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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11  
12 **PEOPLE OF THE STATE OF**  
13 **CALIFORNIA, ex rel. EDMUND G.**  
14 **BROWN JR., Attorney General,**

Plaintiff,

15 v.

16 **SMOKING EVERYWHERE, INC., and**  
17 **DOES 1 through 20, inclusive,**

18 Defendants,

Case No.

**COMPLAINT FOR CIVIL PENALTY  
AND INJUNCTIVE RELIEF**

19  
20  
21 Plaintiff, the People of the State of California, by and through Edmund G. Brown Jr.,  
22 Attorney General, alleges as follows:

23 **INTRODUCTION**

24 1. Electronic cigarettes are battery operated devices designed to look like and to be  
25 used in the same manner as conventional cigarettes. Electronic cigarettes contain cartridges filled  
26 with nicotine and other harmful chemicals. When a user inhales on an electronic cigarette, a  
27 heating element converts the nicotine and other chemicals into a vapor that the user breathes in.  
28





1 No person in the course of doing business shall knowingly and  
2 intentionally expose any individual to a chemical known to the state to  
3 cause cancer or reproductive toxicity without first giving clear and  
4 reasonable warning to such individual, except as provided in Section  
5 25249.10.

6 13. An exposure to a chemical in a consumer product is one "which results from a  
7 person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a  
8 consumer good, or any exposure that results from receiving a consumer service." (Cal. Code  
9 Regs., tit. 27, § 25602, subd. (b).)

10 14. An environmental exposure is an exposure that "may foreseeably occur as the result  
11 of contact with an environmental medium, including, but not limited to, ambient air, indoor air, . .  
12 or manmade or natural substances, either through inhalation, ingestion, skin contact, or  
13 otherwise." (Cal. Code Regs., tit. 27, § 25602, subd. (c).)

14 15. Proposition 65 establishes a procedure by which the State develops a list of  
15 chemicals "known to the State to cause cancer or reproductive toxicity." (Health & Saf. Code, §  
16 25249.8.) No warning need be given concerning a listed chemical until one year after the  
17 chemical first appears on the list. (Id., § 25249.10, subd. (b).)

18 16. Any person "violating or threatening to violate" the statute may be enjoined in any  
19 court of competent jurisdiction. (Health & Saf. Code, § 25249.7.) To "threaten to violate" is  
20 defined to mean "to create a condition in which there is a substantial probability that a violation  
21 will occur." (Id., § 25249.11, subd. (e).) In addition, violators are liable for civil penalties of up  
22 to \$2,500 per day for each violation, recoverable in a civil action. (Id., § 25249.7, subd. (b).)

23 17. Actions to enforce Proposition 65 may be brought by the Attorney General in the  
24 name of the People of the State of California. (Health & Saf. Code, § 25249.7, subd. (c).)

## 25 **B. The Unfair Competition Act**

26 18. California Business and Professions Code section 17200 provides that "unfair  
27 competition shall mean and include unlawful, unfair or fraudulent business practice." Section  
28 17203 of the Business and Professions Code provides that "(a)ny person performing or proposing  
to perform an act of unfair competition within this state may be enjoined in any court of  
competent jurisdiction."

1           19. Unlawful acts under the statute include any act that is unlawful that is conducted as  
2 part of business activity, and therefore include violations of state or federal laws and regulations.

3           20. Business and Professions Code section 17206, subdivision (a), provides that any  
4 person violating section 17200 “shall be liable for a civil penalty not to exceed two thousand five  
5 hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil  
6 action brought in the name of the people of the State of California by the Attorney General. . . .”  
7 Under section 17205, these penalties are “cumulative to each other and to the remedies or  
8 penalties available under all other laws of this state.”

