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Exempt from fees per Gov't Code § 6103  
To the benefit of the City of San Diego

6 Attorneys for Plaintiff,  
7 The People of the State of California

8 Superior Court of California

9 In and for the County of San Diego

10 The People of the State of California,  
11 *Plaintiff,*

Case No.

**Complaint for Injunctive Relief and Civil  
Penalties under the Unfair Competition  
Law (Bus. & Prof. Code § 17200, Et Seq.)**

12 v.

*(UNLIMITED MATTER Amount Demanded  
Exceeds \$25,000)*

13 Payless Smoke Shop Inc.; B&P Sales Inc. dba  
14 Payless Smoke Shop #3; Nasman Haseeb  
Kiryakous, individually; NBK Inc. dba Keg N  
15 Bottle-Sorrento Valley; Tony Konja,  
individually; The Najib and Bernadet Konja  
16 Family Trust, Mama Berna LLC, and Baba  
Najib LP dba Keg N Bottle-National City; and  
17 Does 1-20 inclusive,

18 *Defendants*

19  
20 The People of the State of California (“People”), acting by and through San Diego City  
21 Attorney Mara W. Elliott, allege the following based on information and belief:

22 1. E-cigarette use by teens and young adults is a serious public health concern  
23 nationwide. The nicotine from e-cigarettes is highly addictive and is particularly problematic for  
24 youth due to its effects on brain development. Flavored tobacco products are especially  
25 dangerous as an easy “on ramp” to nicotine addiction; the overwhelming majority of young  
26 smokers use flavored e-cigarettes. Nicotine addiction can prime youth to use other addictive  
27 substances, like traditional cigarettes, alcohol, and drugs. Nicotine use can also cause reduced  
28

1 impulse control, deficits in attention and cognition, and mood disorders.<sup>1</sup>

2         2.         The growth of e-cigarette use by youth has been fueled by the manufacturing and  
3 advertisement of kid-friendly flavors, like cotton candy, bubblegum, and a wide range of fruits.  
4 In 2022, approximately 14.1% of high school students and 3.3% of middle school students were  
5 using e-cigarettes – putting millions of teens at risk of nicotine addictions and its associated  
6 harms. 85% of these youth users used flavored e-cigarettes.<sup>2</sup>

7         3.         The heavy marketing push of fruity and candy-like flavors has also affected the  
8 broader public. Tobacco and menthol flavor sales decreased, while fruity flavors increased, and  
9 e-cigarette sales spiked overall by 46 percent from 2020 to 2022.<sup>3</sup> In 2021, 11% of young adults  
10 (aged 18–24) and 4.5% of all adults were using e-cigarettes.<sup>4</sup>

11         4.         To combat this public health concern, both California and the City of San Diego  
12 prohibit the sale of flavored tobacco products to any person, including adults. Health & Safety  
13 Code § 104559.5; San Diego Municipal Code §42.1603.

14         5.         Despite these prohibitions, several Payless Smoke Shop and Keg ‘N Bottle stores  
15 (“Defendants”) have continued selling flavored tobacco products in the City of San Diego and  
16 elsewhere in California. These violations of state and local law constitute an unlawful business  
17 practice and violate California’s Unfair Competition Law (“UCL”) Bus. & Prof. Code § 17200,  
18 *et seq.*

19 \_\_\_\_\_  
20 <sup>1</sup> U.S. Department of Health and Human Services. E-Cigarette Use Among Youth and  
21 Young Adults. A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and  
Human Services, Centers for Disease Control and Prevention, National Center for Chronic  
Disease Prevention and Health Promotion, Office on Smoking and Health, 2016.

22 <sup>2</sup> Cooper M., Park-Lee E, Ren C., Cornelius M, Jamal A., Cullen KA. Notes from the  
23 Field: E-Cigarette Use Among Middle and High School Students — United States, 2022.  
MMWR Morb Mortal Wkly Rep 2022;71:1283–1285. DOI:  
24 <http://dx.doi.org/10.15585/mmwr.mm7140a3>

25 <sup>3</sup> Ali FR., Seidenberg AB, Crane E., Seaman E., Tynan MA, Marynak K. E-Cigarette  
26 Unit Sales By Product and Flavor Type, and Top-Selling Brands, United States, 2020–2022.  
MMWR Morb Mortal Wkly Rep 2023;72:672–677. DOI:  
<http://dx.doi.org/10.15585/mmwr.mm7225a1>

27 <sup>4</sup> Kramarow EA, Elgaddal N. Current Electronic Cigarette Use Among Adults Aged 18  
28 and Over: United States, 2021. NCHS Data Brief, no 475. Hyattsville, MD: National Center for  
Health Statistics. 2023. DOI: <https://dx.doi.org/10.15620/cdc:129966>



1 (“CFO”) of Payless Smoke Shop Inc. and B&P Sales Inc. On information and belief, Defendant  
2 Kiryakous actively participated in, and exercised control over, the operations of, and is the  
3 Responsible Corporate Officer under California law for, Payless Smoke Shop Inc. and B&P  
4 Sales Inc. Defendants in Paragraphs 11 through 13 (hereinafter referred to as “Defendant Payless  
5 Smoke Shop”).

