

ANNE MILGRAM
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Attorney for Plaintiffs

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| ANNE MILGRAM, Attorney General | : | SUPERIOR COURT OF NEW JERSEY |
| of New Jersey, DAVID SZUCHMAN, | : | CHANCERY DIVISION |
| Director of the New Jersey Division of | : | MERCER COUNTY |
| Consumer Affairs, and MAUREEN | : | |
| ADAMS, Director of the New Jersey | : | |
| Division of Taxation, | : | DOCKET NO. |
| Plaintiffs | : | |
| v. | : | <u>Civil Action</u> |
| RED JACKET TOBACCO, LESLIE A. | : | |
| HOAG, individually, and as principal and | : | |
| owner of RED JACKET TOBACCO, XYZ | : | |
| CORPORATIONS 1-20, and JANE and | : | COMPLAINT |
| JOHN DOES 1-20, individually and as | : | |
| principal(s) and owner(s) of RED JACKET | : | |
| TOBACCO, | : | |
| Defendants. | : | |

Plaintiffs Anne Milgram, Attorney General of the State of New Jersey (“Attorney General”), David Szuchman, Director of the New Jersey Division of Consumer Affairs (“Consumer Affairs”), and Maureen Adams, Director of the New Jersey Division of Taxation (“Taxation”), by way of Complaint against Defendants say:

PARTIES

1. Plaintiff Attorney General Anne Milgram is duly authorized to bring this civil action to enforce compliance with the provisions of the Tobacco Manufacturers Responsibility Act, N.J.S.A. 52:4D-1 et seq., the Cigarette Tax Act, N.J.S.A. 54:40A-1 et seq.; the Cigarette Sales Act, N.J.S.A. 54:40A-46 et seq.; and the New Jersey Consumer Fraud Act, (“CFA”) N.J.S.A. 56:8-1 et seq.

2. Plaintiff David Szuchman, Director of the Division of Consumer Affairs, is charged with the responsibility for enforcing compliance with the provisions of the CFA, pursuant to N.J.S.A. 52:17B-120.

3. Plaintiff Maureen Adams, Director of the New Jersey Division of Taxation, is charged with the responsibility of licensing tobacco distributors and wholesalers pursuant to N.J.S.A. 54:40A-20.

4. Defendant Red Jacket Tobacco is a business entity using the mailing address, Post Office Box 572, Salamanca, New York, 14779 and doing business in the State of New Jersey.

5. Defendant Leslie A. Hoag is a principal of Red Jacket Tobacco and rents Post Office Box 572, in Salamanca, New York 14779.

6. John and Jane Does 1 through 10, are officers, directors, shareholders, founders, owners, agents, servants, and/or employees of Red Jacket Tobacco who have been involved in the conduct that gives rise to this complaint, but are heretofore unknown to the Plaintiffs. As these Defendants are identified, Plaintiffs shall amend the Complaint to include them.

7. XYZ Corporations 1 through 20 are fictitious corporations meant to represent any additional corporations that have been involved in the conduct that gives rise to this Complaint, but

are heretofore unknown to the Plaintiffs. As these Defendants are identified, Plaintiffs shall amend the Complaint to include them.

JURISDICTION AND VENUE

8. This Court has personal jurisdiction over Defendants because Defendants advertised, sold, distributed and profited from the sale of cigarettes to consumers located within the State of New Jersey, thus purposely availing themselves of the privilege of conducting business in this State.

9. Venue is properly laid in Mercer County pursuant to R. 4:3-2(a)(2), because it is the location of the New Jersey Division of Taxation.

FACTS

10. On or about April 8, 2008, Defendants sent advertisements to consumers in New Jersey stating, "TAX FREE CIGARETTES DELIVERED TO YOUR DOOR."

11. The advertisement also proclaimed "IF WE DON'T HAVE IT, WE CAN ORDER IT".

12. On or about June 26, 2008, Defendants mailed five (5) cartons of cigarettes (50 packs of 20 cigarettes or 1,000 cigarettes total) which did not bear the required New Jersey tax stamps to a New Jersey consumer ("Consumer A").