9           **C. Untrue or Misleading Advertising**

10           21. California Business and Professions Code section 17500 provides that it is unlawful  
11 to “make or disseminate or cause to be made or disseminated before the public in this state . . .  
12 any statement . . . which is untrue or misleading, and which is known, or which by the exercise of  
13 reasonable care should be known, to be untrue or misleading,” for the purpose of inducing the  
14 public to an obligation relating to goods or services. Additionally, Business and Professions  
15 Code section 17508, subdivision (a), makes it unlawful to make any false or misleading  
16 advertising claim, including claims that “(1) purport to be based on factual, objective, or clinical  
17 evidence, (2) compare the product’s effectiveness or safety to that of other brands or products, or  
18 (3) purport to be based on any fact.”

19           22. In an action by the Attorney General, persons violating these provisions are subject  
20 to injunctive relief and to a civil penalty not to exceed \$2,500 for each violation of section 17500  
21 and 17508, except that if the same violation is a violation of both sections 17500 and 17508, a  
22 civil penalty can only be assessed for that violation once. (Bus. & Prof. Code, §§ 17508, subd.  
23 (g), 17535, and 17536, subd. (a).) In all other relevant respects, “the remedies or penalties are  
24 cumulative to each other and to the remedies or penalties available under all other laws of this  
25 state.” (Id., § 17534.5.)

26   **DEFENDANTS’ BUSINESS PRACTICES**

27           23. Defendants import, distribute, offer for sale, or sell electronic cigarettes in California  
28 and throughout the United States. As used in this complaint, “electronic cigarettes” includes the

1 cartridges placed inside the electronic cigarette containing materials that a heating element  
2 vaporizes when the user inhales.

3 24. Electronic cigarettes are nicotine delivery devices constructed to mimic the look and  
4 experience of smoking a conventional cigarette. As a general rule, nicotine delivery devices --  
5 such as the "patch" and other smoking cessation devices -- are considered combination drug-  
6 devices that the FDA or the California Department of Health Services ("DHS") must approve  
7 before they lawfully can be distributed for sale in California. (21 U.S.C. §§ 355 *et seq.*; Health &  
8 Saf. Code, § 111550 *et seq.*) Defendants' electronic cigarettes are currently not approved by the  
9 FDA or DHS for any purpose.

10 25. Defendants market electronic cigarettes in California as a safe, carcinogen-free,  
11 alternative to traditional smoking, but in reality electronic cigarettes contain chemicals known to  
12 cause birth defects or other reproductive harm, cancer, and other harm. Defendants do not  
13 provide clear and reasonable warnings about such chemicals. Moreover, Defendants make claims  
14 about the safety of electronic cigarettes and about their potential use as a treatment for addiction  
15 to smoking that are untrue or misleading.

16 26. Defendants have promoted their products with claims that electronic cigarettes help  
17 overcome addiction to nicotine and that electronic cigarettes will help users quit smoking  
18 cigarettes. By selling cartridges with different nicotine levels, including zero nicotine,  
19 Defendants represent that consumers can use electronic cigarettes to reduce and to eliminate  
20 dependence on nicotine. Defendants have used advertisements on the Internet and in print  
21 designed to look like news stories that contain untrue and misleading statements about electronic  
22 cigarettes. The statements are made more misleading by appearing to be part of a news story.

23 27. Defendants have promoted their product to minors under 18 years old. For instance,  
24 they have sold nicotine cartridges in flavors that appeal to minors, including strawberry, chocolate,  
25 mint, bananas, and cookies and cream. In one advertisement, Defendants showed a video with  
26 radio show host Howard Stern claiming, "kids love 'em." Minors are able to purchase electronic  
27 cigarettes on the Internet or at retail locations.

28

1 **FIRST CAUSE OF ACTION**

2 **VIOLATIONS OF BUSINESS AND PROFESSIONS CODE SECTION 17500**

3 **(UNTRUE OR MISLEADING STATEMENTS)**

4 28. Plaintiff realleges and incorporates herein by this reference all paragraphs above as  
5 though set forth here in full.

