

**DEPARTMENT 50 LAW AND MOTION RULINGS****Case Number:** 18STCV03053 **Hearing Date:** April 16, 2021 **Dept:** 50*Superior Court of California**County of Los Angeles**Department 50*THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff,

vs.

KANDYPENS, INC., et al.

Defendants.

Case No.: 18STCV03053

Hearing Date: April 16, 2021

Hearing Time: 2:00 p.m.

**[TENTATIVE] ORDER RE:**

PLAINTIFF'S MOTION FOR REMEDIES

**I. BACKGROUND**

On October 31, 2018, Plaintiff the People of the State of California ("Plaintiff") filed this government enforcement action against Defendant Kandypens, Inc. ("Defendant") seeking to limit Defendant's ability to sell vaping products to minors.

Pursuant to the complaint, Plaintiff seeks injunctive relief and civil penalties for violations of the Unfair Competition Law ("UCL") codified in Business and Professions Code section 17200, *et seq.*, the Stop Tobacco Access to Kids Enforcement Act (the "STAKE Act") codified in Business and Profession Code section 22950, *et seq.*, and the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Prop 65," as in Proposition 65 passed by direct voter initiative in California in 1986) codified in Health and Safety Code section 25249.5, *et seq.*

On March 5, 2019, the Court so-ordered the parties' stipulated preliminary injunction requiring Defendant to restrict certain conduct and produce a compliance report every 90 days documenting compliance with the preliminary injunction's terms.

On November 10, 2020, the Court granted Plaintiff's summary judgment motion.

On January 14, 2021, the Court conducted a status conference. The parties stipulated that Plaintiff could request adjudication of its remedies as the prevailing party in the form of a motion, *i.e.*, without the need for live testimony.

Plaintiff now moves for an adjudication of remedies against Defendant, as specified in its twelve-page Proposed Final Judgment. The Proposed Final Judgment's essential elements include: (1) a permanent injunction lasting four years requiring Defendant to comply with the STAKE Act, Prop 65, and federal and state tobacco laws, and produce semi-annual compliance reports documenting the same; and (2) a \$1,200,000 penalty, which includes \$600,000 under the STAKE Act, \$300,000 under the UCL, and \$300,000 under Prop 65.

Defendant opposes and Plaintiff filed a reply.

As set forth below, the Court GRANTS Plaintiff's motion with a few modifications.

## II. EVIDENCE

The Court grants Plaintiff's request for judicial notice as to Exhibits 28-30 and 38-47.

The Court overrules Defendant's evidentiary objections to the Mahmood Declaration and Curry Declaration made on the grounds of relevance, danger of unfair prejudice, and hearsay.

These documents are helpful in assessing the proposed judgment's reasonableness. The Court can fairly evaluate this evidence without any claimed danger of unfair prejudice to Defendant. The Court does not consider the documents for their truth of the contents, but considers them for background information and the existence of key concepts, which are shared by the same industry in which Defendant operates. Additionally, the Court does not consider the documents annexed to the Curry Declaration for the truth of the contents, but considers them for Defendant's constructive knowledge that it worked with artists who had substantial youth followings.

## III. DISCUSSION

As discussed above, the remedies here involve two main categories of relief: (1) injunctive relief restricting certain conduct, and (2) a penalty. Defendant argues that: (1) the injunctive relief is overbroad, unreasonable, and unnecessary to remedy Defendant's alleged misconduct; and (2) the penalty is excessive. The Court addresses each in turn below.

### **A. Whether the requested injunctive relief is justified**

It is undisputed that some injunctive relief is appropriate here. The parties disagree about the correct relief including the restrictions and compliance duration. Regarding the restrictions, they are too numerous to

describe briefly, though they are adequately captured in Defendant's opposition and Plaintiff's Proposed Final Judgment. (Compare opposition 7:11-10:12 with Proposed Final Judgment 1:12-9:16.) Regarding the compliance duration, Plaintiff requests a four-year period and Defendant proposes a one-year period.

