June 20, 2017

TO: The San Francisco Board of Supervisors

FROM: Mark Block, Executive Director, Electronic Vaping Coalition of America (EVCA)

RE: An outline of the lawsuit that will be filed upon passage of the anti-vaping ordinance by this board.

Members of the Board, you have launched a campaign based on flawed facts, science and theory. Under the guise of protecting youth from the evils of cigarettes, you have set about to prohibit the one effective, safe way for tobacco addicts to get relief from the life of illness and death they eventually face.

You know as well as anyone, indeed, better than most, that vaping is at a *minimum**,* **95 percent safer than combustible cigarettes**, and in the words of Dr. Dunn, it is completely safe. You know better than most that nearly half a billion people die every year from illness and death resulting from smoking combustible cigarettes.

And you know better than most what will happen to your cigarette/tobacco settlement money as vaping sales grow - sales of tobacco will go down, down, and down. As a result, your available cash for the budget will be there at the first of the cycle, but not for the end and beginning of the next.

Your justification for regulating flavors is that in this way you can control youth behavior. Think again. Outlawing e-liquids will simply entice minors who might be wavering to do that which is forbidden. It will not deter those who smoke, it will not induce those who have no intention of smoking, but it will hurry along the experiment of those that would experiment. Nothing motivates a teenager seeking mischief so much as unlawfulness in securing something he or she is not supposed to have.

So, in order to achieve economic value for your government budget you will sacrifice public health, safety and welfare.

But we will try to stop you, and expect to file a lawsuit that will incorporate at least the causes of action set forth herein:

I. EQUAL PROTECTION OF LAWS.

If passed, the ordinance will violate the equal protection clause of the constitutions of *both* the state of California and the United States of America; California's as complement to the U.S. except that it may go even further, and if so, a separate California case would be filed for at least one to three users of vaping, store owners and users of cigarettes.

In analyzing the facts, please consider:

Henry can, on one side of a store buy and drink a flavored alcoholic beverage; while Jason, on the other side of the *same* store, cannot buy, nor can the store sell, a flavored vaping liquid. The distinction is made even more absurd by the fact that alcohol is specially treated under the California Constitution where the people established through initiative, control of alcohol, acknowledging that alcohol is a dangerous substance deserving of restrictions by the people. Vaping and tobacco are not, particularly vaping - Congress has said that cigarettes cannot be prohibited and has not declared vaping to be dangerous.

The case that most clearly makes this out to be an equal protection violation is ***Brown v. Merlo***, 506 P.2d 212 (Supreme Court of California en banc, Tobriner, J. writing the opinion) referring to, and making a part of the argument in every leading U. S. Supreme Court decision.

The Court said that when an equal protection argument is raised, the Court must determine whether "**persons similarly situated with respect to the legitimate purpose of the law receive like treatment**."

The Court also cited the *federal* rule: "The Equal Protection Clause…denies to the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute***. A classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" 38 P. 500 citing Purdy & Fitzpatrick v. state of California, 456*** P.2d 645, 38 ALR 3d 1194, Darcy v. Mayor etc., of San Jose, 38 P. 500, 1894), Reed v. Reed, 404 U.S. 71, 75-6; Royster Guana Co. v. Virginia, 253 U.S. 412; Eisenstadt v. Baird, 405 U.S. 438, 446-447; Weber v. Aetna Casualty & Surety Co, 406 U.S. 164. Thus, ***the rule is that when a statute subjects one person to a different treatment, there is a requirement of "some rationality in the nature of the class***

signaled out." Rinaldi v. Yeager, 384 U.S. 305, 308-9; H ayes v. Superior Court, 490 P.2d 1171

In a portion of the opinion particularly telling to this case is that which holds that in determining the scope of the class of citizens singled out for action by the state, ***"a court cannot confine its view to the terms of the specific statute under attack, but must judge the enactment's operation against the background of other legislative, administrative and judicial directives which govern the legal rights of similarly situated persons. As the United States Supreme Court recognized long ago: 'The question of constitutional validity is not to be determined by artificial standards [continuing review 'within the four corners of a statute). What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution." Gregg Dying Co. v. Query, 286 U.S. 472; James v. strange, 408 U.S.*** 128.

