’s conduct of selling tax- evaded cigarettes violated the  
15 UCL, which could subject him to a civil penalty of \$2,500 per violation. The letter advised  
16 Defendant that an individual Native American was recently found by a California court to have  
17 violated the state’s cigarette excise tax laws and UCL based upon the similar conduct resulting in  
18 a \$3.5 million dollar judgment for civil penalties against him.

19           30. Defendant purchased his cartons of Couture, Heron, King Mountain, Opal, Sands,  
20 Sky Dancer, or Seneca brand cigarettes from Huber Enterprises for between approximately \$16  
21 and \$20 per carton. Defendant sold Couture, Heron, King Mountain, Opal, Sands, Sky Dancer, or  
22 Seneca brand cigarettes for between approximately \$23 and \$30 per carton.

### 23           **Facts Related to Defendant’s Assets and Net Worth**

24           31. Defendant is the sole owner of Yreka Transit Mix, which has a net value of  
25 approximately \$650,000.

26           32. Defendant earns an annual salary of \$300,000 each year.

27           33. Defendant is entitled to approximately \$300,000 of back pay from AIR.

28           34. Defendant is entitled to \$250,000 that is being held by AIR.

1 35. Defendant owns an undeveloped property worth approximately \$216,000.

2 36. Defendant owns a primary residence. Defendant also owns a rental property that  
3 earns him approximately \$1,300 of income each month.

4 37. Defendant owns approximately 110 acres of the Benter Allotment. Defendant's most  
5 recent purchase of shares of the Benter Allotment land was for approximately \$500 an acre.

6 38. Defendant owns approximately 120 acres of the Henry Wallace Allotment.  
7 Defendant's most recent purchase shares of the Henry Wallace Allotment land was for  
8 approximately \$500 an acre.

9 39. Defendant owns approximately \$30,000 of equipment from his closed Rose Brothers  
10 Transportation business.

11 40. Since April 2015, AIR has possessed the funds necessary to pay Defendant his  
12 current salary and the \$300,000 of back pay owed to him, but Defendant and Phillip Del Rosa  
13 have elected not to authorize those payments pending the outcome of this matter. The Court's  
14 finding is based upon the following factual findings: (a) AIR's business decisions are made by  
15 the tribe's three person business committee; (b) for the past year, Defendant and Phillip Del Rosa  
16 have been the only participating members of AIR's business committee; (c) AIR receives  
17 approximately \$275,000 from California's Revenue Sharing Trust Fund ("RSTF") every four  
18 months; (d) AIR uses the RSTF funds to pay salaries; (e) as such, the tribe has over \$91,000 of  
19 RSTF funds available to pay salaries each month; (f) in 2013, tribe used at least \$85,000 of the  
20 available \$91,000 RSTF funds to pay salaries; (g) between approximately July 2014 and April  
21 2015, AIR's RSTF payments were delayed by a tribal dispute; (h) in April 2015, AIR received its  
22 past and current RSTF funds; (i) in April 2015, the tribe's business committee transferred  
23 \$193,754 into the bank account of Defendant's Rose Brothers Transportation business, which has  
24 been closed since 2008; (j) currently, AIR has budgeted only \$63,000 of the RSTF funds to pay  
25 the salaries of Jennifer Christman (\$3,000 per month) and Defendant, Philip Del Rosa, Wendy  
26 Del Rosa (each \$20,000 per month); (k) the remaining six members of AIR are not entitled to any  
27 salaries; (l) since April 2015, the AIR's RSTF funds have been available to AIR's business  
28 committee to pay salaries, but Defendant and Philip Del Rosa have only paid former-member

1 Jennifer Christman's monthly salary of approximately \$3,000; (m) Defendant has not filed a state  
2 or federal tax return during the past five years; (n) Defendant's testimony regarding his assets and  
3 net worth was evasive, not credible, inconsistent during trial, and contradicted by his prior  
4 deposition testimony.

5 41. Defendant chose not offer any additional relevant or admissible evidence regarding  
6 his ability to pay a civil penalty.

7 **Factual Findings Regarding Defendant's Defenses**

8 42. Defendant is a member of the Alturas Indian Rancheria ("AIR"). AIR is a federally-  
9 recognized tribe with nine members. The membership of AIR is comprised of: Defendant and  
10 his four daughters; Phillip Del Rosa and his two children; and Wendy Del Rosa. AIR's Rancheria  
11 is located in Alturas, Modoc County, California.

12 43. In August 2003, Defendant executed a contract that made him a member of AIR.  
13 Before August 2003, Defendant was a member of the Karuk tribe.

14 44. Defendant is a trust holder in two federally-granted allotments that are held in trust by  
15 the United States. Both allotments are within California's exterior borders.