Generally, Defendant argues that the requested injunctive relief is overbroad, unreasonable, and unnecessary to remedy Defendant's alleged misconduct. More specifically, Defendant argues that: (1) it is now in compliance with the STAKE Act and Prop 65 rendering injunctive relief unnecessary; (2) requiring Defendant to comply with other state or federal law or regulation involving marketing or sale of tobacco products is overbroad; and (3) Defendant's marketing practices are lawful and should not be enjoined. The Court addresses each in turn.

As set forth below, the Court mostly disagrees with Defendant.

### 1. Injunctive relief is still necessary for the STAKE Act and Prop 65 violations

Defendant argues that it is in compliance with its obligations under the STAKE Act and Prop 65 rendering further injunctive relief unnecessary. The Court disagrees.

Defendant stipulated to a preliminary injunction prohibiting certain conduct and requiring semi-annual compliance reports. (Mahmood Decl. Ex. 8.) However, Defendant violated the preliminary injunction by not issuing regular compliance reports with the required information and by continuing to engage in misconduct, including engaging in quarterly Instagram giveaways without requiring someone over 21-years-old to sign for the product and not providing proper warnings on its website for Rubi even after the Court ruled on this issue when granting summary judgment in Plaintiff's favor. (*Id.* Ex. 9, 14, 15-22.) Defendant may have implemented stringent age verification software on its website. (Gibson Decl. ¶¶ 29-30.) But Defendant's Instagram giveaways demonstrate that Defendant continued to commit misconduct knowing its explicit obligations regarding its own website. And though Defendant now has "age-gated" its Instagram and requires a copy of identification for its giveaway winners (Matura Decl. Ex. 49 112:24-113:14), there is no indication that Defendant will comply with requirements of a signature by someone over 21 years old when the product is actually delivered. Regarding its Prop 65 violations, Defendant continues to argue the merits of its defenses after the Court already rejected those defenses involving Rubi and the website's product display page. (November 10, 2020 Order pp. 6-10.) Defendant's continued violation of the product display page (Mahmood Decl. Ex. 15-22) despite the Court's explicit order sufficiently demonstrates that an injunction is necessary to ensure Defendant complies with the law.

Accordingly, injunctive relief is appropriate under the STAKE Act and Prop 65.

## 2. Injunctive relief cannot include compliance with non-California state and federal tobacco product laws

Plaintiff requests that the order for injunctive relief requires Defendant to comply with other state or federal law or regulation that addresses the marketing or sale of tobacco products. The Court does have broad power to fashion remedies to prevent illegal practices. (See *United Farm Workers of America, AFL-CIO v. Dutra Farms* (2000) 83 Cal.App.4th 1146, 1165.) However, that power is not unlimited.

As a preliminary matter, Plaintiff identifies no supporting authority providing the Court with the authority to enjoin Defendant's out-of-state business activities generally even if those activities violate California law. These circumstances likely are rare or do not exist because Defendant conducts its business activities online, and thus implicate Californians using the Internet. In other words, Defendant's out-of-state business activities, even those targeting non-Californians, would inherently also target Californians and/or result in California business activities.

Regarding California business activities, there are two separate issues: (1) conduct that violates *non-California state* tobacco product laws; and (2) conduct that violates federal tobacco product laws. Plaintiff identifies no supporting authority providing the Court with the authority to enjoin Defendant's conduct that violates *non-California state* tobacco product laws. Instead, the proper scope of the injunctive relief if premised on state law should involve only California law. Regarding federal tobacco product laws, Plaintiff overlooks that California law and federal law define tobacco products differently. (Compare Bus. & Prof. Code, § 22950.5, subd. (d)[1] with 28 U.S.C., § 321, subd. (rr)(1)[2].) The Court previously determined that the at-issue products were tobacco products only under California law, not federal law. (November 10, 2020 Order 4:20-21.) Because Plaintiff has not conclusively established that the at-issue products are governed by federal tobacco product laws, the Court does not enjoin conduct that may violate federal law.

