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11 SUPERIOR COURT OF CALIFORNIA
12 COUNTY OF SAN DIEGO
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14 **THE PEOPLE OF THE STATE OF CALIFORNIA,**
15 **ex rel. BILL LOCKYER, ATTORNEY**
16 **GENERAL OF THE STATE OF**
17 **CALIFORNIA,**

Plaintiff,

18 v.

19 **S4L DISTRIBUTING, Inc., a Virginia corporation,**
20 **doing business as SMOKIN4LESS/A-1 DISCOUNT**
21 **CIGARETTES, WWW.SMOKIN4LESS.COM and**
22 **WWW.A1DISCOUNTCIGARETTES.COM;**
23 **WILLIAM C. BAKER III, an individual, and DOES**
24 **1 through 15, inclusive,**

Defendants.

Case No. _____

COMPLAINT FOR
INJUNCTION, CIVIL
PENALTIES, AND OTHER
RELIEF (Bus. & Prof. Code, §§
17200, 17500 and 22963 and Rev.
and Tax. Code, § 30101.7)

24 The People of the State of California, through Bill Lockyer, Attorney General of the
25 State of California, hereby allege on information and belief as follows:

26 **INTRODUCTION**

27 Youth smoking is a serious pediatric health problem in California and the rest of the
28 nation. More than 80% of regular smokers began smoking as children. Every day in the United

1 States more than 2,000 children begin smoking cigarettes, and one-third of those children will die
2 one day from tobacco-related disease. It has been shown that the younger a person begins
3 smoking, the more likely it is that he or she will be unable to quit in later life and will suffer a
4 disease attributable to tobacco use. Recent studies indicate that youth demonstrate signs of
5 addiction after smoking only a few cigarettes. Exacerbating these problems, an estimated 690
6 million packs of cigarettes are sold illegally to children each year nationwide.

7 Defendants are cigarette sellers who advertise and sell cigarettes over the Internet to
8 California consumers and consumers in other states. Defendants state on their web sites that
9 potential purchasers must be 18 years old to purchase cigarettes from defendants and that by
10 placing an order, potential purchasers certify that they are of legal age to purchase tobacco
11 products. However, defendants in fact facilitate and promote purchase of cigarettes by children
12 because neither defendants' web sites nor their delivery procedures require face-to-face delivery
13 or otherwise adequate verification of age and identity of would-be purchasers. Defendants have
14 sold cigarettes to children in California from their web sites on twelve occasions. The People
15 have informed defendants several times that the People had documented sales to minors from their
16 web sites. Defendants have been similarly informed of such sales to children by New York City
17 on a another occasion. Notwithstanding the fact that they have been so notified, defendants have
18 not taken adequate precautions to ensure that children cannot purchase and receive delivery of
19 cigarettes from their web sites. Specifically, defendants fail or refuse to put in place effective
20 safeguards so as to prevent or seriously discourage further sales to minors. By refusing to do so
21 and completing sales of cigarettes to minors, defendants are encouraging and allowing children to
22 purchase cigarettes from their web sites, thus undermining the State's efforts to reduce smoking
23 by minors.

24 Defendants, in violation of state law, also fail or refuse to either pay taxes owed on
25 cigarettes shipped into California or notify purchasers that they are responsible for taxes owed. In
26 violation of federal law, defendants fail or refuse to report the shipments of cigarettes into the
27 state, including the identity of the purchasers, to the California Board of Equalization ("BOE"),
28 the entity responsible for collecting those taxes. Defendants' also induce consumers to purchase

1 **FACTUAL ALLEGATIONS**

2 **Sales of cigarettes to minors**

3 7. Pursuant to Penal Code section 308(a), every person, firm or corporation which
4 knowingly or under circumstances in which it has knowledge, or should have grounds for
5 knowledge, sells cigarettes to persons under the age of 18 years is subject either to a
6 misdemeanor criminal action or to a civil action punishable by a fine.

7 8. Smokin4Less has knowledge, or grounds for knowledge that it is selling cigarettes
8 to children from its web sites. Defendants were notified in writing by plaintiff's attorney that
9 since on or before July 2001, Smokin4Less has sold cigarettes from its web sites to children in
10 California on numerous occasions. Smokin4Less does not have adequate procedures and
11 safeguards in place to ensure that minors cannot receive cigarettes purchased from its web sites.

