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13 R.J. Reynolds Tobacco Company,  
14 American Petroleum and Convenience  
15 Store Association

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

17 **COUNTY OF FRESNO**

18 R.J. REYNOLDS TOBACCO COMPANY;  
19 AMERICAN PETROLEUM AND  
20 CONVENIENCE STORE ASSOCIATION,

21 Plaintiffs-Petitioners,

22 v.

23 ROB BONTA, in his official capacity as  
24 Attorney General of California; LISA A.  
25 SMITTCAMP, in her official capacity as  
26 District Attorney of the County of Fresno and  
27 as a representative of all California District  
28 Attorneys; the CALIFORNIA DEPARTMENT  
OF PUBLIC HEALTH; and TOMAS J.  
ARAGÓN, in his official capacity as State  
Public Health Officer for the California  
Department of Public Health,

Defendants-Respondents.

CASE NO. 23CECG01734

Assigned for All Purposes to  
The Honorable Jonathan M. Skiles  
Department 403

**FIRST AMENDED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF AND VERIFIED PETITION  
FOR WRIT OF MANDATE**

Action Filed: May 11, 2023  
Trial Date: None Set

1 Plaintiffs-Petitioners<sup>1</sup> R.J. Reynolds Tobacco Company (“RJRT”) and American Petroleum  
2 and Convenience Store Association (“APCA”), bring this action for declaratory and injunctive  
3 relief and verified petition for a writ of mandate against Defendant-Respondent Rob Bonta, in his  
4 official capacity as Attorney General of California, Defendant-Respondent Lisa A. Smittcamp, in  
5 her official capacity as District Attorney of the County of Fresno and as a representative of all  
6 California District Attorneys, Defendant-Respondent California Department of Public Health  
7 (“CDPH”), and Defendant-Respondent Tomás J. Aragón, in his official capacity as State Public  
8 Health Officer for CDPH.

9 **INTRODUCTION**

10 1. Plaintiff RJRT manufactures cigarettes under the brands Camel and Newport. Until  
11 last year, tobacco- and menthol-flavored versions of both brands were sold in California. Since  
12 December 21, 2022, California has prohibited retailers from selling tobacco products with a  
13 characterizing flavor, defined as a distinguishable taste or aroma other than that of tobacco. In  
14 response to the ban, RJRT ceased making its menthol-flavored Camel and Newport cigarettes  
15 available for sale in California. At the same time, RJRT introduced several new styles of non-  
16 menthol, tobacco-flavored Camel and Newport cigarettes. These new styles contain an ingredient,  
17 referred to as WS-3, that imparts a cooling sensation but does not impart any distinguishable taste  
18 or aroma other than that of tobacco. Each of these new products (collectively, the “WS-3  
19 Products”) prominently states on its packaging and promotional materials that the cigarettes are  
20 “NON-MENTHOL.” And each received an FDA marketing authorization stating that the product’s  
21 characterizing flavor is “None.”

22 2. Despite this, on April 25, 2023, Attorney General Bonta sent RJRT three Notices of  
23 Determination (collectively, the “WS-3 Notices of Determination”) determining that RJRT’s new  
24 products are “presumptively FLAVORED” and thus presumptively unlawful under the  
25 characterizing flavor ban. The Attorney General conceded that these determinations were not based  
26 on any effort to determine the new products’ actual tastes or aromas. Instead, relying on a

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<sup>1</sup> For the convenience of the reader, this Complaint hereinafter refers to Plaintiffs-Petitioners as  
“Plaintiffs” and Defendants-Respondents as “Defendants.”