Accordingly, the Court does not grant injunctive relief on any California business activities that violate non-California state tobacco product laws and federal tobacco product laws. However, the Court notes that this ruling shall not conflict with any injunctive relief granted pursuant to the STAKE Act or any other California law. In other words, for example, if the STAKE Act restricts the conduct, Defendant cannot engage in that conduct even if it is permissible under non-California laws.

## 3. Injunctive relief involving Defendant's marketing practices is appropriate

Defendant argues that the Court should not enjoin Defendant's marketing practices. The Court disagrees.

Defendant argues that the Court has not ruled whether Defendant's marketing strategies constitute a violation of the UCL. However, this argument overlooks that selling tobacco products over the Internet in violation of the STAKE Act is unlawful youth marketing that violates the UCL.

In any event, Defendant engaged in widespread misconduct that permits the Court to exercise its broad power to issue injunctive terms beyond mere adherence to a specific statute in order to protect the underlying policy. (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 540-542 superseded on other grounds.) Defendant's marketing conduct largely took on a purposeful ignorance of demographic data (*see*, motion 7:9-21) or conscious disregard of actual marketing targeting youth (*see, id.* 7:22-8:16).

The Court finds that the injunctive relief restricting the targeted youth marketing as identified in the Proposed Final Judgment is reasonable.

#### 4. Compliance duration

Regarding the compliance duration, Plaintiff requests a four-year period and Defendant proposes a one-year period. Neither party briefs this issue. The Court finds a four-year period reasonable considering the number of violations and Defendant's continued misconduct after Defendant stipulated to a preliminary injunction and the Court granted summary judgment in Plaintiff's favor.

#### 5. Conclusion

The Court grants injunctive relief as set forth in the Proposed Final Judgment that is not inconsistent with the above. The compliance time period is four years from the date of the entry of judgment. Plaintiff is to file a revised proposed judgment as modified to incorporate any adverse or inconsistent rulings above.

### **B. Whether the requested \$1,200,000 penalty is excessive**

It is undisputed that some penalty is appropriate here. The parties disagree about the correct number. Defendant proposes \$350,000. Plaintiff seeks \$1,200,000, which includes \$600,000 under the STAKE Act, \$300,000 under the UCL, and \$300,000 under Prop 65.

Defendant argues that a penalty this high ignores the context. More specifically, Defendant argues that a \$1,200,000 penalty is excessive because: (1) it is disproportional to Defendant's culpability and resulting harm; (2) it is disproportional to treatment of other vape and e-liquid companies; and (3) Defendant cannot afford to pay it.

As set forth below, the Court disagrees with Defendant.

#### 1. The penalty is proportional to Defendant's misconduct

As a preliminary matter, it is first necessary to examine whether the applicable statutes permit a penalty as high as \$1,200,000. In other words, it is first necessary to determine whether a \$1,200,000 penalty is permissible before considering any mitigating factors.

There are many relevant factors for the Court to consider when imposing a penalty, including the number of violations, the violation's degree or severity, defendant's willfulness in committing the misconduct giving rise to the penalty, the penalty's economic impact, and other factors. (*See*, Health & Saf. Code, § 25249.7, subd. (b)(2) [Prop 65], Bus. & Prof. Code, § 17206, subd. (b) [UCL].) The statutes also place a maximum limit on each violation's penalty. (*See*, Bus. & Prof Code, § 22963, subd. (f) [STAKE Act], Health & Saf. Code, § 25249.7 [Prop 65], Bus. & Prof. Code, § 17206, subd. (b) [UCL].)

Plaintiff calculates and explains the applicable statutes' maximum penalties. (Motion 10:18-11:9 [STAKE Act], 11:10-24 [Prop 65], 11:26-12:21 [UCL].) According to Plaintiff's calculations, the maximum penalties based on Defendant's established violations—as admitted by its opposition to Plaintiff's summary judgment motion—are \$27,073,000 for the STAKE Act, \$4,625,000 for Prop 65, and \$11,400,000 for the UCL. Plaintiff's calculations are thorough, sufficiently specific, and accompanied by supporting authority to establish this number as Defendant's approximate<sup>[3]</sup> maximum exposure. Based on these calculations, Defendant's exposure is far greater than the requested \$1,200,000 combined penalty.

