

FILED
Clerk of the Superior Court

JAN 03 2005

By: J. JOHNSON, Deputy

SUPERIOR COURT OF CALIFORNIA - COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF
CALIFORNIA, ex rel. BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF
CALIFORNIA,

Plaintiff,

vs.

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

Defendants.

CASE NO. GIC 808195

**STIPULATED FINAL JUDGMENT
AND PERMANENT INJUNCTION**

Judge: Hon. Richard E.L. Strauss

Dept: 75

Trial: January 21, 2005

eSMOKES, INC., a Florida Corporation, doing
business as WWW.ESMOKES.COM and
WWW.CIGARETTESBYMAIL.COM, GARY
E. KIRSCHNER,

Cross-
Complainants,

vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA, ex rel. BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF
CALIFORNIA, and ROES 1 through 25,
inclusive, individuals and other entities,

Cross-Defendants.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The court has subject matter jurisdiction of this action and personal jurisdiction

1 over Defendants eSmokes and Kirschner.

2 2. Pursuant to Business and Professions Code Section, 17203 and 17535, Defendant
3 Kirschner, except as provided in Paragraph 8, below, and Defendant eSmokes, including its
4 officers, directors, and agents if at the time of the violation of this Final Judgment they are
5 employed by eSmokes, Inc., and all successors in interest and assignees of eSmokes, Inc. as
6 further provided in Paragraph 8, below, are hereby permanently enjoined and restrained from
7 directly or indirectly shipping cigarettes and other tobacco products sold in a non-face-to-face
8 manner into the state of California.

9 3. Without admitting any violations, pursuant to Business and Professions Code
10 Sections 17203 and 17535, defendants shall do the following:

11 (a) Within five (5) days of the signing of the Stipulated Final Judgment and
12 Permanent Injunction ("Stipulated Final Judgment"), defendants shall permanently cease and
13 desist from shipping tobacco products sold in non-face-to-face transactions to consumers located
14 in the State of California and will exercise best efforts to ensure there is no inadvertent shipment;

15 (b) Within five (5) days of the signing of the Stipulated Final Judgment,
16 defendants shall place a statement, clearly and conspicuously, on each and every web site that
17 defendants own or operate in which defendants sell or offer to sell tobacco products in non-face-
18 to-face transactions to California consumers, so that the system will reject any attempted order
19 where the shipping address is located in the State of California;

20 (c) Within five (5) days of the signing of the Stipulated Final Judgment,
21 defendants shall configure each and every web site that defendants own or operate in which
22 defendants sell or offer to sell tobacco products in non-face-to-face transactions to California
23 consumers so that the system will reject any attempted orders where the shipping address input
24 by the consumer is located within the State of California. If a potential customer tries to place an
25 order for which the shipping address is located in the State of California, the web site will (1)
26 reject the order as indicated above and (2) immediately notify the consumer that defendants do
27 not ship to California; and the order will not be processed.

28 (d) In addition to the above, defendants agree to take other reasonable steps to

1 prevent non face-to-face sales of cigarettes and other tobacco products to persons located in
2 California and to assure that shipments of cigarettes or other tobacco products are not shipped to
3 an address in the State of California.

4 (e) Within five (5) days of the signing of the Stipulated Final Judgment,
5 defendants shall adopt written policies and procedures to prevent non-face-to-face sales of
6 cigarettes and other tobacco products to consumers in the State of California and that ensure that
7 their web sites do not ship cigarettes or other tobacco products into the State of California and
8 shall provide a copy of the policies and procedures to each employee with any responsibility in
9 the sale or shipment of cigarettes into the State of California;

10 (f) Within thirty (30) days of signing the Stipulated Final Judgment,
11 defendants shall provide Laura Kaplan, attorney for the people, a copy of the written policies and
12 procedures described in the preceding subparagraph and shall identify the steps taken to give
13 effect to subparagraphs 3(a) through 3(e) inclusive;

14 4. (A) Defendant eSmokes, Inc. shall pay the People the sum of \$475,000, within
15 twenty (20) days from the date the Stipulation for Entry of Final Judgment is executed by all
16 parties and the Stipulated Final Judgment and Permanent Injunction is signed by the Court.

17 (B) At the request of the People, and without Defendants admitting that the
18 following allocation is appropriate or proper, of the total sum of \$475,000, \$285,000 shall be
19 allocated in the following manner: \$95,000 pursuant to the Unfair Competition Law (Business
20 and Professions Code Sections 17206 and 17536), \$95,000 pursuant to Business and Professions
21 Code Section 22963, and \$95,000 pursuant to Revenue and Taxation Code Section 30101.7(e)
22 without any acknowledgement of any violation of such statutes. The remaining \$190,000 shall
23 constitute reimbursement of the Attorney General's investigative costs and attorney fees. The
24 latter amount shall be deposited into the Attorney General's Public Rights Division Special Law
25 Enforcement Fund from which the Attorney General shall reimburse the National Association of
26 Attorneys General any monies previously received or costs paid via grant support of this
27 litigation, and any remaining funds shall be used for enforcement of Business & Professions
28 Code Sections 17200, 17500 and 22963 and Revenue & Taxation Code Section 30101.7 or other

1 tobacco-related laws and regulations. The Defendants do not admit any violation of the above
2 code sections or any law whatsoever.