16 45. Defendant does not own all of either allotment. For each allotment, Defendant has a  
17 fractional ownership right in the property, which he owns jointly with other Native Americans.

18 46. The first allotment is the Benter Allotment located near Yreka, in Siskiyou County,  
19 California. Defendant's Burning Arrow I store was located on the Benter Allotment, which is  
20 located more than 150 miles beyond the exterior borders of the AIR's Rancheria in Alturas,  
21 Modoc County, California.

22 47. AIR does not own the Benter Allotment. The other trust holders of the Benter  
23 Allotment are not members of AIR, and Defendant obtained his interest in the Benter Allotment  
24 as a member of the Karuk tribe.

25 48. The second allotment is the Henry Wallace Allotment located near Ono, in Shasta  
26 County, California. Defendant's Burning Arrow II store was located on the Henry Wallace  
27 Allotment, which is located more than 150 miles beyond the exterior borders of AIR's Rancheria.  
28

1           49. AIR does not own the Henry Wallace Allotment. The other trust holders of the Henry  
2 Wallace Allotment are not members of AIR, and Defendant obtained his interest in the Henry  
3 Wallace Allotment as a member of the Karuk tribe.

4           50. Between November 26, 2011 and the closure of Defendant's last store in January  
5 2014, AIR did not own, operate, or otherwise control Burning Arrow I or Burning Arrow II.

6           51. Defendant did not present any admissible evidence that Burning Arrow I or Burning  
7 Arrow II sold any cigarettes to any members of AIR.

8           52. Defendant did not present any admissible evidence that Burning Arrow I or Burning  
9 Arrow II sold any cigarettes to any Native Americans.

10           53. Defendant did not attempt to comply with the Court's preliminary injunction prior to  
11 September 20, 2013. Defendant does not have any personal knowledge as to the identity of  
12 anyone who purchased cigarettes at Burning Arrow I or Burning Arrow II. Defendant's  
13 testimony regarding the date that he purportedly instructed Burning Arrow I employees to sell  
14 cigarettes only to Native Americans was not credible and failed to specify when the purported  
15 policy change allegedly occurred between September 21, 2013 and January 2014. Moreover, it is  
16 undisputed that Defendant's primary employee at Burning Arrow I, Kathy Rose, continued to sell  
17 Couture, Heron, King Mountain, Opal, Sands, Sky Dancer, and Seneca brand cigarettes to non-  
18 Native Americans between September 21, 2013 and December 19, 2013.

19           54. The Office of the Attorney did not delay the filing <sup>BLB</sup> ~~the filing~~ of this case to prejudice  
20 Defendant.

21           55. Defendant conceded that, if the Office of the Attorney General had sent him a cease  
22 and desist letter in December 2011 advising him that he was violating the Directory Law, Fire-  
23 Safe Act, state cigarette excise tax laws, and UCL, Defendant would not have either: closed the  
24 Burning Arrow I and Burning Arrow II smoke shops; or materially altered his conduct in this  
25 case.

26           56. The Court took judicial notice of the portions of the April 2014 version of California  
27 Board of Equalization ("BOE") Publication 146 pertaining to cigarette sales. During trial,  
28 Defendant did not present any evidence that he reviewed, was aware of, or relied in any way upon

1 BOE Publication 146 between November 26, 2011 and January 2014. It is unreasonable to infer  
2 that BOE's April 2014 publication impacted Defendant's cigarette sales, which stopped in  
3 January of 2014. Therefore, BOE Publication 146 is not relevant to any of Defendant's defenses.

4 57. Defendant's communications with BOE regarding whether AIR was legally obligated  
5 to obtain a tobacco retailer license to operate the Burning Arrow I smoke shop do not bar or  
6 materially limit the imposition of civil penalties in this matter. The Court finds that Defendant's  
7 conduct was not materially based upon his purported voicemails to BOE. Moreover, the Court  
8 finds that Defendant either knew, or should have known, that the state's ability and value of  
9 pursuing extensive litigation against a sovereign tribe regarding licensure is different than the  
10 facts presented <sup>IN BLB</sup> this matter. Defendant was purportedly seeking to contact BOE staff regarding  
11 whether AIR, a sovereign tribe, could be compelled to obtain a retail license to sell cigarettes.  
12 Here, Defendant is an individual person, who cannot assert sovereign immunity. After Defendant  
13 received and reviewed letters referring him to *Chemehuevi Indian Tribe v. California State Board*  
14 *of Equalization* (9th Cir.1986) 800 F.2d 1446 and *People v. Black Hawk Tobacco Inc.* (2011) 197  
15 Cal.App. 4th 1561, he violated the state tax laws more than 51,000 times to depriving the People  
16 of more than \$443,700 in tax revenue. This finding is also based upon Defendant's demeanor  
17 when testifying, Defendant's evasive and misleading testimony regarding his net worth and the  
18 business practices of his stores, the numerous times that Defendant was impeached while  
19 testifying, and Defendant's failure to file a tax return for several years.