When a classification is based upon a policy that has changed, or on facts no longer existent, the classification ends.

If a law overreaches and is overbroad, and "reaches out beyond the individuals 'tainted with the mischief' at which a statute is directed, it imposes its burden on innocent individuals who do not share he condemning characteristics.

Putting these rules into place on the facts of the proposed ordinance, one can see the argument as follows:

California has a general policy toward substance abuse or disabilities that requires treatment and assistance. That is set forth in both the California Constitution and laws (the Alcohol Control Act that implements XXII of the Constitution and the Unruh Civil rights Act)

You will remember from the language in Merlo, above, that one cannot judge the situation on one statute alone when there are many which make up the matrix of the base statutes at issue. Here there are several, because involved are people entitled to protection and care and treatment under state pre-emptive law, and San Francisco has not the power to change state policy and pre-emptions.

Alcohol and tobacco are both in the classification, yet they are treated differently: flavored alcohol can be purchased by adults, flavored e-liquid and e-cigarettes cannot now (Under the ordinance). There is no rational relationship between the two differing positions. In fact, the

result is completely irrational: the more dangerous of the substances, alcohol, triggers no action of prohibition, while the less dangerous, vaping, is placed in the prohibition. That is not rational thought.

With all of the evidence that vaping is a safer alternative to tobacco use, the city is attempting to end that practice, thus flying in the face of article XXII of the state Constitution.

The announced purpose of the ordinance is to prevent kids under 21 from taking up smoking - the prevailing idea is that these youth will be more inclined to try vaping because of the flavor, then will switch to cigarettes.

But the ordinance overreaches because by outlawing sales to keep youth from vaping, sales are outlawed for adults, and adults with a nicotine addiction have a protected state. Thus being overbroad, the ordinance should be set aside.

In other words, in the language of ***Brown v. Merlo***, the persons who would be doing mischief and need protection are youngsters under 21, but the Council is not satisfied with that so they would prohibit all such use even by adults. This scenario shows an ordinance drastically over-reaching and punishing adults who would be prevented from vaping with perfectly legal e-liquid and devices in order to be free of disease and death.

Under ***Brown***, and the myriad cases cited therein, we feel comfortable in seeking relief from the ordinance on the equal protection of laws on this theory.

II. TORTIOUS INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE.

The stores that sell, and the manufacturers who produce, and the dealers and retailers who deliver and share vaping and e-related products, will have cause of action of intentional interference to their business.

Nature of the Tort of Intentional Interference with Prospective Economic Advantage

The elements of that tort of are: '(1) an economic relationship between [the plaintiff and some third person] containing the probability of future economic benefit to the [plaintiff], (2) knowledge by the defendant of the existence of the relationship, (3) intentional acts on the part of the defendant designed to

disrupt the relationship, (4) actual disruption of the relationship, [and] (5) damages to the plaintiff proximately caused by the acts of the defendant.' (Buckaloo v. Johnson (1975) 14 Cal.3d 815, 827.)

It seems clear that this tort is the broader of the two so-called interference torts. The other is interference with contract. The tort of 'interference with contractual relations has its roots in the tort of 'inducing breach of contract.'' (Seaman's Direct Buying Service Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752, 765.) The latter is merely a species of the former. The principal difference between them is that 'the existence of a legally binding agreement is not a sine qua non to the maintenance of a suit based on the more inclusive wrong.' (Buckaloo, supra, at 823.) 'Both the tort of interference with contract relations and the tort of interference with prospective contract or business relations involve basically the same conduct on the part of the tortfeasor.

In one case, the interference takes place when a contract is already in existence, in the other, when a contract would, with certainty, have been consummated but for the conduct of the tortfeasor.

Rather than characterizing the two as separate torts, the more rational approach seems to be that the basic tort of interference with economic relations can be established by showing, inter alia, an interference with an existing contract or a contract which is certain to be consummated, with broader grounds for justification of the interference where the latter situation is presented.' (Builders Corporation of America v. U.S. (N.D.Cal.'57) 148 F.Supp. 482, 484, fn. 1, revd. on other grounds (9th Cir.'58) 259 F.2d 766, see also Pacific Gas & Electric Co. v. Bear Stearns & Co.(1990) 50 Cal.3d 1118, 1126.)

