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12 UNITED STATES DISTRICT COURT

13 FOR THE EASTERN DISTRICT OF CALIFORNIA

14 BRYN GARRETT, on behalf of himself and
15 all others similarly situated,

16 Plaintiff,

17 v.

18 SMOKING EVERYWHERE, INC, a Florida
Corporation.

19 Defendant.

Case No. _____

CLASS ACTION COMPLAINT

1. Violation of Unfair Competition Law, Business and Professions Code §17200
2. Unjust Enrichment

[JURY TRIAL DEMANDED]

NATURE OF THE ACTION

23 1. Defendant imports, markets, and distributes electronic cigarettes, also known as e-
24 cigarettes, in California and throughout the United States. "E-Cigarettes" are battery operated
25 devices designed to look like and be used in the same manner as conventional cigarettes. Sold
26 online and in many shopping malls, the devices contain cartridges filled with nicotine, various
27 flavors and other chemicals. They turn the nicotine and other chemicals into a vapor that is inhaled
28

1 the total number of members of the proposed Class is greater than 100, as required by 28 U.S.C. §
2 1332(d)(2), (5). As set forth below, Plaintiff is a citizen of California, whereas Defendant is a citizen
3 of Florida.

4 5. Venue lies within this District pursuant to 28 U.S.C. § 1391(b)-(c) in that: Defendant
5 conducts business in this District; certain acts giving rise to the claims asserted in this Complaint
6 occurred within this District; and the illegal actions of Defendant, as alleged in this Complaint,
7 caused damage to Plaintiff and Class members within this District.

8 **THE PARTIES**

9 6. Plaintiff Bryn Garrett is an individual residing in Sacramento County, California.
10 During the Class period, he purchased Defendant's e-cigarettes, suffered injury in fact, and has lost
11 money and property as a result of the unlawful, unfair, misleading and deceptive advertising
12 described herein.

13 7. Defendant Smoking Everywhere, Inc. is a Florida corporation with its headquarters
14 and principal place of business located in Sunrise, Florida. Defendant imports, markets, and
15 distributes electronic cigarettes to tens of thousands of consumers throughout the United States,
16 including thousands of consumers in California.

17 **DEFENDANT'S UNLAWFUL CONDUCT**

18 8. In 2008, Defendant began importing and selling electronic cigarettes ("e-cigarettes"
19 or the "Products") in the United States.

20 9. An e-cigarette consists of three parts: a heating element, or atomizer; a battery and
21 related electronics; and a cartridge. The cartridge, also known as the mouthpiece, contains a liquid
22 nicotine mixture that Defendant claims is derived from natural tobacco plants. When the user
23 inhales on the cartridge, the heating element is triggered and vaporizes the nicotine, which the user
24 then inhales. When the liquid in the cartridge has been depleted, it can either be refilled by the user,
25 or replaced with another pre-filled cartridge.

26 10. E-cigarettes are designed to look like and be used in the same manner as conventional
27 cigarettes. They even emit steam, simulating the appearance of smoke. However, there is no flame,
28

1 no combustion, no ash—and according to Defendant, this means no toxins, no carcinogens, and no
2 health risks.

3 11. For example, the Frequently Asked Questions section of Defendant’s website leads
4 off with the following question and answer:

5 Is Smoking Everywhere Electronic Cigarette safe?

6 Smoking Everywhere E-Cigarette contains only water, propylene glycol,
7 nicotine, and a scent that imitates tobacco flavor. *Smoking Everywhere E-
8 Cigarette has been tested and the cartridges have been toxicologically tested
and it contains no known ingredients are considered [sic] cancer-causing
9 agents.* Smoking Everywhere E-Cigarettes also holds CE¹ & ROHS²
10 certifications.

11 (SmokingEverywhere.com, Smoking Everywhere FAQ’s, [http://www.smoking-
13 everywhere.com/faqs.php](http://www.smoking-
12 everywhere.com/faqs.php)) (emphasis added).

14 12. Defendant’s website also states:

15 Smoking Everywhere E-Cig offers smokers a tar-free way to enjoy smoking:

16 Smoking Everywhere E-Cigarette has no tobacco, no tar, no real smoke and
17 *no other chemicals like traditional cigarettes that are known to cause lung
18 cancer.*

19 (SmokingEverywhere.com, Healthier Option than Traditional Cigarette, [http://www.smoking-
21 everywhere.com/healthier.php](http://www.smoking-
20 everywhere.com/healthier.php)) (emphasis added).