1 “rebuttable presumption” provision that governs evidentiary burdens in judicial proceedings, the  
2 Attorney General determined that the packaging and promotional materials of RJRT’s new products  
3 imply that they impart a characterizing menthol flavor. In reaching this determination, the Attorney  
4 General ignored the products’ prominent “NON-MENTHOL” labeling, and instead offered vague  
5 allegations and cherry-picked and incomplete samples of the new products’ marketing and  
6 advertising, which are misleadingly presented or simply wrong (for example, they use incomplete  
7 images of the new products and rely on a “comparator product” that has never been sold anywhere  
8 in the United States). In the end, the WS-3 Notices of Determination do not identify any statements  
9 by RJRT suggesting that any of the new products impart a prohibited characterizing flavor.  
10 Nevertheless, the Attorney General promised to post the WS-3 Notices of Determination on the  
11 Department of Justice’s public website in a clear effort to discourage retailers from carrying the  
12 products.

13       3.      The WS-3 Notices of Determination were subsequently obtained and published by  
14 the media, causing them to be widely publicized and misinterpreted. At least one local public health  
15 official has used the WS-3 Notices of Determination to direct that RJRT’s new products be removed  
16 from retail shelves, and some of RJRT’s customers have stopped stocking the products as a result.  
17 For example, Costco, which accounts for over 18% of RJRT’s sales of the new products in  
18 California, stopped ordering the new products and pulled the new products from its warehouses as  
19 a direct result of the WS-3 Notices of Determination.

20       4.      In contrast to his unwarranted focus on RJRT’s lawful products, the Attorney  
21 General has apparently taken little or no action with respect to open and notorious sales of flavored  
22 disposable e-cigarettes. Targeting RJRT’s lawful tobacco-flavored products while youth use of  
23 flavored disposable e-cigarettes skyrockets is arbitrary and unlawful and undercuts the goals of the  
24 characterizing flavor ban.

25       5.      The WS-3 Notices of Determination, along with certain other circumstances, have  
26 made it clear that there is a live dispute between Plaintiffs on the one hand, and Defendants on the  
27 other, as to whether the WS-3 Products have a “characterizing flavor” and therefore fall within the  
28 scope of the characterizing flavor ban. In addition, the determination in the WS-3 Notices of

1 Determination—that RJRT’s products are presumptively flavored—is erroneous, arbitrary, and  
2 unlawful. Plaintiffs therefore assert two distinct sets of claims: First, the WS-3 Products do not  
3 impart a characterizing flavor and therefore are not within the scope of the characterizing flavor  
4 ban; and second, the Attorney General’s determinations that were thereafter communicated in the  
5 WS-3 Notices of Determination are in error and should be withdrawn and replaced with corrective  
6 notices indicating that RJRT’s WS-3 Products impart no characterizing flavor and are not  
7 prohibited under California law.

8           6. Plaintiffs accordingly seek declaratory and injunctive relief, and petition the Court  
9 to issue a writ of mandate, as set forth more fully below.

## BACKGROUND

11       7.     RJRT manufactures cigarettes under the brands Camel and Newport. Until last year,  
12     tobacco- and menthol-flavored styles of both brands were sold in California.

13        8.        The California Legislature enacted a ban on “flavored tobacco products” on August  
14 28, 2020. The bill amended the California Health and Safety Code by adding a provision that  
15 prohibits a “tobacco retailer, or any of the tobacco retailer’s agents or employees” from selling,  
16 offering for sale, or possessing with the intent to sell or offer to sell “a flavored tobacco product or  
17 a tobacco product flavor enhancer.” Health & Saf. Code, § 104559.5(b)(1).

18        9.        The provision defines a “flavored tobacco product” as “any tobacco product that  
19 contains a constituent that imparts a characterizing flavor.” *Id.*, § 104559.5(a)(4). And in turn, it  
20 defines “characterizing flavor” as “a distinguishable taste or aroma, or both, other than the taste or  
21 aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco  
22 product.” A provision of the statute provides that “[t]here is a rebuttable presumption that a tobacco  
23 product is a flavored tobacco product if a manufacturer or any of the manufacturer’s agents or  
24 employees, in the course of their agency or employment, has made a statement or claim directed to  
25 consumers or to the public that the tobacco product has or produces a characterizing flavor.” *Id.*,  
26 § 104559.5(b)(2).

27        10. The Governor signed the characterizing flavor ban in 2020, and it then withstood a  
28 popular referendum challenge at the ballot in the general election on November 8, 2022.