6 29. Defendants have violated and continue to violate Business and Professions Code  
7 section 17500 by making or disseminating untrue or misleading statements, or by causing untrue  
8 or misleading statements to be made or disseminated in, or from California, with the intent to  
9 induce members of the public to purchase electronic cigarettes. Such statements include, but are  
10 not limited to, the following:

- 11 a. Electronic cigarettes contain no carcinogens;
- 12 b. Electronic cigarettes are safe, or safer than traditional cigarettes;
- 13 c. Electronic cigarettes can be used as dietary supplements by delivering  
14 vitamins into the gastrointestinal system;
- 15 d. Electronic cigarettes contain advertised levels of nicotine or no nicotine;
- 16 e. Electronic cigarettes contain no tobacco-specific nitrosamines or  
17 impurities;
- 18 f. Electronic cigarettes contain no tar;
- 19 g. Electronic cigarettes contain no tobacco;
- 20 h. Electronic cigarettes help smokers to quit smoking;
- 21 i. Electronic cigarettes have no first-hand or second-hand smoke;
- 22 j. Electronic cigarettes can be used anywhere;
- 23 k. Electronic cigarettes satisfy the habit of cigarette smoking; and
- 24 l. Electronic cigarettes provide all the pleasure of smoking without the  
25 health problems from smoking.

26 30. Defendants knew or should have known that these statements were untrue or  
27 misleading at the time they were made.

28

31. Said violations render each defendant liable for civil penalties not to exceed \$2,500 for each violation, as well as other remedies.

**SECOND CAUSE OF ACTION**

**VIOLATIONS OF BUSINESS AND PROFESSIONS CODE SECTION 17508  
(FALSE OR MISLEADING ADVERTISING CLAIMS)**

32. Plaintiff realleges and incorporate herein by this reference all paragraphs above as though set forth here in full.

33. Defendants have violated and continue to violate Business and Professions Code section 17508 by making false or misleading advertising claims that purport to be based on factual, objective, or clinical evidence, that compare the product's effectiveness or safety to that of other brands or products, or that purport to be based on fact. Such claims include, but are not limited to the following claims:

- a. Electronic cigarettes contain no carcinogens;
- b. Electronic cigarettes are safe, or safer than traditional cigarettes;
- c. Electronic cigarettes can be used as dietary supplements by delivering vitamins into the gastrointestinal system;
- d. Electronic cigarettes contain advertised levels of nicotine or no nicotine;
- e. Electronic cigarettes contain no tobacco-specific nitrosamines or impurities;
- f. Electronic cigarettes contain no tar;
- g. Electronic cigarettes contain no tobacco;
- h. Electronic cigarettes help smokers to quit smoking;
- i. Electronic cigarettes have no first-hand or second-hand smoke;
- j. Electronic cigarettes can be used anywhere;
- k. Electronic cigarettes satisfy the habit of cigarette smoking; and
- l. Electronic cigarettes provide all the pleasure of smoking without the health problems from smoking.



1 **THIRD CAUSE OF ACTION**

2 **VIOLATIONS OF HEALTH AND SAFETY CODE SECTION 25249.6**

3 **(PROPOSITION 65; FAILURE TO WARN)**

4 34. Plaintiff realleges and incorporate herein by this reference all paragraphs above as  
5 though set forth here in full.

6 35. "Acetaldehyde" was placed on the Governor's list of chemicals known to the State  
7 of California to cause cancer on April 1, 1988. (Cal. Code Regs., tit. 27, § 27001, subd. (b).)

8 36. "Acrylonitril" was placed on the Governor's list of chemicals known to the State of  
9 California to cause cancer on July 1, 1987. (Cal. Code Regs., tit. 27, § 27001, subd. (b).)

10 37. "Benzene" was placed on the Governor's list of chemicals known to the State of  
11 California to cause cancer on February 27, 1987. (Cal. Code Regs., tit. 27, § 27001, subd. (b).)

