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14 **UNITED STATES DISTRICT COURT**  
15 **CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**

16 DUANE ROBERT GREENE, SHAWN )  
17 RANDALL THOMAS and JAMES )  
18 HIRTZEL, on behalf of themselves and all )  
others similarly situated, )

19 Plaintiffs, )

20 v. )

21 FIVE PAWNS, INC., )  
22 )

23 Defendant. )  
24 )  
25 )

Case No.

**COMPLAINT FOR VIOLATIONS  
OF: (1) CAL. CONSUMERS  
LEGAL REMEDIES ACT;  
(2) CAL. UNFAIR COMPETITION  
LAW; (3) CALIFORNIA FALSE  
ADVERTISING LAW;  
(4) INDIANA DECEPTIVE  
CONSUMER SALES ACT; (5) N.Y.  
GEN. BUS. LAW; (6) BREACH OF  
EXPRESS WARRANTY**

**CLASS ACTION**

**DEMAND FOR JURY TRIAL**

26  
27  
28

1 Plaintiffs Duane Robert Greene (“Plaintiff Greene”), Shawn Randall  
2 Thomas (“Plaintiff Thomas”) and James Hirtzel (“Plaintiff Hirtzel”) (collectively,  
3 “Plaintiffs”), by and through their undersigned attorneys, bring this action on  
4 behalf of themselves and all others similarly situated, and the general public, based  
5 upon personal knowledge as to themselves and their activities, and on information  
6 and belief as to all other matters, against defendant, Five Pawns, Inc. (“Five  
7 Pawns” or “Defendant”), and allege as follows:

8 **JURISDICTION AND VENUE**

9 1. Diversity subject matter jurisdiction exists over this class action  
10 pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4  
11 (2005), amending 28 U.S.C. § 1332, at new subsection (d), conferring federal  
12 jurisdiction over class actions involving: (a) 100 or more members in the proposed  
13 class; (b) where at least some members of the proposed class have different  
14 citizenship from some defendants; and (c) where the claims of the proposed class  
15 members exceed the sum or value of five million dollars (\$5,000,000) in the  
16 aggregate. 28 U.S.C. §§ 1332(d)(2) and (6).

17 2. While the exact number of members in each of the proposed classes is  
18 unknown at this time, Plaintiffs have reason to believe that thousands of consumers  
19 purchased Defendant’s vapor liquids (“e-liquids”) for electronic cigarettes (or “e-  
20 cigarettes”)<sup>1</sup> throughout California, Indiana, and New York during the relevant  
21 period. The number of class members could be discerned from the records  
22 maintained by Defendant.

23 3. While the exact damages to Plaintiffs and the members of the classes  
24 are unknown at this time, Plaintiffs reasonably believe that their claims exceed five  
25 million dollars (\$5,000,000) in the aggregate.

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<sup>1</sup> E-liquids are sometimes used in devices called personal vaporizers, which  
27 are products that include, but are not synonymous to, electronic cigarettes.

1           4. Jurisdiction over the New York and Indiana Plaintiffs is proper  
2 pursuant to 28 U.S.C. § 1367, which provides, in relevant part, that: (a) “in any  
3 action of which the district courts have original jurisdiction, the district courts shall  
4 have supplemental jurisdiction over all other claims that are so related to claims in  
5 the action within such original jurisdiction that they form part of the same case or  
6 controversy under Article III of the United States Constitution . . . includ[ing]  
7 claims that involve the joinder . . . of additional parties.”

8           5. This Court has personal jurisdiction over Defendant because  
9 Defendant is a resident of the State of California and has purposefully availed itself  
10 of the privilege of conducting business in the State of California.

11           6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because  
12 many of the acts and transactions giving rise to this action occurred in this District  
13 and because Defendant:

- 14                   a. has intentionally availed itself of the laws and markets within  
15                   this District through the promotion, marketing, distribution and  
16                   sale of its products in this District;
- 17                   b. does substantial business in this District, including maintaining  
18                   its principal place of business in this district; and
- 19                   c. is subject to personal jurisdiction in this District.

20           7. Venue is proper in this Court as to the New York and Indiana  
21 Plaintiffs and Claims under the doctrine of pendant venue.

22   **NATURE OF THE ACTION**

23           8. Defendant is a manufacturer of e-liquids, which are used in electronic  
24 cigarettes. Defendant’s e-liquids contain hazardous substances known as diacetyl  
25 (“DA”) and acetyl propionyl (“AP”) (also known as 2,3-pentanedione), in addition  
26 to propylene glycol, glycerin, nicotine, and flavorings. As detailed herein, the DA  
27 and AP levels detected for certain particular flavors of Defendant’s e-liquids

1 represent the highest concentration that has ever been seen in any e-liquid. Some e-  
2 liquids manufactured by other companies are sold *without* DA and AP, propylene  
3 glycol, nicotine, or flavors, as it is possible to source ingredients that do not  
4 contain these toxic ingredients.<sup>2</sup>

5 9. DA and AP are compounds of diketone and are responsible for the  
6 buttery and creamy taste of many foods and beverages, most famously, popcorn.  
7 While DA and AP are safe to eat or drink, inhalation is known to cause certain  
8 lung conditions, including Bronchiolitis Obliterans, a condition in which  
9 irreversible scarring to the lungs is produced, in serious cases requiring lung-  
10 transplants. A number of cases of Bronchiolitis Obliterans in popcorn factory  
11 workers exposed to DA and/or AP led authorities to create very strict limits on the  
12 amount of these chemicals that workers may be exposed to. Similar cases of  
13 Bronchiolitis Obliterans have since been discovered in workers in other types of  
14 manufacturing plants.

15 10. It is also known that DA and/or AP are contributing factors to both  
16 chronic obstructive pulmonary disease (“COPD”) and emphysema.<sup>3</sup>

17 11. Defendant does not warn its customers about the dangers of inhaling  
18 DA and AP, neither on its product packaging nor on its website. Instead,  
19 Defendant’s marketing campaign describes its e-liquids as if it were selling wine.  
20 For example, the Company describes its “Bowden’s Mate” e-liquid as “crisp mint  
21 with subtle chocolate undertones and a French vanilla finish,” while its “Absolute  
22

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23 <sup>2</sup> For example, Virgin Vapor, Halo Cigs, Fireband, and Mt. Baker Vapor all  
24 produce e-liquids that are DA and AP free. Five Pawns also recently began selling  
25 a DA and AP free flavor of e-liquid called Symmetry Six.

26 <sup>3</sup> S. Costigan, C. Meredith, *An Approach To Ingredient Screening And*  
27 *Toxicological Risk Assessment of Flavours in E-Liquids*, 72 REG. TOX. AND  
28 PHARM. 361 (July 2015).

1 Pin” e-liquid has an “intense complexity of Irish cream, cinnamon spice, and  
2 caramel with subtle absinthe undertones.” Some special edition flavors in its line of  
3 products are described as having been aged in oak barrels.

4 12. Despite Defendant’s marketing campaign that boasts its “top-notch”  
5 ingredients” that makes for a “high-end experience,” Defendant’s products are  
6 actually laden with harmful chemicals.

7 13. Sometime in 2009, users of electronic cigarettes began to become aware  
8 of the presence of DA and AP in e-liquids and that those substances pose serious  
9 health hazards, particularly health hazards associated with respiratory diseases.  
10 Some e-liquid manufacturers took the issue seriously enough to make efforts to  
11 halt usage of flavorings that contain DA and/or AP in their e-liquids. *See* ¶ 8 n.2,  
12 *supra*.

13 14. From the Company’s inception in November 2012, it has manufactured  
14 and sold high-end e-liquids in a variety of flavors, all containing various amounts  
15 of DA and AP, depending on the flavor. While Defendant claimed on its website  
16 that it “moved to source solely diacetyl-free ingredients,” it subsequently  
17 discovered that “trace amounts of diacetyl” were found in its products. A number  
18 of tests done on Defendant’s e-liquids, including one performed by a laboratory  
19 retained by Defendant in September 2014, show that Defendant’s e-liquids contain  
20 DA and AP, some at substantially more than trace amounts,<sup>4</sup> thus directly  
21 contradicting its claim that its e-liquids contain diacetyl-free flavorings.

22 15. Defendant did not disclose these results until June 2015, and it did so at  
23 that time only in an attempt to rebut the testing that had been conducted by an e-  
24 cigarette store in England called Cloud 9 Vaping (“Cloud9”). The Cloud9 test  
25 results showed that some of Defendant’s line of products contain the highest levels

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26  
27 <sup>4</sup> Trace amounts of DA and/or AP are amounts lower than 5 µg/ml.

1 of AP that have ever been shown in a laboratory test of e-liquids. In light of these  
2 test results, Cloud9 proceeded to withdraw the entire line of Five Pawns products  
3 from its inventory. Shortly thereafter, the Electronic Cigarette Trade Association of  
4 Canada (“ECTA”) notified Canadian vendors of e-liquids to withdraw and cease  
5 sales of Defendant’s e-liquids.

6 16. Defendant’s e-liquids also contain varying levels of nicotine (in 0mg,  
7 3mg, 6mg, 12mg, and 18 mg levels). The Cloud9 laboratory testing has also  
8 shown that Defendant disclosed inaccurate nicotine levels on its packaging.

9 17. Defendant has employed numerous methods to convey to consumers  
10 throughout the United States its deceptive, false and misleading message about its  
11 e-liquids, including its packaging, product inserts, communications with its  
12 customers via e-mail or internet forums, and its website through which it sells its  
13 products directly to the public, <https://fivepawns.com/blog/html> (last visited  
14 August 17, 2015).

15 18. As a result of Defendant’s deceptive, false and misleading claims in its  
16 advertising, consumers – including Plaintiffs and the other members of the  
17 proposed classes – have purchased Defendant’s e-liquids without being advised  
18 that they contain a variety of toxins, impurities, and related potential health hazards  
19 as found by various studies discussed in more detail below. Had Defendant  
20 disclosed these material facts, Plaintiffs would not have purchased Defendant’s e-  
21 liquids. Defendant was able to charge more than what its e-liquids would have  
22 been worth had it disclosed the truth about them. In fact, Defendant charges one of  
23 the highest prices for e-liquids in the e-liquid industry, at \$27.50 for each 30ml  
24 bottle of juice and \$37.50 for its limited edition Castle Long Reserve.

