



June 11, 2020

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Chief Executive Officer
Cool Clouds Distribution, Inc.
316 E. 4th Street
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Robert Diaz
Registered Agent
Puff Bar
201 S. Lake Ave, Suite 512
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Dear Sirs:

We write to set forth a claim for unfair and deceptive trade practices pursuant to Massachusetts General Laws, Chapter 93A, Section 9, the Consumer Protection Act. The claim is asserted by Juliana Larson and Juliana Shulman-Laniel, acting as a testers for the Public Health Advocacy Institute in Massachusetts. As relief for the unfair and deceptive trade practices described below, we demand that you cease immediately the illegal sale of flavored Puff Bar products in Massachusetts.

In April 2020, Ms. Shulman-Laniel purchased a pineapple-lemonade flavored Puff Bar e-cigarette through the website puffbar.com. The product was delivered on April 20, 2020, to Shulman-Laniel's address in Massachusetts, and left without an adult signature. Likewise, in April 2020, Ms. Larson purchased a cool-mint flavored Puff Bar e-cigarette through puffbar.com, which was delivered to Ms. Larson's address in Massachusetts on April 28, 2020, and also left without an adult signature. As a result, Ms. Larson and Ms. Shulman-Laniel were exposed to a harmful, addictive, flavored e-cigarette product, the sale of which has been explicitly banned in Massachusetts. The delivery to Ms. Larson and Ms. Shulman-Laniel also demonstrates that minors likely have been exposed to these illegal products.

Under long-established Massachusetts law, an act or practice violates Chapter 93A if it "fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth . . . intended to provide the consumers of this Commonwealth protection." 940 CMR 3.16. By selling flavored e-cigarettes in Massachusetts, your companies have committed multiple *per se* violations of Chapter 93A. These sales violate the prohibition on the sale of flavored e-cigarettes imposed in 2019 by Massachusetts' Tobacco Control Modernization Act, G.L. c. 270, §28; they violate the Massachusetts Attorney General's regulations requiring a signature for delivery, 940 CMR

21.04; and they violate the Deeming Rule imposed by the United States Food and Drug Administration, 81 FR 28973 (May 10, 2016) – all laws and regulations designed for the protection of public health, particularly the health of vulnerable teens.

Violation of Massachusetts' 2019 Tobacco Control Modernization Act

First and foremost, your companies violated chapter 93A through the online sale of flavored electronic nicotine delivery systems to consumers in Massachusetts. In November 2019, the Massachusetts Legislature passed and the Governor signed a new law codified at G.L. c. 270, section 28, specifically designed to address the kinds of dangers posed by Puff Bar products. The Tobacco Control Modernization Act prohibits the sale of *all* flavored products, including e-cigarettes, in Massachusetts, except in licensed smoking bars. In the Governor's words, the new law went "a long way toward restricting access to the most addictive kinds of nicotine products."

Section 28(b) of G.L. c. 270 the law provides that:

No person, retailer or manufacturer shall sell, distribute, cause to be sold or distributed, offer for sale any flavored tobacco product or tobacco product flavor enhancer in any retail establishment, online or through any other means to any consumer in the commonwealth.

MASS. GEN. LAWS ch. 270, § 28(b) (2019) (emphasis added). A "tobacco product" includes an "electronic nicotine delivery system" or "an electronic device, whether for 1-time use or reusable, that can be used to deliver nicotine or another substance to a person inhaling from the device including, but not limited to, electronic cigarettes . . . vaping pens, or similar devices that rely of vaporization," regardless of nicotine content. MASS. GEN. LAWS ch. 270, § 29(a) (2019) (emphasis added). Moreover, the law prohibits the sale of devices that deliver nicotine with a "characterizing flavor," otherwise defined as "a distinguishable taste or aroma, other than the taste or aroma of tobacco" MASS. GEN. LAWS ch. 270, § 28(a) (2019). This include flavors such as mint as well as fruit and dessert flavors. *Id.*

