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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 **eSMOKES, INC, a Florida Corporation, doing**
20 **business as WWW.ESMOKES.COM**
21 **and WWW.CIGARETTESBYMAIL.COM, GARY**
22 **E. KIRSCHNER, an individual, and DOES 1**
23 **through 15, inclusive,**

Defendants.

Case No. _____

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

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
States more than 2,000 children begin smoking cigarettes, and one-third of those children will one

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

6 Defendants are cigarette sellers who advertise and sell cigarettes over the Internet to
7 California consumers and consumers in other states. Defendants state on their web sites that
8 purchasers must be 21 years of age or older to purchase cigarettes from defendants. However,
9 defendants in fact facilitate and promote the purchase of cigarettes by children because although
10 defendants presently claim on their web sites that they require potential purchasers to provide age
11 verification upon the initial delivery of tobacco products, defendants do not in fact require face-
12 to-face or otherwise adequate verification of age and identity of would-be purchasers upon
13 delivery. The People have documented that defendants have sold cigarettes to children in
14 California from their web sites on nine occasions. The People have informed defendants several
15 times that the People had documented sales to minors from their web sites. Defendants have been
16 similarly informed by New York City on a another occasion. Notwithstanding the fact that they
17 have been so notified, defendants have not taken adequate precautions to ensure that children
18 cannot purchase and receive delivery of cigarettes from their web site. Specifically, defendants
19 fail or refuse to put in place effective safeguards so as to prevent or seriously discourage further
20 sales to minors. By refusing to do so and completing sales of cigarettes to minors, defendants are
21 encouraging and allowing children to purchase cigarettes from their web sites, thus undermining
22 the State's efforts to reduce smoking by minors.

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

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. Defendants have knowledge or grounds for knowledge that they are selling
8 cigarettes to children from their web sites. Defendants were notified in writing by Plaintiff's
9 attorney that since on or before August 2001, eSmokes has sold cigarettes from its web sites to
10 children in California on numerous occasions. eSmokes 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 defendants'
14 web sites and asking defendants to immediately review their web sites in light of the legal
15 requirements prohibiting the sales of cigarettes to minors. (A copy of this letter is attached as
16 Exhibit "A" and incorporated herein by reference.) Defendant Kirschner responded to that letter
17 by asking for the specifics. The People sent defendants a second letter dated October 1, 2002,
18 informing them that the People had verified sales to minors from their web sites since at least July
19 2001. The People also notified defendants, in that letter, that as of January 1, 2003, California
20 prohibits the sale of cigarettes over the Internet unless the seller complies with specified
21 requirements including age verification (Bus. & Prof. Code, § 22963) and payment of applicable
22 taxes (Rev. & Tax. Code, § 30101.7). The People also provided defendants with copies of these
23 newly enacted statutes. (A copy of this letter is attached as Exhibit "B" and incorporated herein
24 by reference.) Defendants did not respond to that letter.

25 10. The People sent another letter to defendants on January 23, 2003, informing them
26 that the California Attorney General had documented sales of cigarettes to minors from their web
27 sites on eight occasions beginning in July 2001, and that the New York City Department of
28 Consumer Affairs had documented and notified eSmokes that a minor placed an order for and

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 eSmokes on October 7, 1999, requesting that
4 the company report all its shipments of cigarettes to California consumers as required by the
5 Jenkins Act.

6 16. Although eSmokes filed a Jenkins Act report on August 1, 1999, eSmokes has
7 failed or refused to file any reports with the BOE, since that time, of shipments of cigarettes to
8 California consumers as required by section 376 of the Jenkins Act. In fact, eSmokes states on its
9 web sites that “eSmokes.com currently does not distribute, sell or rent your name, email address,
10 or other personal information to any third party without your consent.”

11 **Deceptive Advertising**

12 17. At all times relevant to this action, defendants were and are required by the Jenkins
13 Act to report shipments of cigarettes into California to the BOE so that the BOE can collect state
14 taxes on those cigarettes

15 18. Defendants represent or imply through false and misleading statements on their we
16 sites that they do not have to comply with the Jenkins Act’s reporting requirements. For example,
17 in the section on “Legal Information” on defendants’ web sites, defendants state that it ‘... is the
18 responsibility of the buyer to ascertain and comply with any laws in regard to the purchase and
19 use of any cigarette products.’

20 19. To induce consumers to purchase cigarettes from its web sites, defendants do not
21 inform prospective California purchasers of their obligation to pay California taxes on the
22 cigarettes they purchase from eSmokes. Those taxes amount to \$0.87 per package of twenty
23 cigarettes or \$8.70 per carton. eSmokes, according to its web sites, charges taxes in North
24 Carolina, Virginia and Kentucky. These states impose some of the lowest taxes in the country
25 and amount to \$0.05, \$0.2.5 and \$0.03 per pack, respectively, or \$0.50, \$0.25 and \$0.30 per
26 carton, respectively. A California resident may purchase from eSmokes located in North
27 Carolina, Virginia and Kentucky and pay a price that represents an apparent savings of \$8.20,
28 \$8.45 and \$8.40 per carton, respectively.