12 9. The People, along with 39 other states, sent a letter to defendants on September
13 16, 2002, informing them that they had information documenting sales to minors from their web
14 sites and asking defendants to immediately review their web sites in light of the legal requirements
15 prohibiting the sales of cigarettes to minors. (A copy of this letter is attached as Exhibit "A" and
16 incorporated herein by reference.) Defendant Baker responded to that letter by denying that
17 defendants sold cigarettes to children. The People, sent defendants a second letter dated
18 September 25, 2002, informing them that the People had verified multiple sales to minors in
19 California from defendants' web sites since at least July, 2001. The People also notified
20 defendants, in that letter, that as of January 1, 2003, California prohibits the sale of cigarettes over
21 the Internet unless the seller complies with specified requirements including age verification (Bus
22 and Prof. Code §22963) and payment of applicable taxes (Rev and Tax Code §30101.7). The
23 People also provided defendants with copies of those newly enacted statutes. (A copy of this
24 letter is attached as Exhibit "B" and incorporated herein by reference.) Defendants did not
25 respond to that letter.

26 10. The People sent defendants a third letter on January 23, 2003, informing them that
27 the California Attorney General had documented sales of cigarettes to minors from their web sites
28 on eleven occasions since July, 2001, and that the New York City Department of Consumer

1 letter. If the BOE does not receive a response, it will routinely send a follow-up letter requesting
2 compliance from the entities.

3 15. The BOE sent a Jenkins Act letter to Smokin4Less on at least one occasion
4 requesting that the company report all its shipments of cigarettes to California consumers as
5 required by the Jenkins Act. It sent a letter to the company's address in Roanoke, Virginia on
6 October 7, 1999. (A copy of that letter is attached, as Exhibits "D" and incorporated herein by
7 reference.) Smokin4Less did not respond to either of this letters.

8 16. The People in its January 23, 2003 letter to defendants (Exhibit C) also informed
9 defendants of their obligation to comply with the Jenkins Act. Defendants did not respond to the
10 People's letter.

11 17. Smokin4Less has failed or refused to file any reports with the BOE, at any time, of
12 sales of cigarettes to California consumers as required by section 376 of the Jenkins Act.

13 **Deceptive Advertising**

14 18. At all times relevant to this action, defendants were and are required by the Jenkins
15 Act to report shipments of cigarettes into California to the BOE so the BOE can collect state
16 taxes on these cigarettes.

17 19. Defendants, through false and misleading statements on their web sites,
18 misrepresent defendants' obligation to report shipments of cigarettes into California as required
19 by the Jenkins Act. For example, in the privacy policy posted on defendants' web sites,
20 defendants state:

21 "Privacy Policy and Tax Reporting: You are probably aware that a federal
22 regulation known as the Jenkins Act requires cigarette vendors to report their
23 sales to the appropriate state tax authorities. You may not know, however,
24 that the Jenkins Act was passed more than 50 years ago. Long before the
25 advent of electronic communications and e-commerce. Since that time the
26 federal government and several states have passed legislation specifically
27 relating to electronic communications. The Privacy Act of 1974 and the
28 Electronics Communications act of 1986 are examples of this type of
legislation. At this very moment Congress is debating additional legislation to
protect privacy in electronic commerce. To this end we believe there is ample
justification to state the following policy: We will not divulge your
information to any third party without either your express consent or as
directed by the lawful order of a court of proper jurisdiction. You should be
aware that you could be liable for additional taxes to your local state and/or
community tax authorities. We strongly suggest that each customer

1 thoroughly research their potential liability before making the decision to
2 purchase.”

3 20. To induce consumers to purchase cigarettes from its web sites, defendants also
4 misrepresent the obligations of California residents to report cigarette purchases and pay
5 California taxes on the cigarettes purchased from Smokin4Less. Those taxes amount to \$0.87 per
6 package of 20 cigarettes and \$8.70 a carton. Defendants imply, through statements on their web
7 sites that Virginia sales taxes paid by Virginia residents are the only taxes that must be paid on
8 cigarettes purchased from defendants’ web sites. Virginia imposes one of the lowest excise taxes
9 in the country – \$0.02.5 per pack or \$0.25 per carton. A California resident may purchase from
10 Virginia located Smokin4Less and pay a price that represents an apparent savings of \$8.45 per
11 carton.

12 21. Defendants represent to potential purchasers that they may have to report cigarette
13 purchases to their own states taxing entity. For example, defendants state the following on their
14 web site:

15 “All transactions take place within the Commonwealth of Virginia...Note that
16 we collect sales taxes on purchases by Virginia residents only, however many
17 states now require their residents to report purchases made out of state and
18 remit a tax on such purchases.”