22 * * *

23 Smoking everywhere [sic] E-Cigarette . . . provides smokers a real
24 “smoking” experience without the fire flame, tobacco, tar, carbon monoxide,
25 ash, stub, or smell found in real cigarettes. . . . *The product is free of tar &
26 other chemical substances which is produced [sic] in traditional cigarettes. . .*
27 There is NO danger of second hand smoke.

28 ¹ CE stands for “Conformité Européenne, which is French for “European Conformity”.
When the symbol is affixed to a product it is the manufacturer’s declaration that the product
conforms to the essential requirements of all European directives. The essential
requirements include safety, public health, electromagnetic compatibility, and consumer
protection, among other things.

² RoHS is the acronym for Restriction of Hazardous Substances. RoHS, also known as
Directive 2002/95/EC, originated in the European Union and restricts the use of specific
hazardous materials found in electrical and electronic products. The restricted substances are
lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls, and
polybrominated diphenyl ethers.

1 (SmokingEverywhere.com, What is an Electronic Cigarette (E-Cigarette)?, [http://www.smoking-
3 everywhere.com/whatisit.php](http://www.smoking-
2 everywhere.com/whatisit.php)) (emphasis added).

4 * * *

5 The smoke that you see is strictly a harmless water vapor mist.
6 (SmokingEverywhere.com, What is an Electronic Cigarette (E-Cigarette)?, [http://www.smoking-
8 everywhere.com/whatisit.php](http://www.smoking-
7 everywhere.com/whatisit.php).)

9 13. As an attestation of their represented safety, Defendant further represents that:
10 “Smoking E-Cigarette can be smoked almost anywhere and everywhere” – a claim embodied in
11 Defendant’s company name: “Smoking Everywhere.” (SmokingEverywhere.com, Can Be Smoked
12 Anywhere and Everywhere, [http://www.smokingeverywhere.com/smoke_everwhere.php](http://www.smokingeverywhere.com/smoke_everywhere.php).)

13 14. In addition to its affirmative safety assurances, Defendant represents on its Product
14 packages that:
15 “Smoking Everywhere E-Cigarette is simply a healthier
16 alternative to traditional smoking.”

17 To bolster its health claims, Defendant offers vitamin infused cartridges. Users can buy a banana-
18 flavored cartridge with “Vitamin B”; a blueberry-flavored cartridge with “Vitamin D”; or a
19 bubblegum-flavored cartridge with “Multivitamin”, to name but a few.

20 15. Although represented to be safe and healthy, Defendant labels its Products as
21 “intended for use by adults.” Yet, Defendant has designed the Products to appeal to children and
22 adolescents, sells them in places where youth easily can access them and there is no legal age
23 restriction limiting their sale to minors.

24 16. For example, Defendant sells its Products from its website,
25 www.smokingeverywhere.com. Defendant also sells its e-cigarettes at over 110 locations “all over
26 the U.S.,” and claims to have over 150 other locations ready to open by Christmas. Many of these
27 “locations” are in shopping mall kiosks frequented by children and teens.

28 17. Defendant also markets its Products in a variety of fruit, candy, cola and chocolate
flavors particularly appealing to young people.

1 18. And, in addition to selling “High (16 mg nicotine),” “Medium (11 mg nicotine),” and
2 “Low (6 mg nicotine)” cartridges, Defendant sells no-nicotine novelty cartridges tailor-made to
3 appeal to kids.

4 19. The marketing and design of Defendant’s Products to appeal to children is
5 particularly troubling because Defendant’s e-cigarettes are not safe, contain toxins, contain
6 carcinogens, contain nicotine levels that vary materially from those represented, do not promote
7 good health and can lead to nicotine dependence.

8 20. Earlier this year, the FDA tested the chemical composition of 14 of Defendant’s
9 various flavored, nicotine and no-nicotine cartridges. The results are alarming, especially in light of
10 Defendant’s repeated and fervent assertions that its Products contain none of the harmful side effects
11 of smoking.

12 21. The FDA found certain tobacco-specific nitrosamines in several of Defendant’s
13 cartridges. These are the very carcinogens that render tobacco smoke so deadly. Diethylene glycol,
14 a poisonous ingredient used in antifreeze, was detected in one cartridge. (Letter from B.J.
15 Westenberger, Deputy Director, Division of Pharmaceutical Analysis, Food and Drug
16 Administration to Michael Levy, Supervisor Regulatory Counsel, Division of New Drugs and
17 Labeling Compliance (May 4, 2009), attached hereto as Exhibit A, at 1, 4 (table).)