12 "Benzene" was placed on the Governor's list of chemicals known to the State of California to  
13 cause reproductive toxicity on December 26, 1997. It is specifically identified under the  
14 subcategory "developmental reproductive toxicity," which means it causes harm to the  
15 developing fetus, and "male reproductive toxicity," which means it causes harm to the male  
16 reproductive system. (Id., tit. 27, § 27001, subd. (c).)

17 38. "Nicotine" was placed on the Governor's list of chemicals known to the State of  
18 California to cause reproductive toxicity on April 1, 1990. It is specifically identified under the  
19 subcategory "developmental reproductive toxicity," which means it causes harm to the  
20 developing fetus. (Cal. Code Regs., tit. 27, § 27001, subd. (c).)

21 39. "4-nitrosomethylamino-1-(3-pyridyl)-1-butanone" ("NNK") was placed on the  
22 Governor's list of chemicals known to the State of California to cause cancer on April 1, 1990.  
23 (Cal. Code Regs., tit. 27, § 27001, subd. (b).)

24 40. "N-Nitrosomethylethylamine" was placed on the Governor's list of chemicals  
25 known to the State of California to cause cancer on October 1, 1989. (Cal. Code Regs., tit. 27, §  
26 27001, subd. (b).)

1           41. "N-Nitrososaroccosine" was placed on the Governor's list of chemicals known to  
2 the State of California to cause cancer on January 1, 1988. (Cal. Code Regs., tit. 27, § 27001,  
3 subd. (b).)

4           42. "N- Nitrosopyrrolidine" was placed on the Governor's list of chemicals known to  
5 the State of California to cause cancer on October 1, 1987. (Cal. Code Regs., tit. 27, § 27001,  
6 subd. (b).)

7           43. "N-Nitrosopiperidine" was placed on the Governor's list of chemicals known to the  
8 State of California to cause cancer on April 1, 1988. (Cal. Code Regs., tit. 27, § 27001, subd. (b).)

9           44. "N-Nitrosornicotine" was placed on the Governor's list of chemicals known to the  
10 State of California to cause cancer on January 1, 1988. (Cal. Code Regs., tit. 27, § 27001, subd.  
11 (b).)

12           45. "N-Nitrosomorpholine" was placed on the Governor's list of chemicals known to the  
13 State of California to cause cancer on January 1, 1988. (Cal. Code Regs., tit. 27, § 27001, subd.  
14 (b).)

15           46. "N-Nitrosomethylvinylamine" was placed on the Governor's list of chemicals  
16 known to the State of California to cause cancer on January 1, 1988. (Cal. Code Regs., tit. 27, §  
17 27001, subd. (b).)

18           47. "N-Nitroso-N-methylurethane" was placed on the Governor's list of chemicals  
19 known to the State of California to cause cancer on April 1, 1988. (Cal. Code Regs., tit. 27, §  
20 27001, subd. (b).)

21           48. "N-Nitroso-N-methylurea" was placed on the Governor's list of chemicals known  
22 to the State of California to cause cancer on April 1, 1988. (Cal. Code Regs., tit. 27, § 27001,  
23 subd. (b).)

24           49. "N-Nitrosodiethanolamine" was placed on the Governor's list of chemicals known  
25 to the State of California to cause cancer on October 1, 1987. (Cal. Code Regs., tit. 27, § 27001,  
26 subd. (b).)

1           50. "N-Nitroso-N-methylurea" was placed on the Governor's list of chemicals known to  
2 the State of California to cause cancer on October 1, 1987. (Cal. Code Regs., tit. 27, § 27001,  
3 subd. (b).)

4           51. "4-(N-Nitrosomethylamino-1(3-pyridyl)1-butanone" was placed on the Governor's  
5 list of chemicals known to the State of California to cause cancer on April 1, 1990. (Cal. Code  
6 Regs., tit. 27, § 27001, subd. (b).)