19 22. Defendants’ representations concerning defendants’ obligations to comply with the
20 reporting requirements of the Jenkins Act and the obligation of California consumers to pay
21 California taxes are false and misleading for the following reasons:

22 (a) At all times relevant to this action, defendants were and are required by the
23 Jenkins Act to report sales of cigarettes made to California consumers to the BOE so that the
24 BOE can collect state taxes on those cigarettes; and

25 (b) No legislation passed by Congress has changed the reporting requirements of
26 the Jenkins Act, and despite such legislation, defendants are required to comply with the Act.

27 (c) Pursuant to Revenue and Taxation Code sections 30008, 30009 and 30109,
28 California taxes are imposed and collected on the first distribution of untaxed cigarettes in the
29 state. This means that since Smokin4Less does not pay taxes on cigarettes purchased from its

1 web sites and shipped to consumers in California, the California consumers must pay all taxes
2 owed on the cigarettes;

3 (d) Defendants' implication that California taxes need not be paid because all
4 transactions take place in Virginia is erroneous and/or irrelevant because by law, consumers
5 obligation to pay taxes on cigarettes purchased over the Internet from defendants is based on the
6 shipments of cigarettes into California and not the alleged location of the transaction;

7 (e) Defendants' representation concerning responsibility for tax law compliance
8 implies that defendants are not responsible for ascertaining and complying with the relevant tax
9 laws concerning cigarette products and that the burden of doing so rests with the purchaser. In
10 fact, pursuant to the Jenkins Act, it is the responsibility of the seller to report shipments of
11 tobacco products into California; and

12 (f) Defendants advertise Smokin4Less cigarettes at a stated price but fail to
13 inform California consumers that the stated price does not include taxes.

14 **Failure to Notify California Purchasers of Tax Obligations**

15 23. Effective January 1, 2003, California Revenue and Taxation Code section
16 30101.7(d) requires that a person may engage in non-face-to-face sales of cigarettes to California
17 consumers provided that either of the following conditions is met:

18 (1) All applicable California taxes on the cigarettes have been paid.

19 (2) The seller includes, on the outside of the shipping container for any cigarettes shipped
20 to a resident in California from any source in the United States, an externally visible and easily
21 legible notice located on the same side of the shipped container as the address to which the
22 package is delivered as follows:

23 "IF THESE CIGARETTES HAVE BEEN SHIPPED TO YOU FROM A
24 SELLER LOCATED OUTSIDE OF THE STATE IN WHICH YOU
25 RESIDE, THE SELLER HAS REPORTED PURSUANT TO FEDERAL
26 LAW THE SALE OF THESE CIGARETTES TO YOUR STATE TAX
COLLECTION AGENCY, INCLUDING YOUR NAME AND ADDRESS.
YOU ARE LEGALLY RESPONSIBLE FOR ALL APPLICABLE UNPAID
STATE TAXES ON THESE CIGARETTES."

27 24. Although the People informed defendants of this new law, its effective date and
28 sent defendants a copy of the law, since January 1, 2003, Smokin4Less has violated Revenue and
Complaint For Injunction, Civil Penalties, and Other Relief 9

1 **FIRST CAUSE OF ACTION**

2 **Business and Professions Code section 17500**
3 **False or Misleading Advertising**

4 28. The People reallege and incorporate herein by reference, paragraphs 1 through 27,
5 inclusive, as though fully set forth herein.

6 29. Within the past three (3) years from the date of the filing of this Complaint,
7 defendants and their agents and representatives, have made or caused to be made, untrue or
8 misleading statements to members of the public, including to potential customers purchasing
9 cigarettes from their web sites, in violation of section 17500 of the Business and Professions
10 Code, in order to induce them to purchase cigarettes from defendants. Said untrue or misleading
11 statements include, but are not limited to the following:

12 (a) Representing that defendants are not required to comply with the Jenkins
13 Act's reporting requirements;

14 (b) Representing or implying that California consumers are not required to pay
15 taxes in California on cigarettes purchased from Smokin4Less over the Internet.

16 (c) Advertising Smokin4Less' cigarettes at a stated price but failing to inform
17 California consumers that this stated price does not include California taxes.

18 30. Defendants knew, or by the exercise of reasonable care, should have known, that
19 the statements set forth in paragraph 29 were untrue or misleading at the time such statements
20 were made.