1       11. On October 7, 2023, California amended the characterizing flavor ban. 2023 Cal.  
2 Legis. Serv. Ch. 351 (A.B. 935).

3       12. The amendment, which takes effect on January 1, 2024, changes the nature of the  
4 enforcement regime by removing criminal penalties of \$250 for violating the ban, and instead  
5 implementing a robust civil enforcement scheme that provides for heftier fines on an escalating  
6 scale, and also provides for tobacco license suspensions under certain circumstances. *Id.* (cross-  
7 referencing civil penalty scheme of Business & Professions Code, § 22958(a)(1)).

8       13. Under this regime, any “enforcing agency” may “conduct inspections and assess  
9 penalties for violations of [the ban].” Health & Saf. Code, § 104559.5(g)(2). Penalties include  
10 “civil [monetary] penalties,” and, for repeat offenders, “suspen[sion] or revo[cation]” of their  
11 retailer license to sell cigarettes and tobacco products. *Id.*, §§ 104559.5(f)(1)–(2). The amended  
12 statute specifies that the Attorney General and district attorneys are among the “enforcing agencies”  
13 that can bring enforcement actions under the ban. *Id.*, § 104559.5(a)(4). The statute also now  
14 designates CDPH as the “primary” enforcing agency. *Id.*, § 104559.5(g)(1).

15       14. By the ban’s original effective date of December 21, 2022, RJRT ceased making its  
16 menthol cigarettes available for retail sale in California and instructed retailers and wholesalers to  
17 halt any further sales of RJRT’s menthol cigarettes in California.

18       15. RJRT introduced new products in California under the Camel and Newport brands.  
19 RJRT marketed these new products and took steps to make them available to adult retail consumers  
20 (including to consumers in Fresno County) beginning December 21, 2022.

21       16. These new products contain an ingredient commonly referred to as “WS-3.”<sup>2</sup> This  
22 chemical imparts a cooling sensation, but has no taste or aroma that is perceptible by humans in the  
23 concentrations used in RJRT’s new products.

24       17. The Flavor & Extract Manufacturers Association of the United States (“FEMA”)  
25 deemed WS-3 to be Generally Recognized As Safe (“GRAS”) in 1975. In the decades since, WS-

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27       2 N-Ethyl-p-menthane-3-carboxamide is commonly referred to as “WS-3,” or “WS3.” RJRT uses  
28 the scientific name (N-Ethyl-p-menthane-3-carboxamide) instead of the trade name “WS-3” or  
“WS3” in its trade publications concerning the use of N-Ethyl-p-menthane-3-carboxamide, but this  
Complaint utilizes the term “WS-3” for the reader’s convenience.

1       3 has been used in many food and cosmetic products because it imparts a cooling sensation without  
2 any associated taste or aroma.

3       18.      The packaging and promotional materials for these new products prominently state  
4 that the products are “NON-MENTHOL.” Because federal law allows only tobacco- and menthol-  
5 flavored cigarettes, “NON-MENTHOL” unambiguously means that the cigarettes are unflavored  
6 or tobacco-flavored.

7       19.      On April 25, 2023, the Attorney General sent the WS-3 Notices of Determination,  
8 which were three letters to RJRT regarding these products. *See* Ex. 1 (Notice of Determination 23-  
9 04-A2); Ex. 2 (Notice of Determination 23-04-A3); Ex. 3 (Notice of Determination 23-04-A5).

10       20.     In the WS-3 Notices of Determination, the Attorney General determined that the  
11 new products had triggered the characterizing flavor ban’s rebuttable presumption through the new  
12 products’ labeling, packaging, and promotional materials. *See, e.g.*, Ex. 1 [23-04-A2] at 1; Ex. 2  
13 [23-04-A3] at 1; Ex. 3 [23-04-A5] at 1. Contrary to the Attorney General’s assertions, the  
14 characterizing flavor ban’s rebuttable presumption cannot be applied in enforcing the statute  
15 outside of judicial proceedings, and RJRT’s new products in any event do not trigger the rebuttable  
16 presumption. Moreover, the new products are outside the scope of the characterizing flavor ban  
17 because none has any distinguishable non-tobacco taste or aroma.