In either case, '[A]s Justice Tobriner said in the context of voidable contracts: 'The actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable.' (Pacific Gas & Electric Co. v. Bear Stearns & Co., supra, 50 Cal.3d at 1127.)

However, it must be remembered that these torts are intentional torts.

In discussing the related tort of inducing breach of contract, the Supreme Court has stated: 'The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts. ' Imperial Ice Co. v. Rossier (1941) 18 Cal.2d 33, 37.)

The Restatement of Torts explained it this way, 'The essential thing is the purpose to cause the result. If the actor does not have this purpose, his conduct does not subject him to liability under this rule even if it has the unintended effect of deterring the third person from dealing with the other.' (Rest., Torts, section 766, com. d, emphasis added.)

And here, we have the ultimate in intentional tort. The chairwoman has made it perfectly clear in public statements that her intent is to cause the result of interference. And, since she has made that clear, and the others ae going along with the flow without negating or even questioning, they are acting intentionally also. [T]o prevail on a cause of action for intentional interference with prospective economic advantage, plaintiff must plead and prove 'intentional acts on the part of the defendant designed to disrupt the relationship.' (Ibid., quoting from Buckaloo v. Johnson, supra, 14 Cal.3d at 827.)

III. ENVIRONMENTAL CAUSES OF ACTION

The flavored ban runs contrary to both public health and environmental law.

1. Vaping is a new technology that significantly reduces the impact on the environment. (Not unlike solar energy: Solar is sustainable and vaping is sustainable.)

2. Vaping does not contain thousands of toxic chemicals into the air and soil. (As compared to tobacco cigarettes.)

3. Vaping is reusable and positively impacts oceans and forests. (Akin to bringing your own re-usable grocery bag to the store.)

4. Vaping has a simple manufacturing process, and in many instances, does not require any nicotine at all in the products.

5. There is no actual tobacco included in vaping products.

Issue: First cause of action: Deforestation

Smoking: Deforestation is caused due to planting of tobacco fields. It is also caused by "wrapping" cigarettes with paper.

Vaping: No Deforestation

Conclusion: Vaping is better because it does not cause Deforestation and does not require wrapping.

Issue: Second cause of action: Species Extinction in Forests and Wooded Areas

Smoking: Tobacco fields and destruction of wooded areas destroys ecosystems and kills endangered species.

Vaping: No impact on species.

Conclusion: Vaping does not contribute to endangered species.

Issue: Third cause of action: Global Warming

Smoking: Deforestation and "Air-curing" cause pollution, lung cancer, and climate change

Vaping: Does not use burning and "Air-curing" as part of the manufacturing process.

Conclusion: Vaping does not cause Global warming

Issue: Forth cause of action: Soil Erosion

Smoking: Tobacco farming releases thousands of chemicals into the soil and destroys land.

Vaping: This is not required as part of the vaping manufacturing process.

Conclusion: Vaping does not erode soil.

Issue: Fifth cause of action: Pesticides

Smoking: Pesticides are sprayed on plants. Often workers are exposed to these pesticides. This may apply to children/minors* working in the fields

Vaping: Vaping does not use pesticides in the manufacturing process.

Conclusion: Vaping does not involve pesticides

Issue: Sixth cause of action: Littering

Smoking: Cigarette butts are the most littered item in the world.

Vaping: Vaping mods are reusable and can last years.

Conclusion: Vaping is sustainable.

Issue: Seventh cause of action: Oceans and Marine life

Smoking: Cigarettes pollute the oceans and end up in drains.

Vaping: Vaping has no impact on the oceans.

Conclusion: Vaping will lead to sustainable oceans.

Issue: Eighth cause of action: Air pollution and second-hand smoke

Smoking: There are a large number of deaths every year to second hand smoke due to air pollution.

Vaping: There are no confirmed deaths from second-hand vape.

Conclusion: Vaping is better for the air.

Issue: Ninth cause of action: Forest Fires

Smoking: Smoking is one of the leading causes of forest fires

Vaping: Vaping does not cause forest fires.

Conclusion: Vaping is not a leading cause of forest fires because it is reusable.