25 19. Plaintiffs bring this class and private attorney general action against  
26 Defendant, on behalf of themselves, the proposed classes, and the general public,  
27 in order to: (a) halt the dissemination of Defendant’s deceptive advertising

1 message; (b) correct the false and misleading perception Defendant has created in  
2 the minds of consumers through its representations and omissions; and (c) secure  
3 redress for consumers who have purchased one or more of Defendant's e-liquids.  
4 Plaintiffs, on behalf of themselves and the proposed classes, allege violations of  
5 California Business & Professions Code §§ 17200, *et seq.* ("UCL"), the  
6 Consumers Legal Remedies Act, California Civil Code §§ 1750, *et seq.* ("CLRA"),  
7 breach of express warranty, breach of the Indiana Deceptive Consumer Sales Act,  
8 Ind. Code § 24-5-0.5 *et seq.*, and violations of the New York General Business  
9 Law § 349 ("GBL").

10 **PARTIES**

11 ***Plaintiffs***

12 20. Plaintiff Greene is an individual who resides in Indianapolis, Indiana  
13 and who is a citizen of Indiana.

14 21. Plaintiff Thomas is an individual who resides in Kings County and is a  
15 citizen of New York.

16 22. Plaintiff Hirtzel is an individual who resides in Sacramento, California  
17 and is a citizen of California.

18 23. Members of the putative classes reside in California, Indiana, New  
19 York, and other states in the United States.

20 24. During the relevant period, Plaintiffs, while in the states of Indiana,  
21 New York, and California, were exposed to and saw Defendant's material,  
22 deceptive marketing claims and packaging. Plaintiffs, relying on Defendant's  
23 misleading marketing and labeling of Defendant's products, believed that  
24 Defendant's products did not carry dangers or risks associated with DA and/or AP.  
25 While in the states of Indiana New York, and California, Plaintiffs purchased  
26 Defendant's e-liquids, at local retailers and online. Had Defendant disclosed that  
27 its e-liquids contain a variety of toxins, impurities, and related potential health  
28

1 hazards which was, or should have been known to Defendant, and as found by  
2 various studies discussed in more detail below, Plaintiffs would not have  
3 purchased Defendant's e-liquids. Thus, as a result of Defendant's material  
4 deceptive claims and omissions, Plaintiffs suffered injury in fact and lost money.

5 25. Plaintiff Greene first purchased Defendant's e-liquids in May 2014. He  
6 purchased three varieties of Five Pawns Kings e-liquids – Castle Long with 24mg  
7 Nicotine Strength, Fifth Rank with 24mg Nicotine Strength, and Gambit at 24mg  
8 Nicotine Strength. He thereafter intermittently purchased additional Five Pawns e-  
9 liquids. In total, Plaintiff Greene purchased approximately seven 30-ml bottles of  
10 Five Pawns e-liquid for which he paid the retail market price for each bottle, which  
11 was, upon information and belief, \$27.50 at all relevant times. Plaintiff Greene  
12 ceased purchasing Defendant's products when the Cloud9 test results were posted  
13 on the Internet.

14 26. Plaintiff Thomas purchased Defendant's e-liquids at a store called  
15 Beyond Vape in New York County, New York in or around March 2015 for which  
16 he paid the retail market price for each. Plaintiff Thomas ceased purchasing  
17 Defendant's products when the Cloud9 test results were posted on the Internet.

18 27. Plaintiff Hirtzel fist purchased Defendant's e-liquids at a store called  
19 Planet of the Vapes in Sacramento County, Carmichael, California in November  
20 2013. Plaintiff Hirtzel purchased one bottle of Five Pawns Castle Long Reserve  
21 with 12mg Nicotine Strength for \$37.50. He thereafter intermittently purchased  
22 additional Five Pawns e-liquids in various flavors for which he paid the retail  
23 market price of between \$27.50 and \$37.50 for each 30ml bottle. Plaintiff Hirtzel  
24 ceased purchasing Defendant's products when the Cloud9 test results were posted  
25 on the Internet.

26 ***Defendant***

27 28. Five Pawns is incorporated in California, and has its corporate  
28



1 headquarters at 17145 Von Karman Avenue, Suite 105, Irvine, California 92614.  
2 Defendant carries premium, “handcrafted,” artisan-style e-liquid that is mainly sold  
3 in high-end, boutique vape shops. Defendant currently offers two separate e-juice  
4 lines, the Mixology Edition and Signature Series, each consisting of five unique  
5 and complex flavor choices. The company appears to be following the lead of the  
6 beer and liquor industries, branding itself as a sort of microbrewery, or craft  
7 distiller of e-liquid.

8 29. Launched in November 2012, Defendant’s products are sold in  
9 hundreds of retail locations in the United States. Defendant’s products are also sold  
10 in 43 other countries.

11 30. Plaintiffs allege, on information and belief, that at all times herein,  
12 Defendant’s agents, employees, representatives, executives, directors, partners,  
13 and/or subsidiaries were acting within the course and scope of such agency,  
14 employment, and representation, on behalf of Defendant.

15 **FACTUAL ALLEGATIONS**

16 **I. E-LIQUIDS AND ELECTRONIC CIGARETTES**

17 31. This action concerns e-liquids sold by Defendant.

18 32. An electronic cigarette, or e-cigarette, is a device that is an alternative  
19 to tobacco smoking. E-cigarettes are designed to deliver a smoking-like “hit” of e-  
20 liquid vapor, usually containing nicotine, which is inhaled by the user. They work  
21 through the use of a battery operated heating mechanism, which typically converts  
22 the e-liquid that may contain DA, AP, glycerin, glycol, natural and artificial flavors  
23 and, in most electronic cigarettes, various proportions of nicotine, into vapor.  
24 When a person inhales (“vapes”) from an e-cigarette, this mimics the taking of a  
25 “drag” on a traditional tobacco cigarette. A heating device is activated, the e-liquid  
26 is converted into vapor, and the consumer inhales the vapor.

27 33. According to a 2011 study by the Centers for Disease Control and  
28

1 Prevention (“CDC”), as of that year, more than one fifth of smokers in the United  
2 States had tried electronic cigarettes, and 6% of all adults had tried them.<sup>5</sup>

3 34. According to a subsequent study by the CDC, nearly 1.8 million middle  
4 and high school students tried e-cigarettes in 2011 and 2012, including  
5 approximately 160,000 students who had never used conventional cigarettes.<sup>6</sup> The  
6 study also found that the number of U.S. middle and high school student e-smokers  
7 doubled between 2011 and 2012.<sup>7</sup>

8 35. According to analysts, sales of e-cigarettes in America in 2012 were  
9 between \$300 million and \$500 million.<sup>8</sup> This was approximately double what  
10 they were in the preceding year, and sales were projected to double again in 2013.<sup>9</sup>

11 36. E-cigarettes and e-liquids are commonly marketed as a “safer”  
12 alternative to traditional cigarettes. However, the CDC published a report in 2014  
13 that the number of calls to poison centers involving e-liquids containing nicotine  
14 rose from one per month in September 2010 to 215 per month in February 2014.  
15 CDC Director Tom Frieden, M.D., M.P.H. commented, “This report raises another  
16

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17 <sup>5</sup> Press Release, Centers for Disease Control and Prevention, *About One in*  
18 *Five U.S. Adult Smokers Have Tried an Electronic Cigarette* (Feb. 28, 2013),  
19 [http://www.cdc.gov/media/releases/2013/p0228\\_electronic\\_cigarettes.html](http://www.cdc.gov/media/releases/2013/p0228_electronic_cigarettes.html) (last  
visited Nov. 9, 2015).

20 <sup>6</sup> Morbidity and Mortality Weekly Report, Centers for Disease Control and  
21 Prevention, *Notes from the Field: Electronic Cigarette Use Among Middle and*  
22 *High School Students — United States, 2011–2012* (Sept. 6, 2013),  
23 <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm> (last visited Nov.  
10, 2015).

24 <sup>7</sup> *Id.*

25 <sup>8</sup> *E-cigarettes: Vape ‘Em if You Got ‘Em*, THE ECONOMIST, (Mar. 23, 2013),  
26 [www.economist.com/news/business/21573985-challenge-big-tobacco-vape-em-if-](http://www.economist.com/news/business/21573985-challenge-big-tobacco-vape-em-if-you-got-em)  
[you-got-em](http://www.economist.com/news/business/21573985-challenge-big-tobacco-vape-em-if-you-got-em) (last visited Nov. 10, 2015).

27 <sup>9</sup> *Id.*

1 red flag about e-cigarettes – *the liquid nicotine used in e-cigarettes can be*  
2 *hazardous*.”<sup>10</sup>

3 37. Aware of the growing popularity and the potential dangers in e-  
4 cigarettes, the United States Food and Drug Administration (the “FDA”) proposed  
5 rules in April 2014 that would require e-cigarettes, including liquid nicotine and  
6 devices, to be approved by the agency. The rules would also ban sales to minors  
7 and require e-cigarette and e-liquid companies to disclose its ingredients. The rules  
8 were expected to be in place by the end of the summer of 2015.

9 38. Defendant sells what is reportedly premium, high-end e-liquids using  
10 “top notch ingredients”.<sup>11</sup> Defendant sells its e-liquids at a high premium, because  
11 the Company uses “natural ingredients” that are “sourced locally,” according to its  
12 Chief Executive Officer (“CEO”), Rodney Jerabek.<sup>12</sup>

13 39. Defendant’s e-liquids were introduced to the market with a retail price  
14 of \$27.50 and have remained that price, except for its limited edition Castle Long  
15 Reserve, which sells for \$37.50. As of the filing of this Complaint, individual Five  
16 Pawns Kings can be purchased at stores across the country including various stores  
17 in California, New York and Indiana. Defendant also sells its products on its own  
18 website, [www.fivepawns.com](http://www.fivepawns.com).