Your companies' actions squarely violate the new law. Puff Bar and Cool Clouds Distribution, Inc. ("Cool Clouds") are persons selling flavored electronic nicotine delivery systems to consumers in Massachusetts. The Puff Bar e-cigarette products you sell are electronic nicotine delivery systems, because they are disposable devices that rely on vaporization to deliver nicotine to an inhaling person. These products have characterizing flavors, including fruit flavors such as "blueberry ice" and "sour apple," dessert flavors such as "strawberry donut" and "frozen banana," and mint flavors such as cool mint, spearmint, and menthol. As Ms. Larson and Ms. Shulman-Laniel have verified, these products are being sold online to consumers within Massachusetts.

Your companies' actions threaten public health advances that the new law seeks to protect. For two decades, nicotine addiction was on a steady decline in the state. This trend began to change in 2015, however, with the development and proliferation of e-cigarette

products, particularly flavored e-cigarette products in sleek packaging designed for continual, uninterrupted use. From 2017 to 2018, the number of high-school-age children reporting use of e-cigarettes rose by more than 75 percent. Use among middle-schoolers also increased nearly 50 percent. In the words of State Senator John Keenan: “We had made great strides in Massachusetts at decreasing the number of youth smokers, but with the introduction of e-cigarettes and the variety of flavors available, we lost decades of progress.”

Violation of Massachusetts Attorney General’s Age Verification Regulations

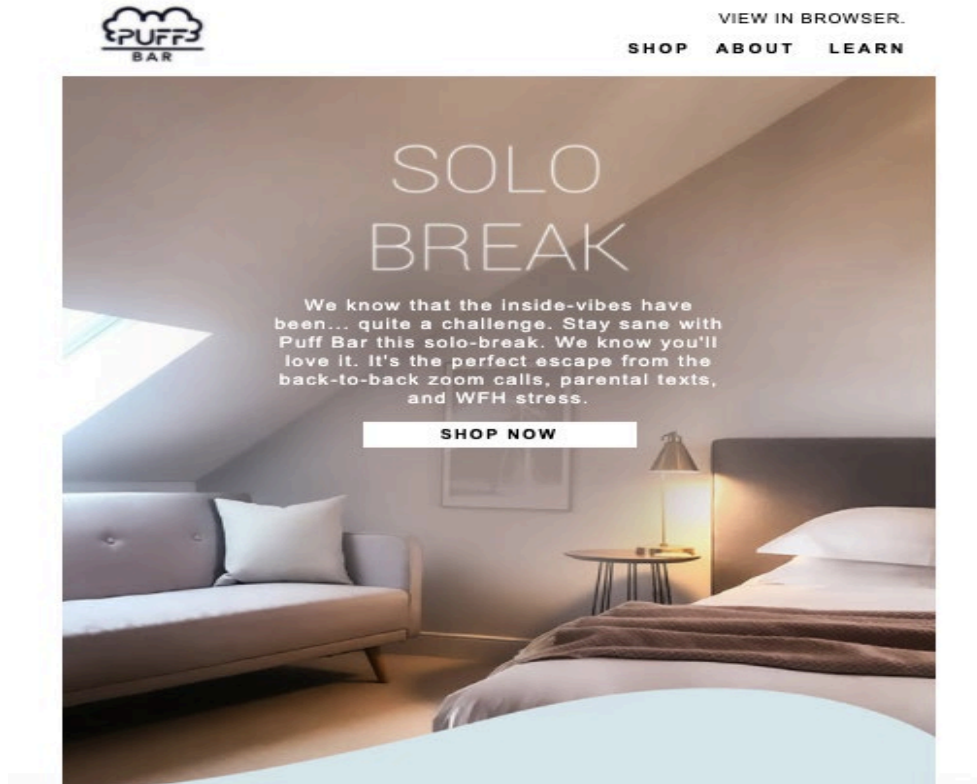
Second, your companies engaged in unfair and deceptive acts and practices by selling Puff Bar e-cigarettes in violation of 940 CMR 21.04(a). Under 940 CMR 21.04(a), internet retailers of e-cigarettes are required to utilize “a method of mailing, shipping, or delivery that requires signature of a person who is of the Minimum Legal Sales Age before the shipping package is released.” As confirmed by aforementioned purchases, your companies failed to employ a means of mailing, shipping, or delivery that necessitated the signature of any recipient: the package was left at Ms. Larson’s and Ms. Shulman-Laniel’s doors with no verification of recipient presence or age of recipient at delivery.