IV. VIOLATION OF DUE PROCESS OF LAW

Violation of due process of law, procedurally and substantively because of the establishment of presumptions without the protection guaranteed by the due process clause of the United States Constitution—protection is *NOT GIVEN BY THE HEARING THAT IS PROVIDED IN ANOTHER STATUTE.* The protection that is missing is the pre-termination thinking, and can be informal but must be given chance to challenge.

A Cause of Action for violation of due process in yet another way: Due Process procedurally and substantively is violated by the definitions of aspects of "flavoring" which will be the base of unlawfulness; there is no definition that does not involve discretionary application of parameters. Since this goes to the very essence of the unlawfulness, due process is violated because the city cannot give fair and adequate notice of what the city will include in the definition that will determine coverage. The due process concept of *Christopher v. SmithKline Beecham Corp.* No 11-204. 567 US, and *FCC v Fox Television Stations INC* No. 10-1293, June 21, 2012, included in FDA Law Blog, July, 2012

In the event of evidence of any violation of due process, a jury trial will be requested with damages to be set by the jury, in an amount limited only by not more than enough to deter the actor from again violating these or any other civil rights.

V. VIOLATION OF THE CIVIL RIGHTS ACT OF 1866. (because of equal protection argument) The due process violation serves as the base for the lawsuit which entitles the plaintiff to a jury trial to set damages.

VI. GOVERNMENT HAS THE BURDEN OF ASSURING IT DOES NOT DO ANYTHING TO INJURE THE PUBLIC HEALTH, OR THE PUBLIC HEALTH OF A CITIZEN.

The ordinance fails here because what it sets out to do is intended to do exactly that which the Constitutional rights of the people say it will not do.

The vaping equipment and artifacts and liquids are safer than tobacco and are not harmful to public health, as witnessed by fact that Congress did not undertake to regulate flavoring. It provides the most effective way to break addiction to combustible cigarettes, and it is the combustion that causes the health and death problems. So, by banning e-liquids, the government denies to the citizens a way to avoid deadly illness, thus is injuring the public health

VI. SEPARATE AND INDEPENDENT ACTION UNDER THE AMERICANS WITH DISABILITIES ACT AND THE CALIFORNIA UNRUH CIVIL RIGHTS ACT

Plaintiffs: Addicts to cigarettes are persons with disabilities under both the Americans With Disabilities Act and the Unruh Civil Rights Act of California, and are thus legally entitled to treatment and assistance. To prohibit sale of a substance abuse treatment to them violates the law and public policy of California.

Cause of Action: Right to assistance denied by state through the prohibition of sale of electronic vaping equipment including liquid with nicotine

Cause of Action: Person addicted to tobacco is protected by the federal Americans with Disability Act and by the Unruh Civil Rights Act in California. Under both, tobacco addiction constitutes a disability subject to appropriate treatment and to no discrimination.

So, the public policy of the state of California is to protect both the disabled rights *to* appropriate treatment and *from* discrimination:

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

SEC. 7. (a) **A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws**; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation.

The California Constitution also guarantees equal protection of laws:

The Unruh Civil Rights Act in California provides that: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

VIII. CAUSE OF ACTION FOR VIOLATION OF PRIVACY OF ADULTS

Based largely and generally on the Ninth Amendment of the United States Constitution. Colloquially called the "just leave me alone" amendment, it says that we have God-given rights and are not dependent on the Constitution to state those rights. The Constitution is a limitation on government and anything not given to it there it does not have.

The Ninth gives vapers the right to engage in an activity that does not involve a dangerous product or object, that is safe and lawful, and that is not under any watch list of the government, or you would have been first to know.

IX. SPECIFIC RIGHT TO PRIVACY VIOLATION APART FROM THE NINTH AMENDMENT

A long series of United States Supreme Court cases have sustained a cause of action based on the citizen's right to be free of government intervention in his private life. The cases cover the waterfront from the right to appreciate pornography in the home to the right to buy birth control medication----- choices of personal health and welfare. Fitting directly into that is the control of devices for adults. Violation of privacy rights:

Meyer v Nebraska (1923)
Griswold v Connecticut (1965)
Stanley v Georgia (1969)

Ravin v State (1975)
Kelley v Johnson (1976)
Moore v East Cleveland (1977)
Cruzan v. Missouri Dep't. of Health (1990)
Lawrence v Texas (2003)