18       21.     First, the rebuttable presumption provision of the characterizing flavor ban does not  
19 apply outside of judicial proceedings. The Attorney General misunderstands the nature of the  
20 presumption, which governs burdens of production and proof in judicial proceedings, not  
21 substantive application of the characterizing flavor ban. The Attorney General may not invoke the  
22 presumption (and the manufacturer’s alleged failure to rebut it) as a basis for enforcing the ban  
23 against the new products outside of judicial proceedings.

24       22.     Second, RJRT’s new products do not trigger the rebuttable presumption. Neither  
25 RJRT nor its agents or employees have made any claims or statements that trigger the presumption.  
26 To the contrary, RJRT clearly and repeatedly communicated to adult tobacco consumers and the  
27 public, on packaging and in promotional materials, that the products are “NON-MENTHOL,” *i.e.*,  
28 tobacco-flavored, cigarettes. Finally, any application of the presumption is rebutted here because

1 RJRT's new products contain no constituent that imparts a distinguishable taste or aroma other than  
2 tobacco.

3       23. Third, the new products do not impart a characterizing flavor other than tobacco.  
4 WS-3 imparts no taste or aroma (let alone a distinguishable taste or aroma) in concentrations used  
5 in RJRT's tobacco products. In fact, WS-3 has been used as an additive in food and cosmetics for  
6 decades precisely because it does not add any distinguishable taste or aroma to the final product.  
7 Therefore, RJRT's tobacco products containing WS-3 impart no distinguishable taste or aroma  
8 other than that of the tobacco. As a result, they are not covered by the characterizing flavor ban.

9       24. Moreover, the Attorney General has selectively and arbitrarily targeted RJRT.  
10 While singling out RJRT's "NON-MENTHOL" products—despite concededly not even attempting  
11 to determine whether those products actually are flavored—the Attorney General has apparently  
12 taken little or no action with respect to other entities that are openly and notoriously violating the  
13 law, particularly retailers of e-cigarettes (also known as vaping products) with characterizing  
14 flavors other than tobacco.<sup>3</sup> For example, disposable e-cigarettes with flavors such as "Watermelon  
15 Bubble Gum" and "Rainbow Candy" are being sold at retail stores in California despite imparting  
16 a prohibited characterizing flavor.

17       25. An ostensible purpose of California's characterizing flavor ban is to address youth  
18 access to e-cigarettes.

19       26. But instead of enforcing the characterizing flavor ban against these flagrant and  
20 widespread violations in a way that pursues its chief purpose, California's Attorney General is  
21 targeting lawful RJRT cigarettes that lack a characterizing flavor other than tobacco and are being  
22 clearly marketed as "NON-MENTHOL." This is arbitrary and irrational. While youth smoking  
23 rates are at an all-time low, disposable e-cigarettes are now the most commonly used tobacco  
24 product among youth who use a tobacco product, and "[o]verwhelmingly, current [youth] users  
25 (nearly 85%) used flavored e-cigarettes," with the most popular flavors including "candy, desserts,  
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27       27       <sup>3</sup> California defines "characterizing flavor" as "a distinguishable taste or aroma, or both, other than  
28 the taste or aroma of tobacco," Health & Safety Code § 104559.5(a)(1), so the "other than tobacco"  
qualifier is not necessary, but Plaintiffs include it for clarity.

1 or other sweets.” See U.S. Food & Drug Admin., *Results from the Annual National Youth Tobacco*  
2 *Survey* (Dec. 20, 2022), <https://tinyurl.com/mwvbf94> (last visited May 7, 2023). Indeed, more  
3 recent data indicates that disposable e-cigarettes are now the most popular e-cigarettes among  
4 youth. U.S. Food & Drug Admin., *National Survey Shows Drop in E-Cigarette Use Among High*  
5 *School Students* (Nov. 2, 2023), <https://tinyurl.com/y82f2z7y>.