Age verification and parental control measures such as those contained in 940 CMR 21.04 are critically important to safeguard children’s health and wellbeing. The regulation is expressly intended to “eliminate deception and unfairness in the way . . . electronic smoking devices are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking, the use of smokeless tobacco and electronic smoking devices by youth.” 940 CMR 21.01. By contrast, your companies’ marketing strategies for Puff Bar e-cigarettes deliberately target young, impressionable consumers who are uniquely vulnerable to nicotine addiction.

Indeed, flavored Puff Bar products are precisely the kind of products for which the strict delivery requirements of 940 CMR 21.04 are essential. In the words of Massachusetts Attorney General Maura Healey, the deceptive practices of vaping companies take “a page right out of the Big Tobacco playbook – marketing to kids, breaking age verification laws, and minimizing the health risks of these addictive products.” For example, Puff Bar’s flavorings – including fruity, dessert-inspired, and mint varieties – appeal to the preferences of minors, whose palates are innately averse to the harshness of unflavored nicotine products and whose brains are particularly susceptible to the appeal of sweet tastes. Puff Bar flavor varieties, including fruit flavors such as “blueberry ice” and “sour apple,” dessert flavors such as “strawberry donut” and “frozen banana,” and mint flavors such as cool mint, spearmint, and menthol, clearly appeal to youth. Studies have found that flavor is a primary reason for youth initiation of e-cigarette use, with the overwhelming majority of youth reporting that their first use was with a flavored product.¹

¹ See, e.g., Andrea C. Villanti et al., *Association of Flavored Tobacco Use With Tobacco Initiation and Subsequent Use Among US Youth and Adults, 2013-2015*. 2 JAMA NETWORK OPEN e1913804 (2019).

Puff Bar products are marketed in language that target youth, such as the “O.M.G.” flavored Puff Bar. Advertisements using words such as “vibes” appeal to adolescents’ familiarity with the “good vibes only” catchphrase that has more than 11 million tags on Instagram, a social media platform that is popular among youth. Puff Bar products are also expressly marketed to kids as a form of escapism from adults, including in an advertisement that encourages the product’s use as a way to “escape from . . . parental texts.”



Puff Bar’s branding as a simple, value-oriented product also appeals to youth, who seek immediate satisfaction with limited barriers to accessibility. Puff Bar devices are marketed to be “compact, light, and portable,” requiring “no maintenance, charging, or refilling.” <https://puffbar.com/> This makes “vaping a breeze.” Puff Bar’s simple, no assembly design also streamlines the vaping process for teens, who can forego the purchasing and replacing of cartridges that other vape products require. As a disposable device activated solely through inhalation, Puff Bar’s design is “as simple as it gets.” Puff Bar’s emphasis on value is equally problematic, in that it appeals to minors who typically do not possess large sums of money, or who are working for minimum wage. Unlike competitors, Puff Bar devices are sold for as low as \$10.95 a piece and do not require the added expense of replacement cartridges. Further, Puff Bar devices are designed to appeal to youth by making the product disguisable to adults. Puff Bars are designed to look like a USB flash drive, enabling undetectable vaping almost anywhere, including in school:



Puff Bar disposable e-cigarettes are a paradigm of the problematic new products that endanger minors, including minor residents of Massachusetts. For example, the Puff Bar Glow product is designed to light up with different colors when inhaled, mimicking a flashy, eye-catching toy. Even Puff Bar packaging is designed to entice teens – Puff Bars are sold in packaging that is bright and colorful, creating youth appeal by making the product appear to young audiences like a harmless, fun accessory. On the contrary, Puff Bar disposable devices deliver very high doses of nicotine nearly three times the nicotine concentration permitted in the European Union.