But Defendant argues that its real exposure is much lower. As a preliminary matter, Defendant does not provide its own specific calculations of the total violations and the applicable penalty. This omission suggests that Defendant's arguments if credited would not reduce the maximum number below \$1,200,000, *i.e.*, the requested penalty is still below the statutory maximum.

First, the Court addresses the STAKE Act penalty. Defendant correctly argues that the STAKE Act's penalties are permissive. (Bus. & Prof. Code, § 22963, subd. (f) [“A district attorney, city attorney, or the Attorney General may assess civil penalties against any person, firm, corporation, or other entity . . . .”].) However, it would be illogical for the Court to find that \$600,000 in STAKE Act penalties is unreasonably high when the exposure is approximately \$27,000,000. Defendant also argues that Plaintiff's calculations improperly include damages for all of Defendant's sales to individuals in California, instead of only sales to minors in California. The Court already rejected this argument when it granted summary judgment. (November 10, 2020 Order 5:25-6:1 [“Failure to comply with age verification requirements, independent of sales to people under 21 years of age, constitutes a violation of [the STAKE Act] . . . .”].) Defendant proffers no supporting authority to reconsider this ruling.

Next, the Court addresses the Prop 65 penalty. It is undisputed that Prop 65's civil penalty liability contains a one-year statute of limitations. (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 978.) But that fact is immaterial here. Plaintiff filed the action on October 31, 2018 and Defendant's conduct starting on October 21, 2017 to present can support a penalty. Defendant's sales of products that gave rise to the Prop 65 violation (Rubi Salts, Feather, and Rubi) occurred either entirely or substantially within the limitations period. A reduction of approximately \$150,000 for 66 days improperly counted for the sale of Feather does not materially affect the original calculation of \$4,625,000.

Finally, the Court addresses the UCL penalty. Defendant incorporates its above arguments because the UCL penalty is based on the derivative violations of the STAKE Act and Prop 65. Only a minimal number of violations are outside of the statute of limitations period. This reduction again does not materially affect the original calculation.

Therefore, as a starting point, the requested \$1,200,000 combined penalty is permissible. The next issue is whether the Court should assess a penalty that high because of the actual misconduct here.

Regarding this issue, Plaintiff persuasively shows that the relevant factors on balance justify a \$1,200,000 penalty. Defendant's misconduct was serious, persisted for multiple years, and directly worsened the public health of Californians. More problematically, Defendant continued to commit serious violations even after stipulating to a preliminary injunction prohibiting certain conduct and the Court granted summary judgment in Plaintiff's favor. (*See*, Mahmood Decl. Ex. 14-22.) Finally, \$1,200,000 is reasonable when examined in the context of Defendant's average annual gross profits millions of dollars higher than the requested penalty and annual marketing budget within several hundreds of thousands of dollars of the requested penalty. (*Id.* Ex. 5-7.)

But Defendant argues that the requested penalties under Prop 65 and UCL are not proportional to the harm caused and potential future harm. Defendant specifically identifies that the physical bottle of Rubi Salts contained a Prop 65 warning and Defendant immediately changed its conduct after receiving Plaintiff's complaint. But these arguments if credited at best mitigate penalties starting at an already much higher permissible maximum. In any event, Defendant has committed so many violations and continues to commit serious violations, including failing to provide the required cancer warnings for its products on its website and engaging in product giveaways through Instagram without requiring someone over 21-years-old to sign for the product. Defendant's continuing violations necessitate a strong financial penalty to deter the same pattern of conduct that Defendant is still engaging in.

Accordingly, the \$1,200,000 penalty is not only permissible under the law, but appropriate considering the circumstances.

## 2. The penalty is proportional to other similarly situated civil penalties

Defendant argues that the \$1,200,000 penalty is disproportional to treatment of other vape and e-liquid companies. Defendant correctly identifies that Plaintiff accepted a smaller civil penalty of \$350,000 from NEwhere, Inc. and VapeCo Distribution, LLC. (Mahmood Decl. Ex. 48.) Essentially, Defendant contends that the similar allegations in those actions do not justify the differential and unfair treatment Plaintiff now seeks.