#### 20 RELEVANT LEGAL STANDARD

21 The burden was on the People to prove by a preponderance of the evidence that Defendant  
22 violated the UCL. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 866; *People v.*  
23 *E.W.A.P. Inc.* (1980) 106 Cal.App.3d 315, 322.) The UCL imposes strict liability; no showing  
24 that Defendant intended to violate the law or to injure anyone is required. (*E.g., Community*  
25 *Assisting Recovery, Inc. v. Aegis Ins. Co* (2001) 92 Cal.App.4th 886, 891.) *Cortez v. Purolator*  
26 *Air Filtration Products* (2000) 23 Cal.4th 163, 181.) The People have met their burden on the  
27 UCL claim. In addition, the People established that the challenged activities were Defendant's  
28 "business acts or practices" under the UCL. (Bus. & Prof. Code, § 17200.)

1 Defendant contends that he lawfully sold an unspecified number of cigarettes to Native  
2 Americans. Defendant's federal preemption argument is an affirmative defense. Thus, under  
3 Evidence Code section 500, Defendant bears the burden of proving all facts essential to his  
4 defense. (*Bolkiah v. Superior Court*, (1999) 74 Cal.App.4th 984, 995-996.) Moreover,  
5 Defendant: created a record keeping system that reflected the brand and quantity of cigarettes  
6 sold by his stores to maintain the inventory available for sale, but the record keeping did not  
7 indicate whether his customers were Native-American or non-Native Americans; the sales log  
8 from Burning Arrow I is incomplete; and except for Burning Arrow I's sales log and Defendant's  
9 bank records, Defendant destroyed all records that he sold cigarettes, including spoiling evidence  
10 after he had a duty to maintain records for both anticipated and pending litigation. Accordingly,  
11 ~~the Court also finds grounds to, alternatively, shift the burden of proving the number of sales that~~  
12 Defendant made to Native Americans to Defendant. (*Williams v. Russ* (2008) 167 Cal.App.4th  
13 1215, 1226; *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1670.)

14 For each violation of the UCL, the court shall award a civil penalty, which may be up to  
15 \$2,500. (Bus. & Prof. Code, § 17206, subds. (a) & (b).) (*People v. National Association of*  
16 *Realtors* (1984) 155 Cal.App.3d 578, 585.) The purpose of awarding civil penalties is both to  
17 punish the defendant and to deter the defendant and others from violating the law in the future.  
18 (*State v. Altus Finance, S.A.* (2005) 36 Cal.4th 1284, 1291.) To determine the amount of the  
19 penalty, the court must consider any one or more "relevant circumstances" presented by the  
20 parties, which include the nature and seriousness of the misconduct, the number of violations, the  
21 persistence of the misconduct, the length of time over which the misconduct occurred, the  
22 willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.  
23 (Bus. & Prof. Code, § 17206, subd. (b).)

24 Injunctive relief under the UCL is available to enjoin anyone who engages or has engaged  
25 in acts of unlawful competition. (Bus. & Prof. Code, § 17203.) The court has broad power to  
26 fashion <sup>or B I B</sup> make the injunction as comprehensive as needed to stop deceptive and illegal conduct.  
27 (*People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676, 684).  
28



DECISION

1  
2 Defendant sold cigarettes by the pack, carton, and case, but cartons were the most common  
3 unit of sale. Accordingly, the Court finds that cartons are the appropriate unit of measurement for  
4 the number of violations committed by Defendant.

5 The Court finds that the evidence in this case establishes that Defendant committed, at least  
6 51,000 violations of the UCL based upon underlying violations the California Tobacco Directory  
7 Law, Fire- Safe Act, and state cigarette excise tax laws.

8 Defendant violated the California Tobacco Directory Law, under Revenue and Taxation  
9 Code section 30165.1, subdivision (e)(2), by selling cigarette brand families not included in the  
10 California Tobacco Directory.

11 ~~Defendant also violated the California Tobacco Directory Law, under Revenue and~~  
12 ~~Taxation Code section 30165.1, subdivision (e)(3)(A), by selling or distributing cigarettes that~~  
13 ~~Defendant knew or should have known were intended to be distributed in violation of paragraph~~  
14 ~~(e)(2) of section 30165.1.~~

15 Defendant sold and distributed untaxed cigarettes without collecting or remitting to the  
16 State Board of Equalization applicable state excise taxes on the cigarettes he sold, as required by  
17 sections 30101, 30108, 30123, and 30131.2 of the Revenue and Taxation Code.