19 40. Defendant’s products are more expensive than those of most of its  
20 competitors. For example, Space Jam, a competitor, offers 15ml bottles for  
21

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22 <sup>10</sup> Press Release, Centers for Disease Control and Prevention, New CDC Study  
23 Finds Dramatic Increase in E-Cigarette-Related Calls to Poison Centers (Apr. 3,  
24 2014), <http://www.cdc.gov/media/releases/2014/p0403-e-cigarette-poison.html>  
(last visited Nov. 10, 2015) (emphasis added).

25 <sup>11</sup> *Five Pawns President Interview*, FIVE PAWNS, (May 31, 2013),  
26 <http://fivepawns.com/five-pawns-president-interview/> (last visited Nov. 10, 2015).

27 <sup>12</sup> *Id.*

1 \$11.99.<sup>13</sup> Another competitor, Ossington by MOSHI, offers 30ml bottles for  
2 \$22.00.<sup>14</sup> Like Five Pawns, both Space Jam and MOSHI market themselves as  
3 high-end e-liquid brands using quality ingredients.

4 41. On information and belief, most members of the proposed classes have  
5 bought more than one of Defendant's products.

6 **II. PUBLISHED STUDIES DEMONSTRATE THE DANGERS AND**  
7 **EXPOSURE TO HEALTH RISKS OF E-LIQUIDS**

8 42. Because of the rapid growth in the use of electronic cigarettes by  
9 consumers in recent years, an increasing number of government agencies, research  
10 facilities, and e-cigarette/e-liquid retailers have begun to conduct studies  
11 concerning the potential health impact and risks of these devices. These studies  
12 have found, *inter alia*, including with respect to Defendant's e-liquids: (a)  
13 measurable amounts of DA and/or AP in e-liquids that are, or potentially are,  
14 disease-causing, (b) harmful potential side effects of inhaling e-liquids, and (c) that  
15 more study is needed to determine the full range of health dangers of inhaling e-  
16 liquids.

17 43. Recently, on June 28, 2015, a UK e-cigarette and e-liquid seller called  
18 Cloud9 hired a laboratory to conduct tests of e-liquids supplied by Defendant as  
19 well as other manufacturers for potentially dangerous chemicals. The results  
20 showed Five Pawns, along with 2 other brands, had dangerously high numbers of  
21 DA and AP, with Five Pawns showing the highest levels Cloud9 had ever seen.

22  
23  
24 <sup>13</sup> *Space Jam-Starship 1 (15ml)*, VAPORDNA,  
25 <http://www.vapordna.com/Space-Jam-Starship-1-p/sj0009.htm> (last visited Nov.  
26 10, 2015).

27 <sup>14</sup> *Ossington by MOSHI*, ELIQUID.COM, [http://www.eliquid.com/collections/  
28 moshi/products/moshi-ossington](http://www.eliquid.com/collections/moshi/products/moshi-ossington) (last visited Nov. 10, 2015).

Brand	Flavour	Diacetyl (ppm)	AP (ppm)	Our Action
Suprem-e	Hazelnut	22	33	withdrawn
Suprem-e	Coffee	105	27	withdrawn
Suprem-e	Irish Creem	17	4	withdrawn
Suprem-e	RY4 Pleasure	217	4	withdrawn
Suprem-e	The Pie	247	n/d	withdrawn
Suprem-e	Vanilla	0.1	43	withdrawn
Mystic	Vanilla Custard V1	400	200	withdrawn and reformulated
Five Pawns	Absolute Pin	40	2500	entire range withdrawn
Five Pawns	Bowden's Mate	90	2200	entire range withdrawn
Five Pawns	Castle Long	70	900	entire range withdrawn
Five Pawns	Gambit	40	2000	entire range withdrawn
Five Pawns	Grandmaster	20	300	entire range withdrawn
Five Pawns	Lucena	30	340	entire range withdrawn
Five Pawns	Queenside	100	1000	entire range withdrawn

ppm = parts per million

n/d = none detected

44. Defendant sent a cease and desist letter to Cloud9, and Cloud9 removed the test results from its website “pending legal advice.”<sup>15</sup>

45. Notably, the results show that nicotine content varies from 1.8mg to 3.7mg on ostensibly 3mg samples, and much of the propylene glycol and vegetable glycerin ratios do not match with what Defendant lists on the bottles. As a result, Cloud9 immediately stopped selling these products.<sup>16</sup>

46. As an attempt to conduct damage control, in early July 2015, Defendant released previously unreleased test results on its products that were done in September 2014 by Newport Scientific, Inc., a laboratory Defendant hired. The tests showed that the products do in fact contain amounts of DA and AP, contrary to Defendant’s representations to the public:

<sup>15</sup> *Liquid Test Results, CREME DE VAPE*, <http://www.cremedevape.com/Blog/Liquid-test-results> (last visited Nov. 11, 2015).

<sup>16</sup> *Five Pawns Bring Out Legal Big Guns – Cloud 9 Removes Testing Results, THE GRUMPY VAPER*, <http://thegrumpyvaper.com/five-pawns-bring-out-legal-big-guns-cloud-9-removes-testing-results/> (last visited Nov. 10, 2015).

**REPORT OF ANALYSIS**

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Ten bottles were received on 23 September 2014. One additional bottle was received on 2 October 2014. The samples were analyzed for the concentrations of diacetyl and 2,3-pentanedione using gas chromatography with mass spectroscopy (GC-MS). The results are presented in the table below.

Sample	Concentration ( $\mu\text{g/g}$ )	
	Diacetyl	2,3-Pentanedione
Grandmaster	TR < 5	130
Gambit	TR < 5	360
Queenside	TR < 5	350
Bowden's Mate	6.6	910
Absolute Pin	TR < 5	290
Castle Long	ND < 5	80
Lucena	ND < 5	74
Sixty-Four	ND < 5	ND < 5
Perpetual Check	16.6	ND < 5
Fifth Rank	ND < 5	ND < 5
Black Flag Fallen	TR < 5	65

47. Specifically, a customer contacted Defendant to inquire if Defendant's products contain DA or AP, and a Five Pawns representative name Annoushka Lyvers replied that "[n]one of our handcrafted flavors use diacetyl or acetone." Another customer asked the same question and received a response from the CEO, who responded: "We use absolutely no Dicetyl or additives of *any kind* in our liquids."<sup>17</sup>

48. In addition, Russell Wishtart ("Wishtart"), consumer activist, vaping guru, and host of the popular podcast Click, Bang! that is devoted to issues regarding vaping, broadcasted a telephone conversation on its July 1, 2015 episode between Wishtart and a Five Pawns representative. Wishtart telephoned Five Pawns to ask if their e-liquids, specifically, the Absolute Pin and Bowden's Mate flavors, contain AP. The Five Pawns employee answered that the liquids in question contain trace amounts and then clarified that their test results contain ND (not detectable levels of AP). However, Defendant's own test results show that

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<sup>17</sup> *Cloud 9 Removes Five Pawns Testing Results Pending Legal Advice*, VAPEMESTOOPID, <http://vapemestoopid.co/2015/06/cloud-9-removes-five-pawns-testing-results-pending-legal-advice/> (last visited Nov. 10, 2015).

1 Absolute Pin contains 290 µg/ml of AP and that Bowden's Mate contains 627.7  
2 µg/ml.

3 49. Cloud9 had initially asked Defendant to provide its own test results  
4 when Cloud9 commenced trading with the Company in the beginning of 2015 but  
5 Defendant declined, at a time when Defendant had conducted testing on its  
6 products and knew the levels of AP and DA in its products.

7 50. The other two e-liquid companies that carry e-liquids containing high  
8 levels of DA and/or AP, Suprem-e and Mystic Vapor, both began work on  
9 reformulating their products. Mystic Vapor's reformulated version of a particular  
10 flavor, Vanilla Custard, recently tested free of both DA and AP.<sup>18</sup>

11 51. The National Institute for Occupational Safety and Health ("NIOSH")  
12 released a report dated August 12, 2011 stating the acceptable levels of DA and/or  
13 AP for e-liquids as 65 µg for DA and 137 µg per day for AP (1 µg = 1 millionth of  
14 a gram).<sup>19</sup> Both Cloud9's and Five Pawns's test results show DA and AP levels  
15 that far exceed these limits. In particular, Absolute Pin tested at 40 µg/ml of DA  
16 and an astonishing 2,500 µg/ml of AP. This means, if a person inhales just 2ml of  
17 Absolute Pin e-liquid they will be over the recommended intake for DA and more  
18 than 36 times over the recommended daily limit for AP. Moreover, almost all of  
19 the e-liquids levels disclosed by Defendant in its own test results are higher than  
20 137 µg per day for AP.

21 52. On June 30, 2015, the ECTA notified 50 vendors via email to withdraw  
22 and cease sales of Five Pawns e-liquids. According to ECTA's standards, an e-

23  
24 <sup>18</sup> See ¶ 47 n.17, *supra*.

25 <sup>19</sup> *Criteria for a Recommended Standard: Occupational Exposure to Diacetyl*  
26 *and 2,3-Pentanedione*, DEPARTMENT OF HEALTH AND HUMAN SERVICES (Aug. 12,  
27 2011) (draft), <http://www.cdc.gov/niosh/docket/archive/pdfs/NIOSH-245/0245-081211-draftdocument.pdf> (last visited Nov. 10, 2015).