6 27. Accordingly, Plaintiffs now assert two separate sets of claims: (1) the WS-3  
7 Products lack a “characterizing flavor” and therefore are not within the scope of the characterizing  
8 flavor ban, and (2) the determinations communicated in the WS-3 Notices of Determination are  
9 erroneous, unlawful, and arbitrary and should be reversed.

10 28. Under the first set of claims, Plaintiffs seek declarations that the sale, offer for sale,  
11 or possession with intent to sell or offer for sale of RJRT’s new products is not within the scope of  
12 Health and Safety Code § 104559.5; and that the characterizing flavor ban’s presumption has not  
13 been triggered by RJRT’s WS-3 Products’ packaging or marketing. Plaintiffs also seek injunctions  
14 prohibiting Defendants from enforcing the characterizing flavor ban against tobacco retailers and  
15 their agents regarding the sale of RJRT’s WS-3 Products, and from taking any other enforcement  
16 actions or filing any lawsuits premised on the notion that RJRT’s WS-3 Products violate the  
17 characterizing flavor ban or based on the notion that the characterizing flavor ban’s rebuttable  
18 presumption has been triggered.

19 29. Under the second set of claims, Plaintiffs seek declarations that it is improper for  
20 the Attorney General to make a “determination” regarding the rebuttable presumption outside the  
21 context of a judicial proceeding; that the determinations made in the WS-3 Notices of  
22 Determination are erroneous because the characterizing flavor ban’s presumption has not been  
23 triggered by RJRT’s WS-3 Products’ packaging or marketing; and that the WS-3 Notices of  
24 Determination have no legal effect or evidentiary value, and are not binding in any judicial or  
25 administrative proceeding. Plaintiffs also seek an order enjoining the Defendants from initiating  
26 any enforcement action or lawsuit against Plaintiffs based on these WS-3 Notices of Determination,  
27 or on the notion that the presumption has been triggered; requiring the Attorney General to rescind  
28 the WS-3 Notices of Determination and issue corrective notices; and enjoining the Attorney

1 General from posting the WS-3 Notices of Determination on the California Department of Justice  
2 website or elsewhere. Plaintiffs further request that the Court issue a writ of mandate requiring the  
3 Attorney General to rescind the WS-3 Notices of Determination served on Plaintiff RJRT on April  
4 25, 2023, and issue corrective notices indicating that RJRT's WS-3 Products impart no  
5 characterizing flavor and are not prohibited under California law; and precluding the Attorney  
6 General from posting the WS-3 Notices of Determination on the California Department of Justice  
7 website or elsewhere.

8 **PARTIES**

9 30. Plaintiff RJRT is a North Carolina corporation headquartered in Winston-Salem,  
10 North Carolina. RJRT develops, manufactures, markets, and distributes tobacco products under a  
11 variety of brand names, including tobacco- and menthol-flavored cigarettes under the brand names  
12 Camel and Newport, among others.

13 31. Plaintiff APCA is an association of independent California gasoline and  
14 convenience store owners. APCA's mission is to unite its members by providing a platform to  
15 educate, empower, and promote shared business values in the communities they serve.

16 32. Defendants California Attorney General Rob Bonta and District Attorney Lisa  
17 Smittcamp are the state's top law enforcement officer and the chief prosecutor for the County of  
18 Fresno, respectively. Defendants are sued here in their official capacities. Defendant Lisa  
19 Smittcamp is also sued as the representative of all district attorneys statewide. *Planned Parenthood*  
20 *Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 257 ("The naming of a local official as  
21 representative of all counterparts statewide is a recognized procedure."). Defendant CDPH is a  
22 subdivision of the California Department of Health and Human Services and Defendant Tomás J.  
23 Aragón is California's State Public Health Officer for CDPH. The amendment to the characterizing  
24 flavor ban designates CDPH as having "primary responsibility for enforcement" of the  
25 characterizing flavor ban. Health & Saf. Code, § 104559.5(g)(1). Defendant Aragón is sued here  
26 in his official capacity.