18 Defendant violated the California Cigarette Fire Safety and Firefighter Protection Act  
19 (“Fire Safety Act”), Health and Safety Code sections 14950-14960, and specifically subdivision  
20 (a) of section 14951, by selling cigarettes not certified in compliance with the requirements of the  
21 California Cigarette Fire Safety and Firefighter Protection Act.

22 Defendant’s status as an individual Native American operating his own smoke shop on a  
23 fractional share of a federal allotment does not bar this action based upon federal preemption.  
24 California’s valid and compelling state interests of promoting public health by increasing the  
25 costs of cigarettes, ensuring that cigarettes comply with ignition propensity requirements to  
26 reduce the incidence of fires and burns caused by cigarettes, and the collection of cigarette tax  
27 revenues significantly outweigh the unidentified tribal and/or federal interest that Defendant  
28

1 contends permit him to sell cigarettes that do not comply with California's taxation, tobacco  
2 Directory, and cigarette fire safety laws.

### 3 REMEDIES

#### 4 A. Civil Penalties

5 Based upon the evidence presented at trial, including but not limited to the persistence and  
6 willfulness of Defendant's conduct, the seriousness of the conduct, the number of violations in  
7 this case, Defendant's substantial assets and net worth, and the need to deter others from engaging  
8 in similar conduct, the Court finds that Defendant should pay \$765,000 in civil penalties, based  
9 upon \$15 per violation for each of the 51,000 violations of the UCL. The amount of civil  
10 penalties awarded is fair, just, and equitable based upon the evidence and applicable laws.

#### 11 ~~B. Injunctive Relief~~

12 Pursuant to section 17203 of the Business and Professions Code and subdivision (f) of  
13 section 14955 of the Health and Safety Code, the Court hereby permanently enjoins Defendant  
14 Darren Rose, individually and doing business as Burning Arrow I and Burning Arrow II,  
15 Defendant's directors, officers, employees, and agents from engaging in any of the following  
16 unlawful business practices:

17 a. Selling, offering, possessing for sale, transporting, or otherwise distributing any  
18 cigarettes whose brand family and manufacturer are not listed on the California  
19 Tobacco Directory, as prohibited by the California tobacco directory law (Rev. &  
20 Tax. Code, § 30165.1, subd. (e)) to anyone, except for enrolled members of AIR on  
21 AIR;

22 b. Selling, offering, or possessing for sale any cigarettes that do not comply with  
23 the Fire-Safe Act (Health & Saf. Code, §§ 14950-14960) to anyone, except for  
24 enrolled members of AIR on AIR; and

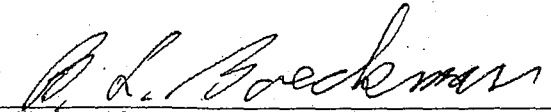
25 c. Selling cigarettes that do not bear a state excise tax stamp without collecting  
26 and remitting the applicable state excise tax, in violation of the state excise tax laws  
27 (Rev. & Tax. Code, §§ 30101, 30108, 30123, & 30131.2) to anyone, except for  
28 enrolled members of AIR on AIR.

1 Defendant shall notify all of his directors, officers, employees, agents, and persons acting in  
2 concert with or participation with him of the provisions for injunctive relief granted in this Order  
3 and provide each of them with a copy of this Order, within 14 days of this Order.

4 Defendant shall obtain and retain a signed statement from each and every enjoined person  
5 indicating that he or she has received and read a copy of this Order and agrees to abide by it, and  
6 shall provide Plaintiff with a copy of all such signed statements within 30 days of this Order.

7 IT IS SO ORDERED.

8 Dated:

*August 28, 2015* 

The Honorable Bradley L. Boeckman

9  
10  
11 SA2012307519  
12 32187310.doc  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. DARREN PAUL ROSE, et al.**  
No.: **176689**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

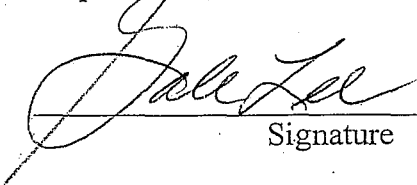
On September 4, 2015, I served the attached **Statement of Decision** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Michael A. Robinson  
Fredericks Peebles & Morgan, LLP  
2020 L Street, Suite 250  
Sacramento, CA 95811

*Attorneys for Darren Paul Rose*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 4, 2015, at Sacramento, California.

\_\_\_\_\_  
Gale Lee  
Declarant

  
\_\_\_\_\_  
Signature