13. Consumer A purchased cigarettes from Defendants and was not charged any New Jersey taxes.

14. Consumer A was not asked by Defendants for confirmation that s/he was at least 19 years old.

15. Of the five (5) cartons of cigarettes Defendants sold to Consumer A, three (3) cartons (30 packs of 20 cigarettes or 600 cigarettes) were of 305's brand cigarettes.

16. The Dosal Tobacco Corporation manufactures 305's brand cigarettes.

17. On or about October 6, 2008 Consumer A placed a second order with Defendants for two (2) cartons (20 packs of 20 cigarettes or 400 cigarettes) of Dosal's, 305's brand cigarettes.

COUNT I

Sale of cigarettes to a New Jersey consumer without a license

18. Plaintiffs repeat and allege each and every allegation set forth in paragraph 1 through 16 of the Complaint and incorporate said allegations as if fully set forth herein.

19. N.J.S.A. 54:40A-2.c. defines "Distributor" to mean and include "any person, wherever resident or located, who brings or causes to be brought into this State un-stamped cigarettes purchased directly from the manufacturers thereof and stores, sells or otherwise disposes of the same after they shall reach this State."

20. N.J.S.A. 54:40-2.d. defines "Wholesale dealer" to include any person wherever resident or located, other than a distributor, as defined herein, who:

(1) Purchases cigarettes from any other person who purchases from the manufacturer and who acquires such cigarettes solely for the purpose of bona fide resale to retail dealers or to other persons for the purposes of resale only; or

(2) Services retail outlets by the maintenance of an established place of business for the purchase of cigarettes, including, but not limited to, the maintenance of warehousing facilities for the storage and distribution of cigarettes.

21. At the time of the sales to Consumer A, Defendants did not have and had not applied for a New Jersey "Wholesale dealer" license as required pursuant to N.J.S.A. 54:40A-3.

22. At the time of the sales to Consumer A, Defendants did not have and had not applied for a New Jersey "Distributor" license as required pursuant N.J.S.A. 54:40A-3.

23. Without possessing either a Wholesale dealer or Distributor license Defendants sold 1,000 cigarettes to Consumer A, on June 26, 2008 and made additional sale of 400 cigarettes on October 6, 2008.

24. Defendants' sales of cigarettes to Consumer A without a license constitutes a violation of N.J.S.A. 54:40A-3.

25. The Cigarette Tax Act, N.J.S.A. 54:40A-24, provides a penalty of no more than \$250 per day for any person engaged in any business or activity for which a license is required. Each day that any such business is engaged in or conducted shall be deemed a separate violation.

26. N.J.S.A. 52:4D-12 expressly states that, unless otherwise expressly provided, the remedies or penalties provided by this Act are cumulative and in addition to the remedies or penalties available under all other laws of this State.

WHEREFORE, Plaintiffs request judgment in their favor affording the following relief:

A. Ordering Defendants to cease and desist from advertising and selling cigarettes in this State unless and until they are properly licensed;

B. Awarding the maximum penalties as permitted by law pursuant to N.J.S.A. 54:40A-24;

C. Awarding the maximum penalties as permitted by law pursuant to N.J.S.A. 52:4D-12;

D. Awarding attorneys fees and costs of suit pursuant to N.J.S.A. 54:40A-24e;
and

E. Awarding such other and further relief as this Court deems just and proper.

COUNT II

Sale or Distribution of Cigarettes Not Included on the New Jersey Attorney General Tobacco Manufacturer Directory

27. Plaintiffs repeat and allege each and every allegation set forth in paragraph 1 through 25 of the Complaint and incorporate said allegations as if fully set forth herein.

28. It is unlawful for any person to “sell, offer or possess for sale in this State, cigarettes of a tobacco products manufacturer or brand family not included in the directory established pursuant to the Act [the Attorney General Tobacco Manufacturer Directory] (hereinafter, “Directory”).” N.J.S.A. 52:4D-8.b.

