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CLERK OF
THE SUPERIOR COURT
By Cheryl Clark, Deputy

CASE NUMBER:

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SUPERIOR COURT OF THE STATE OF CALIFORNIA**IN AND FOR THE COUNTY OF ALAMEDA**

KIM EMBRY, an individual

Plaintiff,

v.

DIVAN LOUNGE DBA MINA LOUNGE, a
California corporation, and DOES 1 through
100, inclusive,

Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code § 25249.6 et seq.)

COMPLAINT

I.
INTRODUCTION

1. This Complaint is a representative action brought by Plaintiff in the public interest of the citizens of the State of California (“the People”). Plaintiff seeks to remedy Defendants’ failure to inform the People of exposures to carcinogens and/or reproductive toxicants listed on the Proposition 65 list. The toxicants that customers are exposed to in Defendant’s place of business may include, but are not limited to: Carbon monoxide (CO), arsenic, cadmium, lead, nickel, benzene, quinoline, benzofuran, ethylbenzene, and/or styrene (“Toxicants”). Defendants allow customers to be exposed to these Toxicants by willingly providing materials used for hookah (“Product”) smoking, including charcoals which harbor carcinogens and reproductive toxins.

2. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code, section 25249.6 et seq. (“Proposition 65”), “[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual. . . .” (Health & Safety Code, § 25249.6.)

3. California identified and listed carbon monoxide as a chemical known to cause developmental/reproductive toxicity on July 1, 1989.

4. Defendants failed to sufficiently warn consumers and individuals in California about potential exposures to Toxicants in connection with Defendants’ use and provision of the Product. This is a violation of Proposition 65.

5. Plaintiff seeks injunctive relief compelling Defendants to sufficiently warn consumers in California before exposing them to Toxicants in Products. (Health & Safety Code, § 25249.7(a).) Plaintiff also seeks civil penalties against Defendants for their violations of Proposition 65 along with attorney’s fees and costs. (Health & Safety Code, § 25249.7(b).)

II.
PARTIES

6. Plaintiff KIM EMBRY is a citizen of the State of California dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposure from consumer

1 products. She brings this action in the public interest pursuant to Health and Safety Code, section
2 25249.7.

3 7. Defendant DIVAN LOUNGE DBA MINA LOUNGE, is a corporation organized and
4 existing under the laws of California. Defendant is registered to do business in California, and does
5 business in County of Alameda, within the meaning of Health and Safety Code, section 25249.11. Divan
6 Lounge dba Mina Lounge provides, distributes, and encourages the use of Products in California and
7 Alameda County, including, for example, charcoals used for smoking hookah.

8 8. The true names of Defendants DOES 1 through 100, inclusive, are unknown to Plaintiff.
9 Plaintiff sues these Defendants by fictitious names. Plaintiff is informed and believes, and on that basis
10 alleges, that each fictitiously named defendant is responsible for the acts and occurrences herein alleged.
11 When ascertained, their true names shall be reflected in an amended complaint.

12 **III.**
13 **VENUE AND JURISDICTION**

14 9. California Constitution Article VI, Section 10 grants the Superior Court original
15 jurisdiction in all cases except those given by statute to other trial courts. The Health and Safety Code
16 statute upon which this action is based does not give jurisdiction to any other court. As such, this Court
17 has jurisdiction.

18 10. Venue is proper in Alameda County Superior Court pursuant to Code of Civil
19 Procedure, sections 394, 395, and 395.5. Wrongful conduct occurred and continues to occur in this
20 County. Defendants conducted and continue to conduct business in this County as it relates to Products.

21 11. Defendants have sufficient minimum contacts in the State of California or otherwise
22 purposefully avail themselves of the California market. Exercising jurisdiction over Defendants would
23 be consistent with traditional notions of fair play and substantial justice.

24 **IV.**
25 **CAUSES OF ACTION**

26 **FIRST CAUSE OF ACTION**
27 **(Violation of Proposition 65 – Against all Defendants)**

28 12. Plaintiff incorporates by reference each and every allegation contained above.

1 13. Proposition 65 mandates that citizens be informed about exposures to chemicals that
2 cause cancer, birth defects, and other reproductive harm.

3 14. Defendants provided, distributed, and encouraged the use of Products containing
4 Toxicants in violation of Health and Safety Code, section 25249.6 et seq. Plaintiff is informed and
5 believes such violations have continued after receipt of the Notices (defined *infra*) and will continue to
6 occur into the future.

7 15. In providing, distributing, and encouraging, the use of Products, Defendants failed to
8 provide a clear and reasonable warning to consumers and individuals in California who may be exposed
9 to Toxicants through reasonably foreseeable use of the Products.

10 16. Products expose individuals to Toxicants through direct inhalation. This exposure is a
11 natural and foreseeable consequence of Defendants placing Products into the stream of commerce. As
12 such, Defendants intend that consumers will use Products for smoking, exposing them to Toxicants.

13 17. Defendants knew or should have known that the Products contained Toxicants and
14 exposed individuals to Toxicants in the ways provided above. The Notice informed Defendants of the
15 presence of Toxicants in the Products. Likewise, media coverage concerning Toxicants and related
16 chemicals in consumer products provided constructive notice to Defendants.

17 18. Defendants' actions in this regard were deliberate and not accidental.

18 19. More than sixty days prior to naming each Defendant in this lawsuit, Plaintiff issued a
19 60-Day Notice of Violation ("Notice(s)") as required by and in compliance with Proposition 65.
20 Plaintiff provided the Notice to the various required public enforcement agencies along with a certificate
21 of merit. The Notices alleged that Defendants violated Proposition 65 by failing to sufficiently warn
22 consumers in California of the health hazards associated with exposures to tobacco smoke used with the
23 Products. Plaintiff then issued a Supplemental Notice that alleges Defendants violated Proposition 65
24 by failing to sufficiently warn consumers in California of the health hazards associated with exposures
25 to Toxicants found in charcoals used with the Products.

26 20. The appropriate public enforcement agencies provided with the Notices failed to
27 commence and diligently prosecute a cause of action against Defendants.
28

21. Individuals exposed to Toxicants contained in the Products through direct inhalation resulting from reasonably foreseeable use of the Products have suffered and continue to suffer irreparable harm. There is no other plain, speedy, or adequate remedy at law.

22. Defendants are liable for a maximum civil penalty of \$2,500 per day for each violation of Proposition 65 pursuant to Health and Safety Code, section 252497(b). Injunctive relief is also appropriate pursuant to Health and Safety Code, section 25249.7(a).

PRAAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. Civil penalties in the amount of \$2,500 per day for each violation;
2. A preliminary and permanent injunction against Defendants from selling and/or providing for use Products in California without providing a clear and reasonable warning as required by Proposition 65 and related Regulations;
3. Reasonable attorney's fees and costs of suit; and
4. Such other and further relief as may be just and proper.

Respectfully submitted:

Dated: March 7, 2019

GLICK LAW GROUP, PC

By:

Roam Sleek

Noam Glick
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