18 22. In addition, *all* of Defendant’s cartridges tested positive for tobacco-specific
19 impurities, such as cotinine, anabasine, myosmine, and beta-nicotyrine. The FDA has identified
20 these impurities as harmful to humans. Ex. A at 4 (table).

21 23. The FDA also found the levels of nicotine varied from the amounts represented on
22 Product labels. Products with labels claiming to have the same amount of nicotine did not. Even
23 more troubling, 4 of the 5 cartridges labeled “No Nicotine” were found to contain nicotine, a highly
24 toxic and addictive substance. (Ex. A at 1, 4; Transcript for FDA’s Media Briefing on Electronic
25 Cigarettes (July 22, 2009) (“Media Transcript”) at 4.)

26 24. Thus, accurately represented, Defendant’s e-cigarettes are potentially just as toxic,
27 just as carcinogenic, and just as unhealthy as traditional cigarettes. They contain the same impurities
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1 and the same cancer-causing agents as traditional cigarettes (not to mention that the Product is used
2 by placing a battery-operated atomizer and a high concentration of nicotine in one's mouth).

3 25. Following the release of the FDA findings, Defendant has continued to actively
4 maintain that its Products are a safe, even a healthy alternative to traditional smoking. Defendant
5 has done so even though it cannot confirm the "safety" of its e-cigarettes with any degree of
6 certainty and has publicly admitted that it is unaware of their potential side effects. When
7 confronted with the FDA's findings, Elicko Taieb, CEO of Smoking Everywhere, commented that
8 Smoking Everywhere is "*pretty sure*" the product is safe, based on laboratory testing in Europe, but
9 that "it is a pretty new product, so we are not 100 percent sure of the side effects at this point." Mr.
10 Taieb continued, "[W]e haven't heard of any negative side effects yet, but we are pretty sure they are
11 safe." See [HTTP://EDITION.CNN.COM/2009/HEALTH/03/13/ECIGARETTES.SMOKING/](http://edition.cnn.com/2009/health/03/13/ecigarettes.smoking/) (Last
12 viewed, September 2, 2009).

13 26. The World Health Organization ("WHO") disagrees with Defendant. In a September
14 2008 press release, WHO commented that: "WHO has no scientific evidence to confirm the
15 product's safety and efficacy." (World Health Organization News Release, *Marketers of Electronic*
16 *Cigarettes Should Halt Unproved Therapy Claims* (Sept. 19, 2008).)

17 27. The American Cancer Society concurs. Earlier this year, the American Cancer
18 Society stated that: "[N]o studies have been done on e-cigarettes to date regarding their health
19 effects ..." (Food and Drug Administration, *Concerns Voiced by Public Health Experts About*
20 *Electronic Cigarettes*, March 24, 2009, available at [http://www.fda.gov/](http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm173175.htm)
21 [NewsEvents/PublicHealthFocus/ucm173175.htm](http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm173175.htm).)

22 28. On July 22, 2009, the FDA, together with representatives from the American
23 Academy of Pediatrics Tobacco Consortium, the University of Southern California Institute for
24 Global Health, and the Office on Smoking and Health at the Centers for Disease Control and
25 Prevention held a press conference for the stated purpose of warning the public that e-cigarettes,
26 including those sold by Defendant, are not subject to FDA regulation, exhibit material variability
27 from the amount of nicotine represented to be delivered due to a lack of product quality control,
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1 contain known human carcinogens and other tobacco specific impurities harmful to humans, do not
2 contain the FDA-approved health warnings found on nicotine replacement products or conventional
3 cigarettes, lack verifiable substantiation for represented health benefits, and are sold without legal
4 age restrictions. (Media Transcript at 1-10).

5 29. As a result of its findings, the FDA has begun turning away shipments of e-cigarettes
6 at the borders; however, Defendant still has millions of e-cigarette products already within the
7 United States that it continues to sell via its website and at locations in California and throughout the
8 country.