27 33. Until January 1, 2024, each violation of the characterizing flavor ban constitutes an  
28 "infraction." Health & Saf. Code, § 104559.5(f). This means that Defendants Bonta and

1 Smittcamp have the authority to prosecute criminal violations of the characterizing flavor ban.  
2 Gov't Code, § 26500 ("The district attorney is the public prosecutor" who "shall initiate and  
3 conduct on behalf of the people all prosecutions for public offenses."); Penal Code, § 16 (defining  
4 "[c]rimes and public offenses" to include "infraction[s]"); Cal. Const. art. V, § 13 (Attorney  
5 General is "the chief law officer of the state" and exercises "direct supervision over every district  
6 attorney."). After the amendment to the characterizing flavor ban takes effect in 2024, each  
7 violation of the ban will be subject to a civil enforcement regime under which the Attorney General  
8 and district attorneys will retain enforcement authority as to the ban while CDPH is assigned  
9 primary enforcement responsibility for the ban. Health & Saf. Code, §§ 104559.5(a)(4), (g)(1).

## 10 **JURISDICTION AND VENUE**

11 34. The Court has jurisdiction over the matters alleged in this Complaint pursuant to  
12 Code of Civil Procedure § 1060 (declaratory relief), § 527(a) (preliminary injunction), and § 526  
13 (permanent injunction).

14 35. Venue for this action properly lies in Fresno County pursuant to California Code of  
15 Civil Procedure §§ 393, 395, 401.

## 16 **FACTUAL ALLEGATIONS**

### 17 California's Characterizing Flavor Ban

18 36. Since 2009, federal law has banned all characterizing flavors other than menthol and  
19 tobacco in cigarettes. 21 U.S.C. § 387g(a)(1)(A). Accordingly, if RJRT describes a cigarette as  
20 "non-menthol," it communicates that the cigarette is "unflavored" or "tobacco-flavored." And for  
21 this reason too, adult tobacco consumers and the public are on notice that a cigarette described as  
22 "non-menthol" is unflavored or tobacco-flavored.

23 37. On August 28, 2020, the California Legislature passed S.B. 793. The bill was  
24 intended to address the rise in youth use of e-cigarettes in 2018 and 2019. The author of S.B. 793  
25 stated, "Fueled by kid friendly flavors like cotton candy and bubblegum, 3.6 million more middle  
26 and high school students started using e-cigarettes in 2018." Senate Floor Analysis of S.B. 793, at  
27 4 (2020). She went on to say that "California needs to take swift action to address this epidemic."

28 *Id.*

1       38. The legislature took such action by banning characterizing flavors other than  
2 tobacco in tobacco products. The bill promulgated a new provision of the Health and Safety Code  
3 that bars a “tobacco retailer, or any of the tobacco retailer’s agents or employees” from selling,  
4 offering for sale, or possessing with the intent to sell or offer to sell “a flavored tobacco product or  
5 a tobacco product flavor enhancer.” Health & Saf. Code, § 104559.5(b)(1).

6       39. The law defines a “flavored tobacco product” as “any tobacco product that contains  
7 a constituent that imparts a characterizing flavor.” *Id.* “Tobacco product” as defined under  
8 California law includes cigarette products and e-cigarette products. *Id.*, § 104559.5(a)(14) (citing  
9 Health & Saf. Code, § 104495).

10       40. A “characterizing flavor,” in turn, is defined as “a distinguishable taste or aroma, or  
11 both, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct  
12 produced by the tobacco product.” *Id.*

13       41. The law further states that “[a] tobacco product shall not be determined to have a  
14 characterizing flavor solely because of the use of additives or flavorings or the provision of  
15 ingredient information. Rather, it is the presence of a *distinguishable* taste or aroma, or both, as  
16 described in the first sentence of this definition, that constitutes a characterizing flavor.” *Id.*  
17 (emphasis added).