7           52. "3-(N-Nitrosomethylamino) propionitrile" was placed on the Governor's list of  
8 chemicals known to the State of California to cause cancer on April 1, 1990. (Cal. Code Regs., tit.  
9 27, § 27001, subd. (b).)

10           53. "N-Nitroso-N-ethylurea" was placed on the Governor's list of chemicals known to  
11 the State of California to cause cancer on October 1, 1987. (Cal. Code Regs., tit. 27, § 27001,  
12 subd. (b).)

13           54. "N-Nitrosodi-n-propylamine" was placed on the Governor's list of chemicals known  
14 to the State of California to cause cancer on January 1, 1988. (Cal. Code Regs., tit. 27, § 27001,  
15 subd. (b).)

16           55. "N-Nitrosodiphenylamine" was placed on the Governor's list of chemicals known to  
17 the State of California to cause cancer on April 1, 1988. (Cal. Code Regs., tit. 27, § 27001, subd.  
18 (b).)

19           56. "p-Nitrosodiphenylamine" was placed on the Governor's list of chemicals known to  
20 the State of California to cause cancer on January 1, 1988. (Cal. Code Regs., tit. 27, § 27001,  
21 subd. (b).)

22           57. "N-Nitrosodimethylamine" was placed on the Governor's list of chemicals known to  
23 the State of California to cause cancer on October 1, 1987. (Cal. Code Regs., tit. 27, § 27001,  
24 subd. (b).)

25           58. "N-Nitrosodiethylamine" was placed on the Governor's list of chemicals known to  
26 the State of California to cause cancer on October 1, 1987. (Cal. Code Regs., tit. 27, § 27001,  
27 subd. (b).)

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1           59. "N-Nitrododi-n-butylamine" was placed on the Governor's list of chemicals known  
2 to the State of California to cause cancer on October 1, 1987. (Cal. Code Regs., tit. 27, § 27001,  
3 subd. (b).)

4           60. In this complaint, the chemicals identified in paragraphs 35-59, above, are referred  
5 to individually and collectively as "Listed Chemicals."

6           61. The following allegations are likely to have evidentiary support after a reasonable  
7 opportunity for further investigation or discovery: Defendants have manufactured, distributed, or  
8 sold electronic cigarettes that contain Listed Chemicals for sale or use within the State of  
9 California.

10           62. Individuals who use electronic cigarettes or who come into contact with its vapor are  
11 exposed to Listed Chemicals present in the product through direct inhalation, ingestion, or dermal  
12 contact and absorption through the skin.

13           63. Defendants have known that the electronic cigarettes they manufacture, distribute, or  
14 sell contain Listed Chemicals. Defendants intend that individuals inhale or otherwise come into  
15 contact with the vapor created by electronic cigarettes they manufacture, distribute, or sell.

16           64. Defendants have failed to provide clear and reasonable warnings that the use of  
17 electronic cigarettes results in exposure to chemicals known to the State of California to cause  
18 cancer, reproductive toxicity, or both. No such warning was provided by any other person.

19           65. By committing the acts alleged above, Defendants have, within the previous twelve  
20 months, in the course of doing business, knowingly and intentionally exposed individuals to  
21 chemicals known to the State of California to cause cancer, reproductive toxicity, or both, without  
22 first giving clear and reasonable warning to such individuals, within the meaning of Health and  
23 Safety Code section 25249.6.

24           66. Said violations render each defendant liable for civil penalties not to exceed \$2,500  
25 for each violation, as well as other remedies.

1 **FOURTH CAUSE OF ACTION**

2 **VIOLATIONS OF BUSINESS AND PROFESSIONS CODE SECTION 17200**

3 **(UNFAIR COMPETITION LAW)**

4 67. Plaintiff realleges and incorporate herein by this reference all paragraphs above as  
5 though set forth here in full.