21 **SECOND CAUSE OF ACTION**

22 **Business and Professions Code section 22963(b)(1),(3) & (4)**
23 **Age Verification and Delivery of Tobacco Products to Unverified Billing Address**

24 31. The People reallege and incorporate by reference, paragraphs 1 through 30,
25 inclusive, as though fully set forth herein.

26 32. Since January 1, 2003, Smokin4Less does not verify the age of potential
27 purchasers, confirm Internet orders by telephone and delivers tobacco products to persons in
28 California at an address other than the purchaser's verified billing address on the check or credit

1 card used for payment, as required by Business and Professions Code section 22963(b)(1),(3) &
2 (4).

3 **THIRD CAUSE OF ACTION**

4 **Revenue and Taxation Code section 30101.7(d)**
5 **Failure to Notify California Purchasers of Their Tax Obligations**

6 33. The People reallege and incorporate by reference, paragraphs 1 through 32,
7 inclusive, as though fully set forth herein.

8 34. Since January 1, 2003, Smokin4Less has engaged and continues to engages in
9 non-face-to-face sales of cigarettes to California consumers without satisfying either of the
10 following conditions required by Revenue and Taxation Code section 30101.7: (1) paying all
11 applicable California taxes or (2) including on the outside of the shipping container for any
12 cigarettes shipped to a resident in California from any source in the United States an externally
13 visible and easily legible notice located on the same side of the shipped container as the address to
14 which the package is delivered.

15 **FOURTH CAUSE OF ACTION**

16 **Business and Profession Code section 17200**
17 **Unfair or Unlawful Business Acts or Practices**

18 35. The People reallege and incorporate by reference paragraphs 1 through 34,
19 inclusive, as though fully set forth herein.

20 36. The People are informed and believe, and upon such information and belief allege
21 that within the past four (4) years from the date of the filing of this Complaint, defendants, and
22 each of them, engaged in acts of unfair competition as defined in and prohibited by Business and
23 Professions Code section 17200 by engaging in conduct which includes, but is not limited to:

24 (a) Making untrue or misleading statements as referenced in paragraph 29 of this
25 Complaint, in violation of Business and Professions Code section 17500;

26 (b) Selling cigarettes over the Internet and delivering them by common carrier to
27 California children since at least July 2001, in violation of Penal Code section 308(a);

28 ///

1 (c) Failing to maintain adequate or effective safeguards or procedures to ensure
2 that children cannot purchase cigarettes from their web site and that cigarettes will not be
3 delivered to children, in violation of Penal Code section 308(a);

4 (d) Failing to report to the BOE sales of cigarettes to California consumers as
5 required by the Jenkins Act;

6 (e) Representing or implying that potential purchasers may be required to report
7 purchases of cigarettes from defendants' web sites to the BOE.

8 (f) Failing to comply with age verification and delivery requirements in violation
9 of Business and Professions Code section 22963(b)(1), (3) & (4); and

10 (g) Failing to either pay the California taxes owed on cigarettes purchased by
11 California consumers over the Internet from Smokin4Less or clearly notify such consumer that
12 defendants have reported the sale of cigarettes to the BOE and the purchaser is responsible for the
13 unpaid taxes, in violation of Revenue and Taxation Code section 30101.7(d).

14 **WHEREFORE**, the People respectfully pray that this Court grant the following relief:

15 1. Pursuant to Business and Professions Code section 17535, defendants, their
16 successors, employees, agents and representatives, and all other persons who are acting in concert
17 with them, be preliminarily and permanently enjoined from making untrue or misleading
18 statements in violation of Business and Professions Code section 17500 and be specifically
19 enjoined from making the untrue or misleading statements set forth in the First Cause of Action.

20 2. Pursuant to Business and Professions Code section 17203, defendants, their
21 successors, employees, agents, representatives, and all other persons who are acting in concert
22 with them, be preliminarily and permanently enjoined from engaging in unfair competition as
23 defined in Business and Professions Code section 17200 and be specifically enjoined from
24 engaging in the types of acts or practices set forth in the Fourth Cause of Action.

25 3. Pursuant to Revenue and Taxation Code section 30101.7(e), defendants, their
26 successors, employees, agents, representatives, and all other persons who are acting in concert
27 with them, be preliminarily and permanently enjoined from failing to comply with Revenue and
28 Taxation Code §30101.7(d).