Accordingly, your failure to employ a means of mailing, shipping, or delivery that necessitate a Massachusetts consumer’s signature and age verification violates both the letter and spirit of 940 CMR 21.04(a).

Violation of FDA Deeming Rule

Your companies are also violating c. 93A because your sale of Puff Bar e-cigarettes violates federal law. In 2016, the U.S. Food and Drug Administration (“FDA”) issued a final agency rule, commonly referred to as the “Deeming Rule,” that deemed e-cigarettes to be tobacco products. 81 FR 28973 (May 10, 2016). Pursuant to the Deeming Rule, new e-cigarette products may not be sold unless and until approved by the FDA. The Rule specifically states that “any new tobacco product that was not on the market on the effective date of the rule . . . will be subject to enforcement if marketed without authorization after the effective date.” 81 F.R. at 29011. The effective date for the Deeming Rule was August 8, 2016. 81 F.R. at 28974.

The FDA adopted the Deeming Rule for many of the same reasons that Massachusetts adopted its new law on e-cigarettes in 2019. In announcing the Rule, the agency stated:

[B]efore this rule, there was no federal law to stop retailers from selling e-cigarettes, hookah, or cigars to youth under age 18. There has been a major drop in the use of traditional cigarettes among youth over the past decade, but their use of other tobacco products is rising. Current e-cigarette use among high school students has skyrocketed from 1.5 percent in 2011 to 16 percent in 2015 (a more than 900 percent increase)

<https://www.fda.gov/consumers/consumer-updates/facts-fdas-new-tobacco-rule>.

Your companies, which sell and distribute Puff Bar products, did not exist at the time of the Deeming Rule's effective date. Cool Clouds Distribution filed its Articles of Incorporation in California on May 1, 2019. Puff Bar filed its Articles of Incorporation on February 1, 2020. Puff Bar e-cigarettes were not on the market on the effective date of the Deeming Rule, and therefore may not legally be sold or distributed because they did not and do not have pre-market approval by the FDA.

Request for Relief

By selling flavored e-cigarettes in Massachusetts in the manner described above, your companies have engaged, and continue to engage, in unfair and deceptive acts that constitute multiple *per se* violations of Chapter 93A. Your companies' sales violate the prohibition on the sale of flavored e-cigarettes imposed in 2019 by the Tobacco Control Modernization Act, G.L. c. 270, §28; they violate the Attorney General's regulations requiring a signature for delivery, 940 CMR 21.04; and they violate the FDA's Deeming Rule covering your products, 81 FR 28973 (2016).

Juliana Larson and Juliana Shulman-Laniel were able to gain access without difficulty to your companies' flavored Puff Bar e-cigarettes, exposing them to the reach of harmful, addictive products that were explicitly banned in Massachusetts in November 2019. They were also provided with e-cigarette products that have not been approved by the FDA, without the signature required by the Massachusetts Attorney General. Your companies' delivery of flavored Puff Bar e-cigarettes to Larson, Shulman, and other similarly situated Massachusetts consumers not only exposes them to an illegally sold product, but opens the door to future harm and consequential adversity, including injury from inhalation of the nicotine and toxic chemicals in Puff Bar e-cigarettes. As such, Larson and Shulman-Laniel, and others similarly situated are categorically in a worse position than before the harm in this case occurred.

This letter serves as our request that your companies cease the illegal and unconscionable sale and distribution of Puff Bar products in the Commonwealth of Massachusetts. In the absence of an amicable resolution, we expect to file suit seeking injunctive and declaratory relief, including reimbursement of attorneys' fees and costs, to enjoin your further unfair and deceptive sales

practices. We ask that you respond within thirty (30) days from the date of this letter with a good faith settlement proposal.

Sincerely,

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