6 14. Defendant NBK Inc. does business as “Keg N Bottle-Sorrento Valley” on 5973  
7 Lusk Blvd in the City of San Diego. NBK, Inc. is a California corporation with its principal place  
8 of business in the City of San Diego.

9 15. On information and belief, Defendant Tony Konja is, and was at all relevant  
10 times, the owner, CEO and CFO of NBK Inc. On information and belief, Defendant Konja  
11 actively participated in, and exercised control over, the operations of, and is the Responsible  
12 Corporate Officer under California law for, NBK Inc.

13 16. Defendants The Najib and Bernadet Konja Family Trust and Mama Berna LLC  
14 are general partners of Baba Najib LP. Baba Najib LP’s principal place of business is in the City  
15 of San Diego. On information and belief, Baba Najib LP and Tony Konja are, and were at all  
16 relevant times, co-owners of a retail store on 2335 Highland Ave named “Keg N Bottle-National  
17 City.” On information and belief, Defendant Konja actively participated in, and exercised control  
18 over, the operations of Keg N Bottle-National City. (Defendants in Paragraphs 14 through 16  
19 hereinafter referred to as “Defendant Keg ‘N Bottle”).

20 17. The true names or capacities of Defendants sued as Doe Defendants 1 through 20  
21 are unknown to the People. The People are informed and believe, and on this basis, allege that  
22 each of the Doe Defendants are legally responsible for the conduct alleged herein. The People  
23 will amend its complaint to set forth the true names and capacities of the Doe Defendants and the  
24 allegations against them as soon as they are ascertained.

25 18. On information and belief, at all relevant times, each Defendant, including Doe  
26 Defendants, was the owner, agent, principal employee, employer, master, servant, partner,  
27 franchiser, joint-venturer, co-conspirator, aider, and abettor of each of its co-Defendants, and  
28 engages (and continues to engage) in the wrongful actions and inaction alleged herein and acted

1 within the scope of its authority in such relationships with the permission and consent of each co-  
2 Defendant.

3 **Facts**

4 19. Payless Smoke Shop is a chain of three retail stores<sup>5</sup> in the City of San Diego that  
5 sells a wide variety of tobacco products, including e-cigarettes, cigars, hookah, and the  
6 associated equipment and accessories.

7 20. Keg ‘N Bottle is a chain of stores, primarily in the County of San Diego, that sells  
8 alcohol and tobacco products. There are six Keg ‘N Bottle locations throughout the City of San  
9 Diego, and additional retail locations in National City, La Mesa, Lemon Grove, Rancho Santa  
10 Fe, and Santa Barbara.<sup>6</sup>

11 21. Effective December 21, 2022, in the State of California, “[a] tobacco retailer, or  
12 any of the tobacco retailer’s agents or employees, shall not sell, offer for sale, or possess with the  
13 intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer.”  
14 Health & Safety Code § 104559.5(b)(1).

15 22. “Characterizing flavor means a distinguishable taste or aroma, or both, other than  
16 the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the  
17 tobacco product. Characterizing flavors include, but are not limited to, tastes or aromas relating  
18 to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint,  
19 wintergreen, herb, or spice.” Health & Safety Code § 104559.5(a)(1) [internal quotations  
20 omitted].

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22 \_\_\_\_\_  
23 <sup>5</sup> These stores are located at 5101 El Cajon Blvd, San Diego CA 92115, 6663 El Cajon  
Blvd, San Diego CA 92115, and 6320 Potomac St, San Diego, CA 92139.

24 <sup>6</sup> These stores are located at 6060 El Cajon Blvd, San Diego, CA 92115, 5973 Lusk Blvd,  
25 San Diego, CA 92121, 3566 Mt Acadia Blvd, San Diego, CA 92111, 5950 Santo Rd Suite N,  
San Diego, CA 92124, 6380 Del Cerro Blvd, Suite A, San Diego, CA 92120, 1030 Torrey Pines  
26 Rd, La Jolla, CA 92037, 1827 Massachusetts Ave, Lemon Grove, CA 91945, 2335 Highland  
Ave, National City, CA 91950, 3681 Avocado Blvd, La Mesa, CA 91941, 16079 San Dieguito  
27 Road, Suite #A2, Rancho Santa Fe, CA 92091, and 915 Embarcadero del Mar, Isla Vista, CA  
93117.

1           23.     Effective January 1, 2023, in the City of San Diego, “[i]t is unlawful for any  
2 person, business, tobacco retailer, or electronic cigarette retailer to sell or distribute flavored  
3 tobacco products.” San Diego Municipal Code §42.1603(a) [emphasis omitted].

4           24.     “Flavored tobacco products means a tobacco product that emits a taste or smell,  
5 other than the taste or smell of tobacco, including but not limited to, any taste or smell relating to  
6 fruit, mint, menthol, wintergreen, chocolate, cocoa, vanilla, honey, candy, dessert, alcoholic  
7 beverage, herb, or spice.” San Diego Municipal Code §42.1602 [emphasis omitted].