3 5. The check required to be paid pursuant to paragraph 4 shall be made payable to:
4 "The California Department of Justice," and sent to the attention of Laura Kaplan, Deputy
5 Attorney General, Department of Justice, 1300 I Street, P.O. Box 944255, Sacramento, CA
6 94244-2550.

7 6. Within sixty (60) days of the signing of this Stipulated Final Judgment, defendant
8 eSmokes, Inc. shall file with the California Board of Equalization all invoices containing the
9 information identifying the person(s), the shipping address(s), ordering address(s), home
10 address(s), quantity and type of cigarettes, the shipping dates, and the order date covering each
11 and every shipment of cigarettes made to California since January 1, 2000, pursuant to 15 U.S.C.
12 § 376 ("Jenkins Act reports"). The Jenkins Act reports should be sent to: California Board of
13 Equalization ("CBE"), Attention: Victor Day, Principal Compliance Supervisor, 450 N Street,
14 MIC 56, Sacramento, CA 94279-0056, or to any other address directed by the CBE, in writing.

15 7. In the event of a violation of this Stipulated Final Judgment, defendants shall pay
16 as a penalty to the People five thousand dollars (\$5,000) for each violation. For purposes of this
17 Stipulated Final Judgment, a violation of the Stipulated Final Judgment shall occur if an order for
18 cigarettes or other tobacco products submitted to a business that defendants own or operate in
19 which defendants sell or offer to sell tobacco products in non-face-to-face transaction, results in
20 the knowing delivery of cigarettes or other tobacco products to an address within the State of
21 California or such delivery was the direct result of a failure by defendants to enforce and give
22 effect to the preventative procedures identified in and implemented pursuant to paragraph 3
23 above. The fact of such delivery shall constitute presumptive proof of a violation of this Final
24 Judgment and defendants shall have the burden of showing that the sale and delivery was
25 inadvertent. Each delivery shall constitute a separate violation.

26 8. The following persons shall be deemed bound by this Stipulated Final Judgment
27 and, as applicable, shall perform the following specific obligations under the Permanent
28 Injunction:

1 (a) Defendant eSmokes, Inc. shall resolve to enter into the Stipulation for Entry of Final
2 Judgment, and the formal resolution shall be recorded in the minute book of the corporation and
3 inserted into the corporate records of minutes and resolutions. The resolution shall include a
4 conformed copy of the signed Stipulated Final Judgment so that any and all successors or
5 assignees of the company will take their interest subject to this Stipulated Final Judgment.

6 (b) Further, in the event that eSmokes, Inc. changes its name the newly named entity
7 shall be deemed to have notice and shall be bound by the Stipulation for Entry of Final Judgment
8 and this Stipulated Final Judgment.

9 (c) In the event that eSmokes, Inc. or a successor in interest or assignee of eSmokes, Inc.,
10 or a successor by virtue of change of name, violates the Stipulation for Entry of Final Judgment
11 and/or the Stipulated Final Judgment, the directors of eSmokes which are directors at the time of
12 an alleged future violation are deemed to be on notice of the Stipulation for Entry of Final
13 Judgment and the Stipulated Final Judgment.

14 (d) Defendant Kirschner is hereby permanently enjoined and restrained from directly or
15 indirectly shipping cigarettes and other tobacco products sold in a non-face-to-face manner into
16 the state of California unless the transaction is in full compliance with all State of California and
17 Federal statutes regulating these transactions.

18 9. The Court accepts that this Judgment is a compromise of disputed litigation and
19 acknowledges that by entry into the Judgment and Permanent Injunction no defendant admits
20 any liability obligation or wrongdoing of any kind.

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10. The Court retains jurisdiction for the purpose of enabling any party to this Judgment and Permanent Injunction to apply to the Court at any time for such further orders and directions as may be necessary and appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of its injunctive provisions, for the enforcement of any of its provisions, or for punishment of any violations of its provisions.

JAN 03 2005

Dated: ~~December 17, 2004~~

RICHARD E.L. STRAUSS

Honorable Richard E.L. Strauss *ES*

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People of the Sate of California v. eSmokes, Inc., et al.**
No.: **San Diego County Superior Court, Case No.: GIC 808195**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar which member's direction this service is made. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **December 30, 2004**, I served the attached, **STIPULATION FOR ENTRY OF FINAL JUDGMENT AND PERMANENT INJUNCTION**, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at San Diego, addressed as follows:

**Charles V. Berwanger
Gordon & Rees, LLP
101 West Broadway, Suite 1600
San Diego, CA 92101
Attorneys for Defendants**

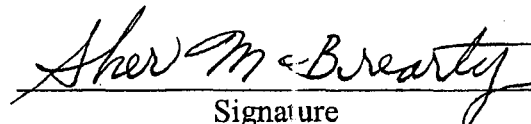
**Larry Davidson
Gordon & Reese
4695 MacArthur Court
Newport Beach, CA 92660
Attorneys for Defendants**

**James Marcus Vernon
Attorney at Law
P.O. Box 6474
Clearwater, FL 33758
Attorneys for Defendants**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **December 30, 2004** at San Diego, California.

Sher McBrearty

Declarant


Signature