6 68. Defendants have, within the previous four years, engaged in unlawful business  
7 practices which constitute unfair competition within the meaning of Business and Professions  
8 Code section 17200. Such unfair competition includes, but is not limited to, the following acts or  
9 practices:

10 a. Defendants have sold unapproved drugs and devices in violation of the  
11 Food, Drug, and Cosmetic Act, 21 U.S.C. §355 *et seq.*;

12 b. Defendants have sold unapproved drugs and devices in violation of the  
13 Sherman Food, Drug, and Cosmetics Law, Health and Safety Code section 111550 *et seq.*;

14 c. Defendants have promoted and sold Electronic Cigarettes to minors  
15 under 18 years old;

16 d. As set forth in the First Cause of Action, Defendants have violated  
17 Business and Professions Code section 17500;

18 e. As set forth in the Second Cause of Action, Defendants have violated  
19 Business and Professions Code section 17508; and

20 f. As set forth in the Third Cause of Action, Defendants have violated  
21 Health and Safety Code section 25249.6.

22 69. Said violations render each defendant liable for civil penalties not to exceed \$2,500  
23 for each violation, as well as other remedies.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff prays that this Court:

26 1. Pursuant to the First, Second, Third and Fourth Causes of Action, grant civil penalties  
27 according to proof.

28

1           2. Pursuant to Business and Professions Code section 17535, enter such temporary  
2 restraining orders, preliminary injunctions, permanent injunctions, declarations, or other orders  
3 prohibiting Defendants, and each of them, and their successors, agents, representatives,  
4 employees, and all persons who act in concert with them, from making untrue or misleading  
5 representations about their products, including, but not limited to, the violations alleged in the  
6 First Cause of Action;

7           3. Pursuant to Business and Professions Code section 17535 enter such temporary  
8 restraining orders, preliminary injunctions, permanent injunctions, declarations, or other orders  
9 prohibiting Defendants, and each of them, and their successors, agents, representatives,  
10 employees, and all persons who act in concert with them, from making false or misleading  
11 advertising claims about their products, including, but not limited to, the violations alleged in the  
12 Second Cause of Action; Pursuant to Health and Safety Code section 25249.7 and Business and  
13 Professions Code section 17203, enter such temporary restraining orders, preliminary injunctions,  
14 permanent injunctions, declarations, or other orders prohibiting Defendants, and each of them,  
15 and their successors, agents, representatives, employees, and all persons who act in concert with  
16 them, from exposing persons within the State of California to Listed Chemicals caused by use of  
17 electronic cigarettes without providing clear and reasonable warning;

18           4. Pursuant to Business and Professions Code section 17203, enter such temporary  
19 restraining orders, preliminary injunctions, permanent injunctions, or other orders prohibiting  
20 Defendants, and each of them, and their successors, agents, representatives, employees, and all  
21 persons who act in concert with them, from selling Electronic Cigarettes in California, and from  
22 committing any acts of unfair competition in violation of Business and Professions Code section  
23 17200, including, but not limited to, the violations alleged in the Fourth Cause of Action;

24           5. Enter such orders as “may be necessary to restore to any person in interest any money  
25 or property, real or personal, which may have been acquired by means of” these unlawful acts,  
26 untrue or misleading representations or false or misleading advertising claims as provided for in  
27 Business and Professions Code section 17203 and 17535 other applicable laws;

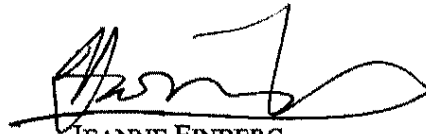
28           6. Award Plaintiff its costs of suit; and

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7. Grant such other and further relief as the Court deems just and proper.

Dated: January 13, 2010

Respectfully Submitted,  
EDMUND G. BROWN JR.  
Attorney General of California



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*Attorneys for Plaintiff*  
*The People of the State of California*

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