9 30. Plaintiff and tens of thousands of other consumers have purchased Defendant's
10 Products. They have done so with no disclosure or warning from Defendant that its Products contain
11 toxins, carcinogens, other harmful chemicals and nicotine levels that vary from labeled amounts.
12 Even though as the importer, marketer and distributor of the Products Defendant knew, or should
13 have known, that its e-cigarettes contained the same toxins and carcinogens as conventional
14 cigarettes, Defendant misleads consumers by affirmatively representing on the Product packages, its
15 website, and other advertising materials and media that its e-cigarettes are safe and beneficial to your
16 health. As a result, Plaintiff and other purchasers of Defendant's Products have been harmed in the
17 amount they paid to purchase Defendant's Products.

18 31. Defendant, by contrast, has profited handsomely from its misrepresentations and
19 material omissions. Defendant represents that in the past year alone it has sold over 600,000 e-
20 cigarette products in the United States, ranging in price from \$40.00 to \$70.00.

21 PLAINTIFF'S EXPERIENCE

22 32. Approximately 8 to 12 months ago Plaintiff purchased a "Smoking Everywhere"
23 electronic cigarette device for approximately \$60.00-\$75.00.

24 33. Plaintiff read the representations on the Product package, including the representation
25 that because e-cigarettes are smoke-free, they do not contain the harmful chemicals found in tobacco
26 smoke. Plaintiff's reliance on Defendant's representations was reasonable particularly since
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1 Defendant represented that its Products had been scientifically tested and determined to be free from
2 harmful chemicals.

3 34. Plaintiff used the Smoking Everywhere electronic cigarette as directed.

4 35. On or about July 2009, Plaintiff learned that Defendant's Products contain toxins and
5 carcinogens and are not safe as represented.

6 36. Plaintiff has suffered injury in fact and lost money and property as a result of
7 Defendant's alleged misconduct. He has been injured in the amount he paid for the Products.

8 **CLASS ALLEGATIONS**

9 37. Plaintiff brings this action on his own behalf and as a Class action pursuant to Rule
10 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure and seeks certification of the
11 following Class:

12 All persons in the United States or, alternatively, all California
13 residents, who from and after September 22, 2005, purchased
14 Smoking Everywhere, Inc.'s electronic cigarette products.

15 38. Excluded from the Class are Defendant, any person, firm, trust, corporation, officer,
16 director or other individual or entity in which Defendant has a controlling interest or which is related
17 to or affiliated with Defendant, and the legal representatives, heirs, successors-in-interest or assigns
18 of any such excluded party.

19 39. Plaintiff and the members of the Class are so numerous that joinder of all members
20 individually, in one action or otherwise, is impractical.

21 40. This action involves questions of law and fact common to Plaintiff and all members
22 of the Class which include:

- 23 (a) Whether Defendant engaged in an unlawful, unfair, misleading or deceptive
24 business act or practice through its labeling and advertising practices;
- 25 (b) Whether Defendant misrepresented the safety and failed to warn of the health
26 risks of its Products;
- 27 (c) Whether Plaintiff and Class members are entitled to injunctive relief enjoining
28 Defendant from continuing to represent that its Products are safe and healthy; or,

1 (d) Whether Defendant should be made to engage in a corrective advertising
2 campaign warning of the toxins, carcinogens, other harmful chemicals and dangers associated with
3 use of its Products; and

4 (e) Whether Plaintiff and Class members are entitled to restitution of the monies
5 they paid to purchase the Products and disgorgement of the profits Defendant received from sales of
6 its Products.

7 41. Plaintiff's claims are typical of the claims of the members of the Class. The named
8 Plaintiff is a member of the Class of victims described herein.

9 42. The named Plaintiff is willing and prepared to serve the Court and proposed Class in
10 a representative capacity with all of the obligations and duties material thereto. Plaintiff will fairly
11 and adequately protect the interests of the Class and has no interests adverse to or which directly and
12 irrevocably conflict with, the interests of the other members of the Class.

13 43. The self-interests of the named Class representative are co-extensive with, and not
14 antagonistic to, those of the absent Class members. The proposed representative will undertake to
15 represent and protect the interests of the absent Class members.

16 44. The named Plaintiff has engaged the services of counsel indicated below. Said
17 counsel are experienced in complex class litigation, will adequately prosecute this action, and will
18 assert and protect the rights of, and otherwise represent the named Class representative and absent
19 Class members.

20 45. A class action is superior to all other available methods for the fair and efficient
21 adjudication of this controversy because joinder of all members is impracticable. Furthermore, as
22 the damages suffered by individual Class members may be relatively small, the expense and burden
23 of individual litigation makes it impossible for members of the Class to individually redress the
24 wrongs done to them. There will be no difficulty in the management of this case as a class action.

