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**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.

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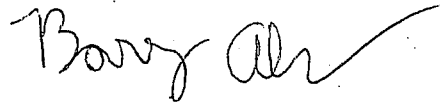
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A true and correct copy of the Statement of Decision is attached hereto as Exhibit A.

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*

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**EXHIBIT A**



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 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, subs. (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).  
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