29. Dosal Tobacco Corporation, the manufacturer of 305’s brand cigarettes, was not listed on the Directory on June 26, 2008 and has not been listed as of the date of this filing.

30. The 305’s brand of cigarettes was not listed on the Directory on June 26, 2008, either has that brand of cigarettes been listed as of the date of this filing.

31. Defendants’ sale of 305’s brand cigarettes manufactured by Dosal Tobacco Corporation to a New Jersey consumer constitutes a violation of N.J.S.A. 52:4D-8.b.

32. The Attorney General, on behalf of the Director of Taxation, may seek an injunction to restrain a threatened or actual violation of N.J.S.A. 52:4D-8, pursuant to N.J.S.A. 52:4D-11.c.

33. N.J.S.A. 52:4D-11.a provides that each offer to sell cigarettes in violation of N.J.S.A. 52:4D-8 shall constitute a separate violation.

34. For each violation, the Director of Taxation may also impose a civil penalty in an amount not to exceed the greater of 500% of the retail value of the cigarettes sold or \$5,000 upon a determination of the violation.

35. Unless otherwise expressly provided, the remedies or penalties provided by this Act are cumulative and in addition to the remedies or penalties available under all other laws of this State pursuant to N.J.S.A. 52:4D-12.

36. N.J.S.A. 52:4D-12.f. further provides for the disgorging of any profits, gain, gross receipts or other benefits from the violation of the Tobacco Manufacturers Responsibility Act N.J.S.A. 52:4D-1 et seq.

WHEREFORE, Plaintiffs request judgment in their favor affording the following relief:

A. Granting a permanent injunction to restrain Defendants from further violation of N.J.S.A. 52:4D-8.b., pursuant to N.J.S.A. 52:4D-11.c.;

B. Awarding the maximum penalties as permitted by law pursuant to N.J.S.A. 52:4D-11.a.;

C. Awarding the maximum penalties as permitted by law pursuant to N.J.S.A. 52:4D-12;

D. Awarding costs of the investigation, attorney's fees and costs of suit pursuant N.J.S.A. 52:4D-11.c.; and

E. Awarding such other and further relief as this Court deems just and proper.

COUNT III

Violation of Cigarette Sales Act

37. Plaintiffs repeat and allege each and every allegation set forth in paragraphs 1 through 35 of the Complaint and incorporate said allegations as if fully set forth herein.

38. The Cigarette Sales Act, N.J.S.A. 54:40-46 et seq., requires out of State cigarette sales to conform with the Jenkins Act, 15 U.S.C. §375 et seq.

39. The Jenkins Act, 15 U.S.C. §376 requires:

Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a State distributor by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and any other place of business; and

(2) not later than the 10th of each day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; memorandum or invoice in each case to include the name and address of the person to whom shipment was made, the brand, and the quantity thereof.

40. Pursuant to N.J.S.A. 54:40A-48:

a 'face-to-face' sale means a sale in which the purchaser is in the physical presence of the seller or the seller's employee or agent at the time of the sale. A 'face-to-face sale' does not include any transaction conducted by mail order, the Internet, telephone, or any other anonymous transaction method in which the buyer is not in the seller's physical presence or the physical presence of the seller's employee or agent at the time of the sale.

41. Pursuant to the Cigarette Sales Act, N.J.S.A. 54:40A-49.a-c, non face-to-face sales of cigarettes are strictly prohibited unless the seller has:

a. fully complied with all requirements of the Jenkins Act for shipments of cigarettes into this State;

b. verified payment of, paid or collected all applicable State taxes, including the cigarettes imposed by the Cigarette Tax Act, N.J.S.A. 54:40A-1 et seq. and the sales or use taxes imposed by the

Sales and Use Tax Act N.J.S.A. 54:32B-1 et seq. due on cigarettes; and

c. has before mailing or shipping the cigarettes:

(1) obtained from the purchaser reliable confirmation that the purchaser is at least 19 years old and a statement by the purchaser under penalty of perjury certifying the purchaser's date of birth and address;

(2) made a good faith effort to verify the information contained in the certification provided by the purchaser against a commercially available database or has obtained a photocopy or other image of a government-issued identification bearing the purchaser's image and stating the date of birth or age of the purchaser;

(3) received payment for the sale from the prospective purchaser by a credit or debit card that has been issued in the purchaser's name or by check; and

(4) verified that a credit or debit card used for payment has been issued in the purchaser's name, and address to which the cigarettes are being shipped matched the credit or debit card company's address for the cardholder.