But Defendant's argument improperly focuses on a flawed comparison. Defendant's misconduct involved more violations over a greater period of time and include Prop 65 violations, of which the other nonparties were not accused. More problematically, those other nonparties voluntarily accepted the lower penalty as part of a settlement instead of actively litigating the claims like Defendant has done here.

In other words, Defendant fails to identify an apt, similarly situated comparison. Therefore, the Court cannot find that Plaintiff seeks a disproportional penalty. Instead, Plaintiff cites examples of cases where similarly high penalties were upheld based on similarly high number of violations. (Motion 14:19-26.) Accordingly, the penalty is proportional to other similarly situated civil penalties, even if not in enforcement actions involving vape and e-liquid companies.

## 3. Defendant can afford this penalty

Finally, Defendant argues that it cannot afford to pay the \$1,200,000 penalty, and instead proposes a \$300,000 penalty payable over two years. The Court disagrees.

Plaintiff shows that Defendant has earned significant cash, including gross profits of approximately \$5 million each in 2018 and 2019 and \$3 million in the first half of 2020. (Mahmood Decl. Ex. 5-7.) Although Defendant correctly argues that gross profits does not equal actual profits because it fails to account for liabilities and expenses, the Court can use gross profits as a guide to determine what is reasonable. (*See, People v. Morse* (1993) 21 Cal.App.4th 259, 272.) Plaintiff has shown that Defendant has made some significant shareholder distributions, including some close to \$1 million. (Mahmood Decl. Ex. 5-7.) Defendant's significantly lower numbers for net income and the claimed \$72,430.17 available cash on hand (Matura Decl. Ex. 58) reflect more on its business priorities and operations, *e.g.*, making large shareholder distributions instead of increasing its available cash and/or reinvesting into the business, and not its financial position or ability to pay a penalty.



Defendant knew about this government enforcement action since it began in 2018. Without Defendant's choice to make large shareholder distributions, Defendant would not be in a position to argue it cannot afford a large penalty. Finally, the Court rejects Defendant's argument about the disproportionality of the requested penalty to its marketing budget. This argument depends on the notable exclusion of the expense of the Blue Jay House, which Defendant previously included in earlier profit and loss statements. (Mahmood Decl. Ex. 7, 58.) Including this missing expense shows that the marketing expenses are sufficiently close to the requested penalty.

#### 4. Conclusion

The Court assesses the requested \$1,200,000 penalty on Defendant because it is appropriate and justified.

Plaintiff's Proposed Final Judgment does not indicate how and when Defendant should make this payment. (*See*, Proposed Final Judgment 9:17-10:6.) In the reply, Plaintiff consents to a payment plan over one year with an acceleration clause if Defendant misses an installment or pays one late. (Reply 10:17-20.) Because Plaintiff made this proposal in reply, Defendant has not had an opportunity to respond. The Court will hear from Defendant at the hearing, though the Court is inclined to find that this proposal is reasonable considering Defendant's profit and loss statements suggest that Defendant can absorb an installment payment plan.

#### **IV. CONCLUSION**

The Court GRANTS Plaintiff's motion as set forth above.

Plaintiff is to serve and file a revised proposed final judgment within 10 days reflecting the Court's rulings. Defendant will have 5 days from service to serve and file any objections to the proposed final judgment. Plaintiff will have 5 days from service to serve and file any response to Defendant's objections to the proposed final judgment. The objections and response to the objections are not to exceed 5 pages.

The Court will then enter its judgment.

Plaintiff is to give notice of this ruling.

DATED: April 16, 2021

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Hon. Teresa A. Beaudet  
Judge, Los Angeles Superior Court

[1] “(d) (1) ‘Tobacco product’ means any of the following:

(A) A product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff.

(B) An electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah.

(C) Any component, part, or accessory of a tobacco product, whether or not sold separately.”

[2] “(1)The term ‘tobacco product’ means any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product).”

[3] As discussed later in the ruling, there are certain, individual violations that are outside the statute of limitations.

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