8           25.     Despite the state and local bans on selling tobacco flavored products, Defendant  
9 Payless Smoke Shop has sold, and continues to sell, flavored tobacco products at all three of its  
10 San Diego locations through the date of this Complaint.

11          26.     City investigators acting undercover made multiple visits to Defendant Payless  
12 Smoke Shop locations from May to August 2023, saw flavored tobacco products offered for sale,  
13 and purchased flavored tobacco products.

14          27.     Defendant Keg ‘N Bottle has sold, and continues to sell, flavored tobacco  
15 products at multiple locations through the date of this Complaint, including in the City of San  
16 Diego.

17          28.     City investigators acting undercover made multiple visits to Defendant Keg ‘N  
18 Bottle locations from May to August 2023, saw flavored tobacco products offered for sale, and  
19 purchased flavored tobacco products. On one occasion, a store clerk asked the City investigator  
20 to conceal the flavored tobacco products in a bag as they exited the store because they were  
21 “illegal” to sell.

22          29.     Defendants’ repeated, intentional, ongoing violations of the California and City of  
23 San Diego ban on the sale of flavored tobacco products constitute unlawful and unfair business  
24 practices under the UCL. The People seek injunctive relief ordering Defendants to cease selling  
25 flavored tobacco products and to pay appropriate civil penalties.

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1 **Cause of Action**

2 **Violation of Unfair Competition Law**

3 (Cal. Bus. & Prof. Code § 17200, *et seq.*)

4 30. All preceding factual statements and allegations are incorporated by reference.

5 31. The UCL, Business and Professions Code section 17200 prohibits “any unlawful,  
6 unfair or fraudulent business act or practice.”

7 32. “Any person who engages, has engaged, or proposes to engage in unfair  
8 competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars  
9 (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the  
10 name of the people of the State of California ... by any city attorney of a city having a  
11 population in excess of 750,000 ... in any court of competent jurisdiction.” Bus. & Prof. Code  
12 § 17206(a).

13 33. The Business and Professions Code section 17206.1(a) also provides: “In addition  
14 to any liability for a civil penalty pursuant to Section 17206, a person who violates this chapter,  
15 and the act or acts of unfair competition are perpetrated against one or more senior citizens or  
16 disabled persons, may be liable for a civil penalty not to exceed two thousand five hundred  
17 dollars (\$2,500) for each violation, which may be assessed and recovered in a civil action as  
18 prescribed in Section 17206.”

19 34. Defendants are “person(s)” as defined by the Business and Professions Code  
20 section 17201, which includes “natural persons, corporations, firms, partnerships, joint stock  
21 companies, associations and other organizations of persons.”

22 35. Defendants’ sale of flavored tobacco products is unlawful under California and  
23 City of San Diego law and, therefore, constitutes an unlawful business practice under the UCL.  
24 Defendants have been selling flavored tobacco products from December 21, 2022 (the effective  
25 date of the statewide ban) to at least the date of this Complaint. Defendants have been selling  
26 flavored tobacco products at their locations in the City of San Diego from January 1, 2023 (the  
27 effective date of the City of San Diego ban) to at least the date of this Complaint. Each sale of a  
28 flavored tobacco product, at each location, is a separate violation of state and local law and, as

1 such, constitutes a separate violation of the UCL.

2 36. Defendant's ongoing sale of flavored tobacco products also constitutes an unfair  
3 business practice under the UCL. Defendants stock, sell, and profit from banned flavored  
4 tobacco products, which leaves Defendants with an unfair advantage over its law-abiding retail  
5 store competitors.

6 37. The People seek an appropriate civil penalty under Business and Professions  
7 Code section 17206(a), up to \$2,500 for each violation to hold Defendants accountable for their  
8 unlawful business acts or practices and to deter further violations of the law. The People also  
9 seek an additional appropriate civil penalty under Business and Professions Code  
10 section 17206.1(a)(1), up to \$2,500 for each violation perpetrated against a senior citizen or  
11 disabled person.

12 38. Pursuant to California Business and Professions Code section 17203, the People  
13 are entitled to an injunctive order requiring Defendants to cease selling flavored tobacco  
14 products.

15 **Prayer for Relief**

16 Based on the above, the People request the following remedies:

17 39. Pursuant to Business and Professions Code section 17203, an order requiring  
18 Defendants to cease selling flavored tobacco products in compliance with California Health and  
19 Safety Code section 104559.5 and San Diego Municipal Code section 42.1603.

20 40. Pursuant to Business and Professions Code section 17206, Defendants be assessed a  
21 civil penalty in an amount, up to \$2,500 for each violation of the UCL, as proven at trial;

22 41. Pursuant to Business and Professions Code section 17206.1, Defendants be assessed  
23 an additional civil penalty in an amount, up to \$2,500 for each violation of the UCL perpetrated  
24 against a senior citizen or disabled person, as proven at trial;

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42. The People recover such costs of this action, including costs of investigation; and

43. The People be granted such other and further relief as this Court may deem to be just and proper.

Dated: August 22, 2023

MARA W. ELLIOTT, City Attorney

  
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Kevin B. King  
Deputy City Attorney