25 46. In addition, the prosecution of separate actions by individual Class members would
26 create a risk of inconsistent or varying adjudications with respect to individual members, which
27 would establish incompatible standards of conduct for Defendant. And, Defendant has acted on
28

1 grounds that apply generally to the Class, making equitable relief appropriate respecting the Class as
2 a whole.

3 **FIRST CAUSE OF ACTION**
4 **VIOLATION OF UNFAIR COMPETITION LAW**
5 **BUS. & PROF. CODE § 17200**
6 **(AND SIMILAR UNFAIR COMPETITION LAWS IN OTHER STATES)**

7 47. Plaintiff incorporates by reference each of the preceding allegations as though fully
8 set forth herein.

9 48. California Business & Professions Code §17200, *et seq.* prohibits acts of unfair
10 competition, which means and includes any “unlawful, unfair or fraudulent business act or practice,”
11 or any “unfair, deceptive, untrue or misleading advertising.”

12 49. Defendants violated California Business & Professions Code §17200’s, and similar
13 laws in other states, prohibition against engaging in an “unlawful” business act or practice, by, *inter*
14 *alia*, misrepresenting on Product packages, on its website, and in other marketing materials and
15 media that the Products are safe and even healthy, and that scientific tests have shown that they do
16 not contain the toxins and carcinogens found in traditional cigarettes, in violation Cal. Bus. & Prof.
17 Code §17500, common law, and false advertising statutes in other states.

18 50. Defendant also violated California Business & Professions Code §17200’s, and
19 similar laws in other states, prohibition against engaging in an “unfair” business act or practice by,
20 *inter alia*, misrepresenting on Product packages, on its website, and in other marketing materials and
21 media that its e-cigarettes are safe and healthy, and do not contain the toxins and carcinogens found
22 in traditional cigarettes. Defendant engaged in its deceptive marketing campaign to, *inter alia*, gain
23 an unfair competitive advantage over other manufacturers and distributors of smoking cessation and
24 nicotine replacement products, who did not engage in similar misleading advertising practices.
25 Defendant’s business practices are unscrupulous, unethical and substantially injurious to consumers.
26 There is no legitimate business reason for Defendant’s business practices and thus the utility of
27 Defendant’s business practices does not outweigh the harm to consumers. Further, Defendant’s
28 conduct caused and continues to cause substantial injury to consumers. The gravity of Defendant’s

1 business practices undermine California’s fundamental policy against unfair and sharp business
2 practices that are likely to deceive or mislead consumers, and which undercut trust and fair
3 competition in the consumer marketplace.

4 51. The foregoing conduct also violates Business & Profession Code §17200’s, and
5 similar laws in other states, prohibitions against “fraudulent” or deceptive business practices.
6 Defendant’s misrepresentations on Product packages, on its website, and in other marketing
7 materials and media that its e-cigarettes are safe and healthy, and failure to disclose that its e-
8 cigarettes contain toxins, carcinogens, other harmful chemicals and nicotine levels that vary from
9 labeled amounts are likely to and did deceive reasonable consumers, including Plaintiff.

10 52. Plaintiff reserves the right to allege other violations of law which constitute additional
11 “unlawful, unfair or fraudulent business act[s] or practice[s].”

12 53. Plaintiff has been actually injured by Defendant’s unlawful, unfair, deceptive and
13 fraudulent business acts and practices.

14 54. As a result of Defendant’s violations of the UCL and similar unfair competition laws
15 in other states, Plaintiff and Class members are entitled to damages in an amount to be proven at
16 trial, and equitable relief in the form of full restitution of all monies paid for Defendant’s Products
17 and disgorgement of Defendant’s profits from sales of the Products.

18 55. Plaintiff and Class members also are entitled to an award of injunctive relief enjoining
19 Defendant from continuing to represent that its Products are safe and healthy, and an order requiring
20 Defendant to engage in a corrective advertising campaign that includes prominent disclosure that its
21 Products contain toxins, carcinogens, other harmful chemicals and nicotine levels that vary from
22 labeled amounts.

23 **SECOND CAUSE OF ACTION**
24 **UNJUST ENRICHMENT**

25 56. Plaintiff incorporates by reference each of the preceding allegations as though fully
26 set forth herein.

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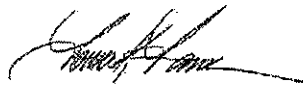
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JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

DATED: September __, 2009

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