1 liquid with AP levels of more than 45 µg/ml but less than 100 µg/ml requires  
 2 disclosure to the public, and e-liquids with levels of more than 100 µg/ml cannot  
 3 be sold by ECTA members and immediate stop sale is required.<sup>20</sup>

4 **From:** [ECTA Members](#)  
**To:** ["ECTA of Canada \(info@ectaofcanada.com\)"](mailto:info@ectaofcanada.com)  
**Cc:** ["Paul Bergen \(pbergen1@gmail.com\)"](mailto:pbergen1@gmail.com)  
**Bcc:**

5  
6  
7  
8  
9 **Subject:** Five Pawns Test Results  
**Date:** Tuesday, June 30, 2015 10:39:00 PM

10 As many of you may or may not be aware, Five Pawns has released/published their E-Liquid testing  
 11 results on their website. <http://fivepawns.com/five-pawns-test-results/>

12 There is a significant amount of drama behind their publication of these results. Suffice it to say that  
 13 they appear to have been prompted to release their test results by an E-Liquid Distributor (Cloud 9  
 14 in the UK) sending samples to West Yorkshire Analytical lab for Diacetyl (DA) and Acetyl Propionyl  
 15 (AP) testing. The flavour samples that they sent came back positive for both compounds as seen  
 16 below:

Flavour	DA	AP
Absolute Pin	40	2500
Bowden's Mate	90	2200
Castle Long	70	900
Gambit	40	2000
Grandmaster	20	300
Lucena	30	340
Queenside	100	1000

17  
18 Those are some of the highest AP number that I think we've ever seen. Cloud 9 has since removed  
 19 the test results from their website, "pending legal advice".

20 Yesterday (6/29), Five Pawns released their own results which conflict with the numbers posted  
 21 Cloud 9. The Five Pawn numbers are seen below:

Flavour	DA	AP
Grandmaster	TR < 5	130
Gambit	TR < 5	360
Queenside	TR < 5	350
Bowden's Mate	6.6	910
Absolute Pin	TR < 5	290
Castle Long	ND < 5	80
Lucena	ND < 5	74

22  
23  
24  
25 <sup>20</sup> *ECTA E-Liquid Testing Standards*, ECTA,  
 26 [http://www.ectaofcanada.com/pagedisp.php?section=E-Liquid\\_Testing](http://www.ectaofcanada.com/pagedisp.php?section=E-Liquid_Testing) (last visited  
 27 Nov. 10, 2015).



Sixty-Four	ND < 5	ND < 5
Perpetual Check	16.6	ND < 5
Fifth Rank	ND < 5	ND < 5
Black Flag Fallen	TR < 5	65

It is difficult to say what we should do in a case like this but unless any member has test results for Five Pawns to the contrary of what Five Pawns themselves say, we need to act on what has been published by the manufacturer.

We need to be sure that we are following our own guidelines because that is why each of us is here as an ECTA member. As such, we ask that our members review the flavours/numbers above. If you are carrying (or considering) any of the liquids that were tested and the results fall within an “action range” (from disclosure to discontinue), please take appropriate action.

Action ranges for Diacetyl are as follows:

- **Non-detection** – This is the goal
- **Less than 22 µg/ml (ppm)** – requires no action
- **Less than 100 µg/ml (ppm)** – requires disclosure to the public but the product can still be sold
- **100 µg/ml (ppm) or more** – cannot be sold by ECTA members and immediate stop sale is required

Action ranges for Acetyl Propionyl are as follows:

- **Non-detection** – This is the goal
- **Less than 45 µg/ml (ppm)** – requires no action
- **Less than 100 µg/ml (ppm)** – requires disclosure to the public but the product can still be sold
- **100 µg/ml (ppm) or more** – cannot be sold by ECTA members and immediate stop sale is required

Given the above action ranges, this is what needs to be done according to those ranges:

Flavour	DA	AP	ECTA Action
Grandmaster	TR < 5	130	Stop Sale
Gambit	TR < 5	360	Stop Sale
Queenside	TR < 5	350	Stop Sale
Bowden's Mate	6.6	910	Stop Sale
Absolute Pin	TR < 5	290	Stop Sale
Castle Long	ND < 5	80	Disclosure
Lucena	ND < 5	74	Disclosure
Sixty-Four	ND < 5	ND < 5	No Action
Perpetual Check	16.6	ND < 5	No Action
Fifth Rank	ND < 5	ND < 5	No Action
Black Flag Fallen	TR < 5	65	Disclosure

53. In order to create positive spin on the detrimental publicity these test results have caused, Defendant released a statement on its website containing false assertions such as “[H]igh levels of both diacetyl and AP are present in cigarettes,

1 yet there has been no link to bronchial obliterates,” and “AP has not been linked to  
2 any health concerns related specifically to vaping . . . its relative safety or harm is  
3 unknown.”<sup>21</sup> However, studies *have* shown that DA and AP do cause lung  
4 damage.<sup>22</sup>

5 54. E-cigarettes are a subject of concern to major international entities. The  
6 ECTA took action and ordered a stop sale for five Five Pawns e-liquids and  
7 ordered disclosure of DA and/or AP levels for three Five Pawns e-liquids. A  
8 similar trade association in the United Kingdom has taken similar measures  
9 regarding Defendant’s products.

10 55. Numerous other studies have been performed by universities and other  
11 research centers, and have reported similar concerns about the potential for health  
12 risks associated with electronic cigarettes.

13 **III. DEFENDANT’S ADVERTISING OF ITS FIVE PAWNS E-LIQUIDS**  
14 **IS MATERIALLY DECEPTIVE, FALSE AND MISLEADING**

15 56. Defendant has carried out a consistent and widespread campaign of  
16 deceptively promoting its e-liquids. Its core marketing statement indicating that its  
17 products contain quality ingredients or similar variations, and its repeated  
18 statements that its products do not contain DA and AP, are false and misleading  
19 given the studies discussed above that have found DA and AP in Defendant’s e-  
20 liquids and that DA and AP are found to be hazardous to one’s health. It is also  
21 false and misleading given the content of Defendant’s products because there is  
22 still insufficient research for Five Pawns to assert or convey that its products do not  
23 pose long term health dangers. Defendant’s statements and omissions have

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24 <sup>21</sup> *Five Pawns – Be Informed*, FIVE PAWNS (June 29, 2015),  
25 <http://fivepawns.com/five-pawns-test-results/> (last visited Nov. 10, 2015).

26 <sup>22</sup> See Farsalinos, Konstantinos E., *et al.*, *Evaluation of Electronic Cigarette*  
27 *Liquids and Aerosol for the Presence of Selected Inhalation Toxins*, J. OF NICOTINE  
& TOBACCO RESEARCH (Aug. 18, 2014); see also ¶ 52 n.20, *supra*.

1 occurred in at least three forms, all of which constitute “advertising.” These  
2 include: its packaging, inserts to its packaging and shipping materials, and its  
3 website through which it directly sells its e-liquids to the public. Defendant’s  
4 pervasive advertising message conveys the impression and false statement that its  
5 e-liquids do not contain DA and/or AP, and when it felt compelled to release its  
6 test results, that the amounts of DA and/or AP that are in fact in its products do not  
7 carry any risk of disease. As demonstrated above in Section II, however, this is  
8 materially deceptive, false and misleading given the information revealed by  
9 studies that not only do Defendant’s e-liquids contain DA and AP, but they are  
10 potentially dangerous to consumers’ health and they also may carry many risks of  
11 disease, including COPD, emphysema, and Bronchiolitis Obliterans. Information  
12 regarding the effects of inhaling such substances must be disclosed to ensure that a  
13 reasonable consumer is not misled.

14 57. Defendant’s packaging on its e-liquids only discloses the amount of  
15 nicotine, propylene glycol and vegetable glycerin. It does not state that its products  
16 contain AP and/or DA, nor does it contain a warning regarding the hazardous  
17 effects on the human body of inhaling AP and DA.

18 58. Defendant’s pattern of deceptive marketing continues today, including  
19 false, misleading and deceptive statements, as discussed in Section II, *supra*.

20 59. Defendant’s current packaging and advertising conveys the impression  
21 that the product contains no meaningful health risks other than possibly those that  
22 are a direct result of nicotine:



1           60. While Defendant does disclose that its e-liquids contain certain levels  
2 of nicotine (selected by the customer) and that the ratio of propylene glycol and  
3 vegetable glycerin is 50/50, nowhere on the packaging does it mention the  
4 existence of DA and AP. By omitting these ingredients from the label, Defendant  
5 denies consumers at the point of sale the opportunity to decide for themselves  
6 whether they are willing to take the risk of inhaling these chemicals. For example,  
7 by omitting the ingredients, Defendant hides the fact that its e-liquids contain DA  
8 and/or AP, chemicals found to cause various lung diseases and thus no longer used  
9 by certain of its competitors in their e-cigarettes. Moreover, as discussed below,  
10 omitting the ingredients on the package conceals the dangers associated with the  
11 chemicals contained in its e-liquids, which are described in the studies referenced  
12 above.

13           61. The text of the warning on Defendant's website reads, in its entirety:

14           WARNING: This product is not a smoking cessation  
15 product and has not been tested as such. The FDA has  
16 not evaluated the safety of this product or any of the  
17 statements made by the manufacturer. This product is  
18 intended for use by persons of legal age or older, and  
19 not by children, women who are pregnant or breast  
20 feeding, or persons with or at risk of heart disease, high  
21 blood pressure, diabetes, or taking medicine for  
22 depression or asthma. Nicotine is addictive and habit  
23 forming, and can be toxic if in contact with skin, or if  
24 swallowed. Nicotine can increase your heart rate and  
25 blood pressure and cause dizziness, nausea, and  
26 stomach pain. Inhalation of this product may aggravate  
27 existing respiratory conditions. Ingestion of the non-

1 vaporized concentrated ingredients can be poisonous.  
2 This product is not intended to diagnose, treat, cure or  
3 prevent any condition, disorder, disease or physical or  
4 mental condition.

5 CA Proposition 65 WARNING: This product contains  
6 nicotine, a chemical known to the State of California to  
7 cause birth defect or other reproductive harm.

8 Ingredients: Tobacco-Derived Nicotine, Vegetable  
9 Glycerin, Propylene Glycol, and Natural and Artificial  
10 Flavors.

11  
12 Use only as intended - Under age sales to minors are  
13 prohibited and subject to criminal and civil penalties.<sup>23</sup>

14 62. The text on a bottle of Five Pawns e-liquid is as follows<sup>24</sup>:



24 63. By warning of risks relating to nicotine, and the risks that may arise if  
25

26 <sup>23</sup> FIVE PAWNS, <http://fivepawns.com> (last visited Nov. 10, 2015).