42. In April 2008 Defendants advertised in the State of New Jersey, "CIGARETTES DELIVERED TO YOUR DOOR."

43. On or about June 26, 2008, Defendants located in Salamanca, New York, sold 1,000 cigarettes to Consumer A.

44. Prior to advertising or selling cigarettes within the State of New Jersey, Defendants did not file a statement setting forth their name and trade name (if any) and their address of principal place of business and any other place of business with the tobacco tax administrator (Taxation), pursuant to 15 U.S.C. § 376.

45. Defendants did not charge Consumer A the New Jersey Cigarette tax or New Jersey Sales tax.

46. Defendants did not submit the required reports to Taxation for a non face-to-face sale to a New Jersey consumer.

47. Defendants' advertising and sale of cigarettes to Consumer A constitute violations of the Cigarette Sales Act pursuant to N.J.S.A. 54:40A-47 et seq.

48. Pursuant to N.J.S.A. 54:40A-50a., Taxation shall assess a penalty of not less than \$1,000 and not more than \$2,000 for the first violation of the Cigarette Sales Act.

WHEREFORE, Plaintiffs request judgment in their favor affording the following relief:

A. Ordering Defendants to cease and desist from further violation of N.J.S.A. 54:40A-46 et seq.;

B. Requiring Defendants to comply with the reporting requirements of the Jenkins Act, pursuant to 15 U.S.C. § 378, for all sales made to New Jersey consumers since November 1, 2005;

C. Requiring Defendants to comply with the reporting requirements of the Jenkins Act, pursuant to 15 U.S.C. § 378, if and when Defendants are licensed with the State of New Jersey;

D. Requiring Defendants to comply with the requirements of the Cigarette Sales Act, pursuant to N.J.S.A. 54:40A-49b and c, if and when Defendants are licensed with the State of New Jersey;

E. Awarding the maximum penalties as permitted by law pursuant to N.J.S.A. 54:40A-50; and

F. Awarding such other and further relief as this Court deems just and proper.

COUNT IV

Violations of the Consumer Fraud Act

49. Plaintiffs repeat and allege each and every allegation set forth in paragraphs 1 through 47 of the Complaint and incorporate said allegations as if fully set forth herein.

50. The CFA, N.J.S.A. 56:8-2 prohibits:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing[] concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise....

51. When advertising and selling cigarettes in New Jersey, Defendants have engaged in unconscionable commercial practices, deceptive practices, misrepresentations and knowing omissions.

52. Defendant's conduct in violation of the CFA includes, but is not limited to, the following misrepresentations:

a. Misrepresenting that cigarettes the Defendants sold to New Jersey consumers are "tax free" when, in fact, taxes are due on cigarettes sold in the State pursuant to N.J.S.A. 54:40A-8.

b. Misrepresenting that all brands and manufacturers of cigarettes are available for sale in New Jersey, when in fact, only cigarettes on the Directory may be sold in New Jersey.

53. Defendants' conduct in violation of the CFA includes, but is not limited to, the following unconscionable commercial practices:

a. Advertising and selling cigarettes when Defendants are not licensed to do so.

b. Advertising “TAX FREE CIGARETTES DELIVERED TO YOUR DOOR”.

c. Advertising and selling cigarettes that are not on the New Jersey Attorney General Tobacco Manufacturers Directory to a New Jersey consumer.

d. Advertising and selling cigarettes that do not bear the required New Jersey tax stamps to New Jersey consumers.

e. Selling cigarettes to a New Jersey consumer and failing to verify whether s/he was 19 years of age.