1 20. Further, defendants represent or imply through statements on their web sites that
2 federal law exempts California consumers from paying California taxes on cigarette products
3 purchased for personal consumption from an out-of-state retailer even though the cigarette
4 products are shipped into California. For example, defendants state on their web sites that
5 “federal legislation permits the purchase of cigarette products for personal consumption from out-
6 of-state.”

7 21. Additionally, defendants, through statements on their web sites falsely imply that
8 California consumers’ are not required to pay California taxes on the cigarettes they purchase
9 from defendants’ web sites. For example, defendants represent on their web sites that transfer of
10 title to the goods being sold in the order takes place in North Carolina and/or Kentucky and
11 eSmokes will charge sales tax if the order is being shipped to North Carolina, Virginia or
12 Kentucky.

13 22. Defendants’ representations are false and misleading for the following reasons:

14 (a) Defendants’ representation concerning responsibility for tax law compliance
15 implies that defendants are not responsible for ascertaining and complying with the relevant tax
16 laws concerning cigarette products and that the burden of doing so rests with the purchaser. In
17 fact, pursuant to the Jenkins Act, it is the responsibility of the seller to report shipments of
18 tobacco products into California.

19 (b) Pursuant to Revenue and Taxation Code sections 30008, 30009 and 30109,
20 California taxes are imposed and collected on the first distribution of untaxed cigarettes in the
21 state. This means that since eSmokes does not pay taxes on cigarettes purchased from its web
22 sites and shipped to consumers in California, the California consumers must pay all taxes owed on
23 the cigarettes;

24 (c) Defendants’ implication that California taxes need not be paid because the
25 sale takes place in North Carolina, Virginia or Kentucky is erroneous and/or irrelevant because
26 by law consumers are obligated to pay taxes on cigarettes purchased from defendants over the
27 Internet and shipped into the state; and

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1 (d) Federal legislation does not exempt California consumers from paying
2 California taxes on cigarette products purchased for personal consumption from an out-of-state
3 retailer when those products are shipped into California.

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

5 23. Effective January 1, 2003, California Revenue and Taxation Code section
6 30101.7(d) requires that a person may engage in non-face-to-face sales of cigarettes to California
7 consumers provided that either of the following conditions is met:

- 8 (1) All applicable California taxes on the cigarettes have been paid, or
9 (2) The seller includes, on the outside of the shipping container for any cigarettes shipped
10 to a resident in California from any source in the United States, an externally visible and easily
11 legible notice located on the same side of the shipped container as the address to which the
12 package is delivered as follows:

13 “IF THESE CIGARETTES HAVE BEEN SHIPPED TO YOU FROM A
14 SELLER LOCATED OUTSIDE OF THE STATE IN WHICH YOU
15 RESIDE, THE SELLER HAS REPORTED PURSUANT TO FEDERAL
16 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.”

17 Since January 1, 2003, eSmokes has violated this law by failing to pay applicable taxes or to
18 inform California consumers of their obligation to pay all applicable unpaid taxes on the
19 cigarettes.

20 24. The failure of out-of-state-retailers like defendants to comply with federal
21 reporting laws, identifying the shipments of cigarettes into California and the identity of the
22 purchasers and notifying purchasers of their California tax obligations, has resulted in significant
23 loss of tax revenue to the state. The Board of Equalization estimates that for fiscal year 2001-
24 2002, California lost approximately \$53.9 million through sales of cigarettes to California
25 consumers over the Internet, by mail order and cross-border sales. This figure represents the
26 taxes owed on 61.9 million packs of cigarettes.

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1 **FIRST CAUSE OF ACTION**

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

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

6 26. 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 or implying that eSmokes is not required to comply with the
13 Jenkins 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 eSmokes over the Internet;

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

18 (d) Representing or implying that consumers do not have to pay taxes on
19 cigarettes for personal consumption purchased from defendants over the Internet and shipped into
20 California.

21 27. Defendants knew, or by the exercise of reasonable care should have known, that
22 the statements set forth in paragraph 26 were untrue or misleading at the time such statements
23 were made.

24 **SECOND CAUSE OF ACTION**

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

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

1 defendants have reported the sale of cigarettes to the BOE and the purchaser is responsible for the
2 unpaid taxes, in violation of Revenue and Taxation Code section 30101.7(d).

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

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

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

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

18 4. That defendants be required to pay to the People civil penalties pursuant to
19 Business and Professions Code section 17536 of \$2,500 for each violation, as determined by
20 proof, in an amount of no less than \$100,000.

21 5. That defendants be required to pay to the People civil penalties pursuant to
22 Business and Professions Code section 17206 of \$2,500 for each violation, as determined by
23 proof, in an amount of no less than \$100,000.

24 6. That defendants be required to pay to the People civil penalties pursuant to the
25 schedule set forth in Revenue and Taxation Code section 30101.7(e), as determined by proof.

26 7. That defendants be required to pay to the People fees and costs, including
27 reasonable attorney's fees pursuant to Code of Civil Procedure section 1021.10.

28 8. That the Court grant such other and further relief as the Court deems just and

1 proper.

2 Dated: March 28, 2003

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Respectfully submitted,

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