27 <sup>24</sup> Actual bottle of Five Pawns e-liquid purchased by Plaintiff Thomas.

1 the concentrated contents of the cartridge are swallowed without being vaporized,  
2 this packaging implies that those are the only health-related risks that relate to  
3 Defendant's e-liquids. The website warning is more substantial compared to the  
4 warning label on the product packaging, but still inadequate. Warnings regarding  
5 inhalation of the products and that it "may aggravate existing respiratory  
6 conditions" is misleading as studies show that inhaling DA and AP causes  
7 respiratory conditions, rather than merely aggravating them. Further, the website  
8 and the packaging omit reference to the other toxins and impurities, including DA  
9 and AP found in Defendant's e-liquids, and inaccurate levels of nicotine, as  
10 discussed above in Section II.

11 64. As demonstrated below, Defendant's pervasive advertisements  
12 representing that its products are of high quality and the levels of DA and AP  
13 contained therein are materially deceptive, false and misleading given the studies  
14 discussed above in Section II and fail to disclose that such research and studies  
15 have raised significant concerns about the health risks of Defendant's e-liquids,  
16 including but not limited to:

- 17 • the harmful impact to lung capacity as a result of the chemicals,  
18 including DA, AP, and propylene glycol, that are present in  
19 Defendant's e-liquids; and
- 20 • other potentially dangerous but unknown health effects caused by the  
21 long term use of e-cigarettes and e-liquids, including Defendant's e-  
22 liquids.

23 65. On June 29, 2015, in the "News" section of its website, Defendant told  
24 its customers and potential customers:

25 In response to the diacetyl concern in 2014, some vapor industry  
26 flavor suppliers began using acetyl propionyl (AP), Also known as 2,3  
27 pentanedione, as a substitute for diacetyl. While AP has not been  
28

1 linked to any health concerns related specifically to vaping, and it is  
2 not banned by the FDA or any International body, its relative safety or  
3 harm is unknown.<sup>25</sup>

4 66. Defendant also stated:

5 Five Pawns does not feel there is any concern with diacetyl or AP in  
6 our e-liquids at current levels. AP can be an important flavor  
7 enhancer for flavor profiles that are creamy in nature, and is used  
8 widely in the food and beverage industries.<sup>26</sup>

9 67. Again, this is false and misleading because, as shown in Section II,  
10 *supra*, DA and AP are harmful to the user's health. The fact that AP is approved by  
11 the FDA as an ingredient in food for ingestion is irrelevant as it is proven, as  
12 described in Section II, that ingesting AP is safe but inhaling AP is not.

13 68. By stating that the FDA has yet to ban DA and AP, and only including  
14 a warning regarding the harmful effects of ingestion on its product packaging,  
15 Defendant creates the false and misleading impression that these substances carry  
16 no risk and are safe as used for inhalation, as discussed above. However, the  
17 gastrointestinal system processes foreign matter differently than the respiratory  
18 system, and ingredients that may be safe when digested may not be safe when  
19 inhaled, especially with long term use. The additional statement that AP "is not  
20 banned by the FDA or any International body" is itself misleading in the absence  
21 of reference to the studies finding that these ingredients may not be safe when  
22 inhaled, including, but not limited to, the studies referenced in Section II above.  
23 For example, the study conducted by Professor Farsalinos stated: "Although the  
24 majority of flavourings are 'Generally Recognized As Safe' (GRAS) for food use,

25  
26 <sup>25</sup> See ¶ 53 n.21, *supra*.

27 <sup>26</sup> *Id.*

1 these substances have not been adequately tested for safety when inhaled.” *See* ¶  
2 53 n.22 at 3, *supra*. Farsalinos continued:

3 [T]here are some chemicals which, although approved for ingestion,  
4 have already established adverse health effects when inhaled. A  
5 characteristic example of this is diacetyl [DA]. This substance, also  
6 known as 2,3-butanedione, is a member of a general class of organic  
7 compounds referred to as diketones . . . [DA] has been associated with  
8 decline in respiratory function, manifested as reduced Forced  
9 Expiratory Volume in . . . subjects exposed to it through inhalation.  
10 Additionally it has been implicated in the development of  
11 bronchiolitis obliterans . . . .

12 *Id.* at 4.

13 69. Also found in the June 29, 2015 blog post in the “News” section on  
14 Defendant’s website, Defendant states, with respect to DA that it “can naturally  
15 occur in vapor liquids, just as with beer and wine, and some fruits such as  
16 strawberries.”<sup>27</sup>

17 70. To draw a parallel between DA in e-liquids and beer, wine, and  
18 strawberries is deceptive and misleading, as demonstrated by the studies cited  
19 *supra* in Section II.

20 71. Finally, Defendant lists the other ingredients of its e-liquids as  
21 unspecified “Natural and Artificial Flavors.” This is deceptive and misleading  
22 because the website does not disclose what those “Flavors” are or, if they contain  
23 AP and/or DA nor does it acknowledge that safety for use in food products does  
24 not denote safety for use in inhaled products, as described above.

25 72. On July 9, 2015, Plaintiffs, through their attorneys, sent Defendant a

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27 <sup>27</sup> *See* ¶ 53 n.21, *supra*.



1 pre-suit demand letter describing the allegations in this complaint.

2 73. On July 21, 2015, Defendant released its latest test results on its current  
3 ten vapor liquid flavors. Results for five of those ten flavors were identical to the  
4 results from the test performed on October 2014. After numerous comments on  
5 social media regarding the virtual impossibility of obtaining the same results down  
6 to the tenth of a  $\mu\text{g/ml}$ , on July 24, 2015, Defendant was compelled to insert  
7 asterisks in the “new” test results explaining that, five of those ten flavors, were in  
8 fact, not retested at all. The Company is therefore continuing to deceive its  
9 consumers. In fact, the post dated July 21, 2015 continues to state that “Five Pawns  
10 is pleased to release the latest test results on our current 10 vapor liquid flavors.”<sup>28</sup>  
11 The disclaimer that Defendant inserted can only be seen if you click on the pdf  
12 document embedded in the blog post.

13 74. On August 7, 2015, counsel for Defendant sent a letter to counsel for  
14 the Class and Subclasses. In the letter, counsel described the actions purportedly  
15 taken by Defendant to cure the violations in Plaintiffs’ pre-suit demand letter.  
16 Defendant claimed that it had “taken proactive steps to ensure proper  
17 communication, correction, and clarification of any prior inaccurate statements,  
18 including removing all outdated responses from all customer service computers,”  
19 as an effort to correct its “inadvertent mistaken responses” to “specific inquiries by  
20 a handful of individuals.”

21 75. Counsel for Defendant also stated that moving forward, Defendant will  
22 post results from DA and AP testing “on all of its liquids” on its website on a  
23 quarterly basis. *Id.*

24 76. The letter also stated that Defendant had contacted recipients of the

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25 <sup>28</sup> *Five Pawns 3Q 2015 & Past 12 Months Test Results*, FIVE PAWNS (July 21,  
26 2015), <http://fivepawns.com/fivepawns-2015-test-results/> (last visited Nov. 10,  
27 2015).

1 communications at issue and had offered refunds as compensation.

2 77. These actions fail to cure the defects as alleged in this Complaint.  
3 Defendant continues to misrepresent to its customers the adverse health effects of  
4 its products. Its website continues to state that Defendant “source[s] solely  
5 diacetyl-free ingredients, only to discover that trace amounts of diacetyl can  
6 naturally occur in vapor liquids . . . .”<sup>29</sup> This statement is false as the results from  
7 Defendant’s own testing show, that some of Defendant’s e-liquids contain levels of  
8 diacetyl that exceed amounts that are naturally occurring.

9 78. Defendant also states that “AP has not been linked to any health  
10 concerns related specifically to vaping . . . and its relative safety or harm is  
11 unknown.”<sup>30</sup> This statement is false as studies have demonstrated that AP (as well  
12 as DA) causes significant damage to the lungs.<sup>31</sup>

13 79. Moreover, contrary to the letter, Defendant does not post test results of  
14 “all of its liquids.” Defendant, in a footnote contained in a document embedded on  
15 its website, admitted that some of its e-liquids have not been tested since  
16 September 2014.

17 80. The fact that Defendant contacted a “handful of individuals” by email  
18 does not cure the violations outlined in this Complaint. Not only does the email  
19 contain more false statements and misrepresentations – *i.e.*, that the diacetyl found  
20 in Defendant’s e-liquids are naturally occurring, and that Defendant will “post test  
21 results quarterly on all of its liquids – but contacting a few individuals is  
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23 <sup>29</sup> See ¶ 53 n.21, *supra*.

24 <sup>30</sup> *Id.*

25 <sup>31</sup> *NIOSH Alert: Preventing Lung Disease in Workers Who Use or Make*  
26 *Flavorings*, DEP’T OF HEALTH AND HUMAN SERVICES (Dec. 2003),  
27 <http://www.cdc.gov/niosh/docs/2004-110/pdfs/2004-110.pdf> (last visited Nov. 10,  
2014).

1 insufficient to cure the alleged violations for the proposed Class and Subclasses.

2 81. On August 21, 2015, Defendant announced on its website that it is  
3 ceasing production on five of its e-liquid flavors – Absolute Pin, Sixty-Four, Fifth  
4 Rank, Lucena, and Perpetual Check, and consolidating the other five flavors,  
5 Castle Long, Grandmaster, Gambit, Queenside, and Bowden’s Mate, into a  
6 collection called The Insignia Series.<sup>32</sup> These actions are also insufficient to cure  
7 the alleged violations for the proposed Class and Subclasses.

8 82. On September 9, 2015, counsel for Plaintiffs responded to the August 7,  
9 2015 letter asserting that the actions Defendant had taken to date do not cure the  
10 defects alleged herein. Enclosed with the letter was a draft copy of this complaint  
11 and an invitation to confer regarding the outstanding violations.