54. Defendants conduct in violation of the CFA includes, but is not limited to, the following knowing omissions:

a. Failing to disclose that purchasers of non face-to-face sales are required to pay cigarette and sales taxes pursuant to the Jenkins Act.

b. Failing to disclose that a consumer must be over 19 years of age to purchase cigarettes in New Jersey.

55. Defendant’s advertising and selling cigarettes to New Jersey consumers constitutes multiple violations of the CFA.

56. Pursuant to N.J.S.A. 56:8-8, Plaintiff the Attorney General may seek and obtain an injunction prohibiting a person from continuing from engaging in an unlawful practice.

WHEREFORE, Plaintiffs request judgment in their favor affording the following relief:

A. Granting an injunction prohibiting Defendants from selling and advertising cigarettes to New Jersey consumers pursuant to N.J.S.A. 56:8-8 unless and until they are duly licensed to do so in this State;

B. Deeming each unconscionable commercial practice, misrepresentation and knowing omission to constitute a separate violation under the CFA pursuant to N.J.S.A. 56:8-13;

C. Assessing the maximum statutory civil penalties against Defendants for each and every violation of the CFA, in accordance with N.J.S.A. 56:8-13;

D. Awarding attorneys fees and costs of suit pursuant to N.J.S.A. 56:8-11 and N.J.S.A. 56:8-19; and

E. Awarding such other and further relief as this Court deems just and proper.

COUNT V

Violations of the Advertising Regulations

57. Plaintiffs repeat and allege each and every allegation set forth in paragraph 1 through 55 of the Complaint and incorporate said allegations as if fully set forth herein.

58. The Regulations Governing General Advertising, N.J.S.A. 13:45A-9.1 et seq. (the “Advertising Regulations”), promulgated pursuant to the CFA, address, among other issues, general advertising practices.

59. The Advertising Regulations provide, in relevant part:

(a) Without limiting the application of N.J.S.A. 56:8-1 et seq., the following practices shall be unlawful with respect to all advertisements:

.....

9. . . . The making of false or misleading representation of facts concerning the reasons for, . . . the nature of an offering . . . of advertised merchandise available for sale.

[N.J.A.C. 13:45A-9.2(a)(9)]

60. In its advertisement for the sale of cigarettes, Defendants misrepresented that New Jersey consumers do not have to pay taxes on their cigarette purchases in or into this State.

61. While New Jersey consumers may not have had to pay cigarette and sales taxes to Defendants, the consumers are required to pay the State of New Jersey these taxes.

62. Defendants have violated the Advertising Regulations by falsely advertising “TAX FREE CIGARETTES”.

63. Defendants have violated the Advertising Regulations by falsely advertising “IF WE DON’T HAVE IT WE CAN ORDER IT”, when in fact, only cigarettes on the Directory may be sold in New Jersey.

64. Each violation of the Advertising Regulations by Defendants constitutes a per se violation of the CFA.

WHEREFORE, Plaintiffs request judgment in their favor affording the following relief:

- A. Assessing the maximum statutory civil penalties against Defendants for the violation of the Advertising Regulations, N.J.A.C. 13:45D-1.1 et seq., in accordance with N.J.S.A. 56:8-13;
- B. Awarding attorneys fees and costs of suit pursuant to N.J.S.A. 56:8-11 and N.J.S.A. 56:8-19; and
- C. Awarding such other and further relief as this Court deems just and proper.

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Cathy A. Melitski
Deputy Attorney General

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:5-1(c) Deputy Attorney General Cathy A. Melitski is hereby designated as trial counsel for plaintiffs.

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Cathy A. Melitski
Deputy Attorney General

Dated: October 9, 2008

CERTIFICATION PURSUANT TO R. 4:5-1

I hereby certify that to the best of my knowledge the matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding and that no other action or arbitration proceeding is contemplated.

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Cathy A. Melitski
Deputy Attorney General

Dated: October 9, 2008