12 **CLASS ACTION AND PRIVATE ATTORNEY GENERAL ALLEGATIONS**

13 83. Plaintiffs bring this action as a class action pursuant to Rule 23(a) and  
14 (b)(2) and/or (b)(3) of the Federal Rules of Civil Procedure (“Rule”) for the  
15 purpose of asserting the claims alleged in this Complaint on a common basis.  
16 Plaintiffs bring this action on behalf of themselves and all members of the  
17 following class comprised of:

18 All persons, exclusive of Defendant and its employees, who  
19 purchased in the United States, one or more Five Pawns e-liquids sold  
20 by Defendant from November 2012 to the present (the “Class”).

21 84. Plaintiff Greene brings this action on behalf of himself and all members  
22 of the following subclass comprised of:

23 All persons, exclusive of Defendant and its employees, who  
24 purchased in Indiana one or more Five Pawns e-liquids sold by

25  
26 <sup>32</sup> *Updated Tasting Notes, FIVE PAWNS* (Aug. 21, 2015),  
27 <http://fivepawns.com/updated-tasting-notes/> (last visited Nov. 10, 2015).

1 Defendant from November 2012 to the present (the “Indiana  
2 Subclass”).

3 85. Plaintiff Thomas brings this action on behalf of himself and all  
4 members of the following subclass comprised of:

5 All persons, exclusive of Defendant and its employees, who  
6 purchased in New York State one or more Five Pawns e-liquids sold  
7 by Defendant from November 2012 to the present (the “New York  
8 Subclass”).

9 86. The Indiana Subclass and the New York Subclass are collectively  
10 referred to herein as the “Subclasses,” and the Class and Subclasses are  
11 collectively referred to herein as the “Classes.”

12 87. Plaintiffs reserve the right to modify or amend the definitions of the  
13 Classes after they have had an opportunity to conduct discovery.

14 88. **Numerosity. Rule 23(a)(1).** The members of the Classes are so  
15 numerous that their individual joinder is impracticable. Plaintiffs are informed and  
16 believe that the proposed Classes contain at least thousands of purchasers of  
17 Defendant’s e-liquids who have been damaged by Defendant’s conduct as alleged  
18 herein. The number of Class members is unknown to Plaintiffs but could be  
19 discerned from the records maintained by Defendant.

20 89. **Existence of Common Questions of Law and Fact. Rule 23(a)(2).**  
21 This action involves common questions of law and fact, which include, but are not  
22 limited to, the following:

- 23 a. Whether the statements made by Defendant as part of its  
24 advertising for Defendant’s e-liquids discussed herein are true,  
25 or are reasonably likely to deceive, given the omissions of  
26 material fact described above;
- 27 b. Whether Defendant’s conduct described herein constitutes a  
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deceptive act or practice in violation of the CLRA;

- c. Whether Defendant’s conduct described herein constitutes an unlawful, unfair, and/or fraudulent business practice in violation of the UCL;
- d. Whether Defendant’s conduct described herein constitutes unfair, deceptive, untrue or misleading advertising in violation of the UCL;
- e. Whether Defendant’s conduct constitutes a breach of express warranty;
- f. Whether Defendant’s conduct described herein constitutes an unconscionable, deceptive, or unfair act or practice in violation of the Indiana Deceptive Consumer Sales Act;
- g. Whether Defendant’s conduct described herein constitutes a deceptive act or practice in violation of the GBL;
- h. Whether Plaintiffs and the other members of Classes are entitled to damages; and
- i. Whether Plaintiffs and the Classes are entitled to injunctive relief, restitution or other equitable relief and/or other relief as may be proper.

90. **Typicality. Rule 23(a)(3).** All members of the Classes have been subject to and affected by the same conduct and omissions by Defendant. The claims alleged herein are based on the same violations by Defendant that harmed Plaintiffs and members of the Classes. By purchasing Five Pawns e-liquids during the relevant time period, all members of the Classes were subjected to the same wrongful conduct. Plaintiffs’ claims are typical of the Classes’ claims and do not conflict with the interests of any other members of the Classes. Defendant’s unlawful, unfair, deceptive, and/or fraudulent actions and breaches of warranty

1 concern the same business practices described herein irrespective of where they  
2 occurred or were experienced.

3 91. **Adequacy. Rule 23(a)(4).** Plaintiffs will fairly and adequately protect  
4 the interests of the members of the Classes. Plaintiffs have retained counsel  
5 experienced in complex consumer class action litigation, and Plaintiffs intend to  
6 prosecute this action vigorously. Plaintiffs have no adverse or antagonistic  
7 interests to those of the Classes.

8 92. **Injunctive and Declaratory Relief. Rule 23(b)(2).** Defendant's actions  
9 regarding the deceptions and omissions regarding Five Pawns e-liquids are  
10 uniform as to members of the Classes. Defendant has acted or refused to act on  
11 grounds that apply generally to the Classes, so that final injunctive relief as  
12 requested herein is appropriate respecting the Classes as a whole.

13 93. **Predominance and Superiority of Class Action. Rule 23(b)(3).**  
14 Questions of law or fact common to the Classes predominate over any questions  
15 affecting only individual members, and a class action is superior to other methods  
16 for the fast and efficient adjudication of this controversy, for at least the following  
17 reasons:

- 18 a. Absent a class action, members of the Classes as a practical  
19 matter will be unable to obtain redress, Defendant's violations  
20 of their legal obligations will continue without remedy,  
21 additional consumers will be harmed, and Defendant will  
22 continue to retain its ill-gotten gains;
- 23 b. It would be a substantial hardship for most individual members  
24 of the Classes if they were forced to prosecute individual  
25 actions;
- 26 c. When the liability of Defendant has been adjudicated, the Court  
27 will be able to determine the claims of all members of the  
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Class;

- d. A class action will permit an orderly and expeditious administration of the claims of each member of the Classes and foster economies of time, effort, and expense;
- e. A class action regarding the issues in this case does not create any problems of manageability; and
- f. Defendant has acted on grounds generally applicable to the members of the Classes, making class-wide monetary relief appropriate.

94. Plaintiffs do not contemplate class notice if the Classes are certified under Rule 23(b)(2), which does not require notice, and notice to the putative Classes may be accomplished through publication, signs or placards at the point-of-sale, or other forms of distribution, if necessary; if the Classes are certified under Rule 23(b)(3); or if the Court otherwise determines class notice is required. Plaintiffs will, if notice is so required, confer with Defendant and seek to present the Court with a stipulation and proposed order on the details of a class notice program.

**COUNT I**

**Violations of the Consumers Legal Remedies Act**

**(Cal. Civil Code §§ 1750, *et seq.*)**

**(On Behalf of Plaintiffs and the Class)**

95. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

96. This cause of action is brought pursuant to the Consumers Legal Remedies Act, California Civil Code §§ 1750, *et seq.* (the “CLRA”), which provides that enumerated listed “unfair methods of competition and unfair or deceptive acts or practices [including those listed below in ¶ 101] undertaken by

1 any person in a transaction intended to result or which results in the sale or lease of  
2 goods or services to any consumer are unlawful,” Cal. Civ. Code § 1770, and that  
3 “[a]ny consumer who suffers any damage as a result of the use or employment by  
4 any person of a method, act, or practice declared to be unlawful by Section 1770  
5 may bring an action against that person to recover or obtain,” various forms of  
6 relief, including an injunction and damages. Cal. Civ. Code § 1780. This cause of  
7 action is seeks both injunctive relief and damages on behalf of the Class.

8 97. On July 9, 2015, prior to the filing of this Complaint, Plaintiffs sent  
9 Defendant a CLRA notice letter providing the notice required by California Civil  
10 Code section 1782(a). Plaintiffs sent the letter via certified mail, return receipt  
11 requested, to Defendant’s principal place of business in Irvine, California advising  
12 Defendant that it is in violation of the CLRA and must correct, replace or  
13 otherwise rectify the goods and/or services alleged to be in violation of section  
14 1770. Defendant was further advised that in the event the relief requested was not  
15 provided within thirty (30) days, Plaintiffs would file their Complaint that would  
16 include a request for monetary damages pursuant to the CLRA. A true and correct  
17 copy of Plaintiffs’ letter is attached hereto as Exhibit A.

18 98. On August 7, 2015, Defendant, by its attorneys, responded to Plaintiffs’  
19 letter. A true and correct copy of Defendant’s letter is attached hereto as  
20 Exhibit B. As set forth in Defendant’s letter, Defendant did not correct, replace, or  
21 otherwise rectify the goods and/or services alleged in Plaintiffs’ letter.  
22 Accordingly, Plaintiffs seek monetary damages pursuant to the CLRA.

23 99. Plaintiffs were deceived by Defendant’s unlawful practices as described  
24 more fully above, which included carrying out an advertising campaign, directed at  
25 Plaintiffs and the Class, conveying the message that Defendant’s e-liquids are free  
26 of DA and AP and variations of that statement. This advertising campaign was  
27 deceptive, false and misleading given: the ingredients and characteristics of  
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1 Defendant's products which were known or should have been known to Defendant;  
2 and the test results and studies that have found DA and AP and other harmful  
3 impurities in Defendant's e-liquids, and that inhaling these substances could be  
4 harmful to health, none of which was disclosed. Also undisclosed was the lack of  
5 research required to assess the potential danger of electronic cigarettes, especially  
6 in long term users.

7 100. Defendant's actions, representations and conduct have violated, and  
8 continue to violate, the CLRA because they extend to transactions that are intended  
9 to result, or which have resulted, in the sale of goods to consumers.

10 101. Defendant marketed, sold and distributed its e-liquids in California  
11 and throughout the United States during the relevant period.

12 102. Plaintiffs and members of the Class are "consumers" as that term is  
13 defined by the CLRA in California Civil Code section 1761(d).

14 103. Defendant's e-liquids were and are "good[s]" within the meaning of  
15 California Civil Code section 1761(a) & (b).

16 104. Defendant violated the CLRA by engaging in at least the following  
17 practices proscribed by California Civil Code section 1770(a) in transactions with  
18 Plaintiffs and the Class which were intended to result in, and did result in, the sale  
19 of Defendant's e-liquids:

20 (5) Representing that [Five Pawns e-liquids] have . . . approval,  
21 characteristics . . . uses [or] benefits . . . which they do not have . . . .

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23 (7) Representing that [Five Pawns e-liquids] are of a particular standard,  
24 quality or grade . . . if they are of another.

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26 (9) Advertising goods . . . with intent not to sell them as advertised.

27 105. As such, Defendant's conduct constitutes unfair methods of  
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1 competition and unfair or fraudulent acts or practices because it does not sell, and  
2 because it intends not to sell, the e-liquids as advertised and instead misrepresents  
3 the particulars by, in its marketing, representing its e-liquids as described above  
4 when it knew, or should have known, that the representations and advertisements  
5 were deceptive, false and misleading in light of the omissions of material facts as  
6 described above.

7 106. The omitted information would have been material to a reasonable  
8 customer in his or her decision as to whether to purchase Defendant's e-liquids  
9 and/or purchase Defendant's e-liquids at the price at which they were offered.

10 107. Defendant had a duty to disclose this information to Plaintiffs and the  
11 members of the Class for several reasons. First, Defendant repeatedly made the  
12 representation that its products are free of DA and AP and that even if they do,  
13 they do contain those ingredients, they do not pose a health risk, or closely  
14 analogous representations, as detailed above. Disclosure of the omitted  
15 information, including information in the studies referred to *supra* in Section II,  
16 was necessary to avoid the false impression of safety provided by that tagline.  
17 Second, Defendant was in a position to know of the omitted information, both from  
18 its own product knowledge and creation decisions and the studies of the presence  
19 of DA and AP in its e-liquids, especially as described in the studies and test results,  
20 including Defendant's own test results referenced *supra* in Section II, while  
21 consumers were not reasonably in a position to be aware of Defendant's internal  
22 product information or such studies. Third, Defendant actively failed to disclose  
23 these material facts to, or actively concealed these material facts from, Plaintiffs  
24 and the Class. Finally, while Defendant made representations about the risks  
25 associated with its e-liquids, stating that its products contain nicotine and that  
26 consumers bear risks related thereto, those representations were misleading half-  
27 truths because they implied that those are all of the risks relating to the product,

1 when, in fact, they are not.

2 108. Defendant provided Plaintiffs and the other Class members with e-  
3 liquids that did not match the quality portrayed by its marketing.

4 109. As a result, Plaintiffs and members of the Class have suffered  
5 irreparable harm. Plaintiffs' and the other Class members' injuries were  
6 proximately caused by Defendant's conduct as alleged herein. Plaintiffs,  
7 individually and on behalf of all other Class members, seek entry of an order  
8 enjoining Defendant from continuing to employ the unlawful methods, acts and  
9 practices alleged herein pursuant to California Civil Code section 1780(a)(2),  
10 awarding exemplary and punitive damages against Defendant pursuant to  
11 California Civil Code sections 1780(a)(1) and (a)(4), and ordering the payment of  
12 costs and attorneys' fees, and such other relief as deemed appropriate and proper  
13 by the Court under California Civil Code section 1780(a)(2). If Defendant is not  
14 restrained from engaging in these practices in the future, Plaintiffs and the Class  
15 will continue to suffer harm.

16 110. Pursuant to section 1780(d) of the CLRA, attached hereto as Exhibit C  
17 is an affidavit showing that this action has been commenced in the proper forum.

18 **COUNT II**

19 **Violations of the Unfair Competition Law**

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

21 **(On Behalf of Plaintiffs and the Class)**

22 111. Plaintiffs repeat and reallege the allegations contained in the  
23 paragraphs above, as if fully set forth herein.

24 112. The Unfair Competition Law, Cal. Business & Professions Code §§  
25 17200, *et seq.* ("UCL"), prohibits any "unlawful," "unfair," or fraudulent, business  
26 act or practice and any false or misleading advertising.

27 113. In the course of conducting business, Defendant committed unlawful  
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1 business practices by, *inter alia*, making the representations (which also constitute  
2 advertising within the meaning of § 17200) and omissions of material facts, as set  
3 forth more fully herein, and violating California Civil Code sections 1750, *et seq.*,  
4 and the common law.

5 114. Plaintiffs, individually and on behalf of other Class members, reserve  
6 the right to allege other violations of law which constitute other unlawful business  
7 acts or practices. Such conduct is ongoing and continues to this date.

8 115. Defendant's actions constitute "unfair" business acts or practices  
9 because, as alleged above, *inter alia*, Defendant engages in deceptive and false  
10 advertising, and misrepresents and omits material facts regarding its e-liquids, and  
11 thereby offends an established public policy, and engages in immoral, unethical,  
12 oppressive, and unscrupulous activities that are substantially injurious to  
13 consumers. This conduct constitutes violations of the unfair prong of Business &  
14 Professions Code sections 17200, *et seq.*

15 116. Business & Professions Code sections 17200, *et seq.*, also prohibits  
16 any "fraudulent business act or practice."

17 117. Defendant's actions, claims, nondisclosures, and misleading  
18 statements, as alleged in this Complaint, also constitute "fraudulent" business  
19 practices in violation of the UCL because, among other things, they are false,  
20 misleading, and/or likely to deceive reasonable consumers within the meaning of  
21 Business & Professions Code sections 17200, *et seq.*

22 118. There were reasonably available alternatives to further Defendant's  
23 legitimate business interests, other than the conduct described herein.

24 119. As a result of Defendants' pervasive false marketing, including  
25 deceptive and misleading acts and omissions as detailed in this Complaint,  
26 Plaintiffs and other members of the Class have in fact been harmed as described  
27 above. If Defendant had disclosed the information discussed above about its e-

1 liquids and otherwise been truthful about their safety, Plaintiffs would not have  
2 purchased Defendant's products. Defendant was also able to charge more than  
3 what its e-liquids would have been worth had it disclosed the truth about them.

4 120. As a result of Defendant's unlawful, unfair, and fraudulent practices,  
5 Plaintiffs and the other Class members have suffered injury in fact and lost money.

6 121. As a result of its deception, Defendant has been able to reap unjust  
7 revenue and profit in violation of the UCL.

8 122. Unless restrained and enjoined, Defendant will continue to engage in  
9 the above-described conduct. Accordingly, injunctive relief is appropriate for  
10 Plaintiffs and the Class.

11 123. As a result of Defendant's conduct in violation of the UCL, Plaintiffs  
12 and members of the Class have been injured as alleged herein in amounts to be  
13 proven at trial because they purchased Defendant's e-liquids without full  
14 disclosure of the material facts discussed above.

15 124. As a result, Plaintiffs individually, and on behalf of the Class, and the  
16 general public, seek restitution and disgorgement of all money obtained from  
17 Plaintiffs and the other members of the Class collected by Defendant as a result of  
18 its unlawful, unfair, and/or fraudulent conduct, and seek injunctive relief, and all  
19 other relief this Court deems appropriate, consistent with Business and Professions  
20 Code section 17203.

21 125. Plaintiffs are also suing on behalf of the general public as defined in  
22 Business and Professions Code section 17204 in order to enjoin and remedy the  
23 ongoing unlawful, unfair, and fraudulent business practices alleged herein and to  
24 obtain declaratory, injunctive, and other appropriate relief on behalf of all those  
25 members of the general public who have been victimized by Five Pawns's actions.

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**COUNT III**

**Violations of the False Advertising Law  
(Cal. Bus. & Prof. Code §§ 17500 *et seq.*)  
(On Behalf of Plaintiffs and the Class)**

126. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

127. Plaintiffs have standing to pursue this claim as Plaintiffs suffered injury in fact as a result of Defendant’s actions as set forth herein. Specifically, prior to the filing of this action, Plaintiffs purchased Defendant’s e-liquids in reliance upon Defendant’s marketing claims. Plaintiffs used Defendant’s e-liquids believing that the products were of a higher quality and safer to consume than as advertised.

128. Defendant’s business practices as alleged herein constitute unfair, deceptive, untrue, and misleading advertising pursuant to California Business and Professions Code sections 17500, *et seq.*, because Defendant has advertised its Products in a manner that is untrue and misleading, or that Defendant knew was untrue or misleading, or omitted material information from its advertising which Defendant had a duty to disclose.

129. Defendant’s wrongful business practices have caused injury to Plaintiffs and the Class, in the form of the lost purchase price of the e-juices. Plaintiffs and the Class purchased the products after being exposed to Defendant’s false or deceptive advertising claims, as described herein.

130. Defendant’s conduct caused and continues to cause substantial injury to Plaintiffs and the other members of the Class. Plaintiffs and the Class continue to be exposed to Defendant’s false and/or misleading advertising every time they shop for e-liquids and encounter Defendant’s false or deceptive advertising on store shelves or on the internet. Defendant’s competitors will also continue to

1 suffer from Defendant’s unfair or deceptive business conduct if injunctive relief is  
2 not afforded.

3 131. Pursuant to section 17535 of the California Business and Professions  
4 Code, Plaintiff and the Class seek an order of this Court enjoining Defendant from  
5 continuing to engage in deceptive business practices, false advertising, and any  
6 other act prohibited by law, including those set forth in this Complaint.

7 132. Plaintiff and the Class also seek an order for the disgorgement and  
8 restitution of all monies from the sale of Defendant’s e-liquids, which were  
9 unjustly acquired through acts of unlawful, unfair, and/or fraudulent competition.

10 **COUNT IV**

11 **Breach of the Indiana Deceptive Consumer Sales Act**

12 **(Ind. Code §§ 24-5-0.5, *et seq.*)**

13 **(On Behalf of Plaintiff Greene and the Indiana Subclass)**

14 133. Plaintiff Greene repeats and realleges the allegations contained in the  
15 paragraphs above, as if fully set forth herein.

16 134. This cause of action is brought pursuant to the Indiana Deceptive  
17 Consumer Sales Act, Ind. Code §§ 24-5-0.5, *et seq.* (the “IDCSA” or the “Act”).  
18 The stated purpose of the Act is to “protect consumers from suppliers who commit  
19 deceptive and unconscionable sales acts” and to “encourage the development of  
20 fair consumer sales practices.” Ind. Code § 24-5-0.5-1(b).

21 135. This cause of action is for damages pursuant to Indiana Code section  
22 24-5-0.5-4(a). Pursuant to the Act, a consumer may bring an action “for the  
23 damages actually suffered . . . as a result of the deceptive act or [\$500], whichever  
24 is greater.” Ind. Code § 24-5-0.5-4(a).

25 136. Plaintiff Greene and each member of the Indiana Subclass are  
26 consumers and purchased Defendant’s e-liquids during the period of Defendant’s  
27 pervasive false advertising.

1 137. Defendant is engaged in trade or commerce within the meaning of the  
2 Act.

3 138. Indiana Code section 24-5-0.5-2(a)(8) defines “incurable deceptive  
4 act” as “a deceptive act done by a supplier as part of a scheme, artifice, or device  
5 with intent to defraud or mislead.” The wrongs complained of herein are “incurable  
6 deceptive acts” as Plaintiffs gave Defendant sufficient notice and an opportunity to  
7 cure, as alleged more fully *infra*.

8 139. Defendant has violated the Act by engaging in the unfair and  
9 deceptive practices as described herein, which included carrying out an advertising  
10 campaign, directed at Plaintiff Greene and the Indiana Subclass, conveying the  
11 message that Defendant’s e-liquids are free of DA and/or AP and that they are not  
12 harmful even if those ingredients do exist in their products, and variations of that  
13 statement, which were deceptive, false and misleading given the studies that have  
14 found carcinogens, toxins, and other potentially harmful impurities in Defendant’s  
15 e-liquids and in e-liquids generally. Also undisclosed was the lack of additional  
16 research which such studies have determined is required to assess the potential  
17 danger of e-liquids, especially in long term users, which failure to disclose offends  
18 public policies and is immoral, unethical, unscrupulous and substantially injurious  
19 to consumers.

20 140. Plaintiff Greene and the members of the Indiana Subclass have been  
21 aggrieved by Defendant’s unfair and deceptive practices in that they purchased  
22 Defendant’s e-liquids. As a result of Defendant’s unfair and deceptive acts, and  
23 unlawful conduct, Plaintiff Greene and the other members of the Indiana Subclass  
24 have in fact been harmed. If Defendant had disclosed the information discussed  
25 above about Defendant’s e-liquids and had been otherwise truthful about their  
26 safety, Plaintiff Greene would not have purchased Defendant’s products. In fact,  
27 Defendant was able to charge more than what its e-liquids would have been worth



1 had it disclosed the truth about them.

2 141. The damages suffered by Plaintiff Greene and the Indiana Subclass  
3 were directly and proximately caused by Defendant's unfair and deceptive  
4 practices, as more fully described herein.

5 142. On July 9, 2015, prior to the filing of this Complaint, Plaintiffs sent  
6 Defendant a notice letter pursuant to Indiana Code section 24-5-0.5-4(a) providing  
7 the required notice. Plaintiffs sent the letter via certified mail, return receipt  
8 requested, to Defendant's principal place of business in Irvine, California advising  
9 Defendant that it is in violation of the Act and must correct, replace or otherwise  
10 rectify the goods and/or services alleged to be in violation of the Act. Defendant  
11 was further advised that in the event the relief requested has not been provided  
12 within thirty (30) days, Plaintiffs would file their Complaint that would include a  
13 request for monetary damages pursuant to the Act. A true and correct copy of  
14 Plaintiffs' letter is attached hereto as Exhibit A.

15 143. On August 7, 2015, Defendant, by its attorneys, responded to  
16 Plaintiffs' letter. A true and correct copy of Defendant's letter is attached hereto as  
17 Exhibit B. As set forth in Defendant's letter, Defendant did not correct, replace, or  
18 otherwise rectify the goods and/or services alleged to be in violation of the Act in  
19 Plaintiffs' letter. Accordingly, Plaintiff Greene seeks monetary damages pursuant  
20 to the Act.

21 144. Pursuant to Indiana Code section 24-5-0.5-4(c) Plaintiff Greene, on  
22 behalf of himself and the Indiana Subclass, seeks a declaratory judgment and a  
23 court order enjoining the above-described wrongful acts and practices of  
24 Defendant and for restitution and disgorgement.

25 145. Additionally, pursuant to Indiana Code section 24-5-0.5-4, Plaintiff  
26 Greene, on behalf of himself and the Indiana Subclass, seeks damages, attorneys'  
27 fees and costs.

**COUNT V**

**Violations of the New York General Business Law**

**(N.Y. GBS Law § 349)**

**(On Behalf of Plaintiff Thomas and the New York Subclass)**

146. Plaintiff Thomas repeats and realleges the allegations contained in the paragraphs above, as if fully set forth herein.

147. This cause of action is brought pursuant to the New York General Business Law section 349 (“GBL § 349”), which prohibits deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in New York State.

148. The conduct of Defendant alleged herein violates GBL § 349 in that Defendant engaged in the unfair and deceptive practices as described herein, which included carrying out an advertising campaign, directed at Plaintiff Thomas and the New York Subclass, conveying the message that Defendant’s e-liquids are free of DA and/or AP and that they are not harmful even if those ingredients do exist in their products, and variations of that statement, which were deceptive, false and misleading given the studies that have found carcinogens, toxins, and other potentially harmful impurities in Defendant’s e-liquids and in e-liquids generally. Also undisclosed was the lack of additional research which such studies have determined is required to assess the potential danger of e-liquids, especially in long term users, which omissions offend public policies and are immoral, unethical, unscrupulous and substantially injurious to consumers. Such conduct is inherently and materially deceptive and misleading, and Defendant knew, or by the exercise of reasonable care should have known, that its misstatements and omissions were untrue, deceptive or misleading.

149. The materially misleading conduct of Defendant alleged herein was directed at the public at large.

1           150. Defendant's acts and practices described above are likely to mislead a  
2 reasonable consumer acting reasonably under the circumstances.

3           151. Defendant has willfully and knowingly violated GBL § 349 because,  
4 in order to increase its own profits, Defendant intentionally engaged in deceptive  
5 and false advertising, misrepresentations and omission of material facts regarding  
6 its e-liquids as discussed above.

7           152. As a result of Defendant's deceptive and misleading acts, Plaintiff  
8 Thomas and the other members of the New York Subclass have been injured  
9 because they purchased Defendant's e-liquids without full disclosure of the  
10 material facts discussed above.

11           153. As a result of Defendant's conduct in violation of GBL § 349,  
12 Plaintiff Thomas and the other members of the New York Subclass have been  
13 injured as alleged herein in amounts to be proven at trial because if Defendant had  
14 disclosed the information discussed above about its e-liquids and otherwise been  
15 truthful about their safety, Plaintiff Thomas would not have purchased Defendant's  
16 products. Defendant was also able to charge more than what its e-liquids would  
17 have been worth had it disclosed the truth about them.

18           154. As a result, pursuant to GBL § 349, Plaintiff Thomas and the New  
19 York Subclass are entitled to make claims against Defendant for actual or statutory  
20 damages to be determined at trial, but for not less than fifty (50) dollars per New  
21 York Subclass member, such damages to be trebled.

22           155. Additionally, pursuant to GBL § 349, Plaintiff Thomas and the New  
23 York Subclass make claims for attorneys' fees, costs, and injunctive relief  
24 requiring Defendant to adequately disclose the omitted information described  
25 above.

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**COUNT VI**

**Breach of Express Warranty**

**(On Behalf of Plaintiffs and the Class)**

156. Plaintiffs repeat and reallege the allegations contained in the paragraphs above, as if fully set forth herein.

157. Plaintiffs bring this claim individually and on behalf of the Class.

158. Plaintiffs, and each member of the Class, formed a contract with Defendant at the time Plaintiffs and the other members of the Class purchased Defendant's e-liquids or related paraphernalia. The terms of that contract include the promises and affirmations of fact made by Defendant on its e-liquids packaging and inserts and through the Five Pawns marketing campaign, as described above. This product packaging and advertising constitutes express warranties, became part of the basis of the bargain, and is part of a standardized contract between Plaintiffs and the members of the Class on the one hand, and Defendant on the other.

159. Plaintiffs and the Class members performed their obligations under the contract.

160. Defendant breached the terms of this contract, including the express warranties, with Plaintiffs and the Class by not providing Defendant's e-liquids that offered a product free of DA and AP (or similar variations) and otherwise omitted material information about potential health risks associated with the product. Such express warranties breached by Defendant include the representations set forth above in Sections II and III.

161. As a result of Defendant's breach of its contract, Plaintiffs and the Classes have been damaged in the amount of the purchase price of the Five Pawns e-liquids they purchased.

**PRAAYER FOR RELIEF**

Wherefore, Plaintiffs, on behalf of themselves, all others similarly situated, and the general public, pray for a judgment:

- a. Certifying each of the Classes as requested herein, appointing Plaintiffs Greene, Thomas and Hirtzel as class representatives for the Class and respective Subclasses;
- b. Requiring Defendant to disgorge or return all monies, revenues and profits obtained by means of any wrongful act or practice to Plaintiffs and the members of the Classes under each cause of action where such relief is permitted;
- c. Enjoining Defendant from continuing the unlawful practices as set forth herein, including marketing or selling its e-liquids without disclosing the potential health risks relating thereto, and directing Defendant to engage in corrective action, or providing other injunctive or equitable relief;
- d. Awarding damages pursuant to California Civil Code section 1780, the Indiana Deceptive Consumer Sales Act, and GBL § 349 including exemplary and punitive damages to prevent and deter Defendant from future unlawful conduct;
- e. Awarding damages for breach of express warranty;
- f. Awarding all equitable remedies available pursuant to California Civil Code section 1780, Indiana Code section 24-5-0.5-4(c), GBL § 349 and other applicable law;
- g. Awarding attorneys' fees and costs;
- h. Awarding pre-judgment and post-judgment interest at the legal rate; and
- i. Providing such further relief as may be just and proper.

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**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demand a trial by jury on all issues so triable.

DATED: November 11, 2015

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**

By:           /s/ Rachele R. Rickert            
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