18       42. The law also imposes a presumption “that a tobacco product is a flavored tobacco  
19 product if a manufacturer or any of the manufacturer’s agents or employees, in the course of their  
20 agency or employment, has made a statement or claim directed to consumers or to the public that  
21 the tobacco product has or produces a characterizing flavor.” *Id.*, § 104559.5(b)(2). That  
22 presumption is rebuttable. *Id.*

23       43. Until December 31, 2023, each violation of the ban is a criminal infraction  
24 punishable by a fine of \$250. *Id.* The original characterizing flavor ban went into effect on  
25 December 21, 2022.

26       44. On October 7, 2023, California amended the characterizing flavor ban. 2023 Cal.  
27 Legis. Serv. Ch. 351 (A.B. 935).

28       45. The amendment, which takes effect on January 1, 2024, removes criminal penalties

1 for violating the ban, but leaves in place a robust civil enforcement scheme.

2 46. Under this regime, any “enforcing agency” may “conduct inspections and assess  
3 penalties for violations of [the ban].” Health & Saf. Code, § 104559.5(g)(2). Penalties include  
4 “civil [monetary] penalties,” and, for repeat offenders, “suspen[sion] or revo[cation]” of their  
5 retailer license to sell cigarettes and tobacco products. *Id.*, §§ 104559.5(f)(1)–(2). The amended  
6 statute specifies that the Attorney General and district attorneys are among the “enforcing agencies”  
7 that can bring enforcement actions under the ban. *Id.*, § 104559.5(a)(4).

8 47. Under the statute as amended, CDPH is designated as the “primary” enforcing  
9 agency. *Id.*, § 104559.5(g)(1).

10 RJRT’s WS-3 Products

11 48. In anticipation of the characterizing flavor ban, RJRT ceased making its menthol  
12 cigarettes available for retail sale in California. Further, RJRT instructed all retailers and  
13 wholesalers in California to halt the sale of any remaining RJRT menthol cigarettes. In addition,  
14 the APCA member stores ceased the retail sale of menthol cigarettes (including those manufactured  
15 by RJRT) in California.

16 49. In anticipation of the characterizing flavor ban going into effect, RJRT notified adult  
17 tobacco consumers that RJRT’s current menthol products would no longer be available in  
18 California, and that new non-menthol products would be available.

19 50. RJRT introduced new styles of products—the WS-3 Products—in California. These  
20 new products are marketed under three Camel and Newport styles: (i) Newport Non-Menthol  
21 Green (comprising Newport Non-Menthol Green Box and Newport Non-Menthol Green 100 Box),  
22 (ii) Newport EXP (comprising Newport EXP Non-Menthol Mix Box, Newport EXP Non-Menthol  
23 Mix 100 Box, Newport EXP Non-Menthol Max Box, and Newport Non-Menthol EXP Max 100  
24 Box), and (iii) Camel Crisp Non-Menthol Green (comprising Camel Crisp Non-Menthol Green  
25 Box).<sup>4</sup> These cigarettes are not menthol-flavored, and impart no distinguishable taste or aroma

26 <sup>4</sup> In this litigation, Plaintiffs previously used the defined term “New Products” to refer to the WS-  
27 3 Products along with Camel Crush Non-Menthol Oasis comprising Camel Crush Non-Menthol  
28 Oasis Blue Box, Camel Crush Non-Menthol Oasis Green Box, and Camel Crush Non-Menthol  
Oasis Silver Box. RJRT no longer markets the Camel Crush products, and those products are not  
part of this First Amended Complaint.

1 other than tobacco.

2 51. The WS-3 Products contain a cooling agent known as WS-3.

3 52. The WS-3 Products provide adult tobacco consumers who wish to continue smoking  
4 with an alternative to menthol cigarettes.

5 53. WS-3 produces a cooling sensation but not a taste or aroma when used in the  
6 concentration used in RJRT's cigarette products.

7 54. WS-3 has been used for decades in food and cosmetics because it produces a cooling  
8 sensation without imparting any taste or aroma when added in the concentrations used in various  
9 consumer products.

10 55. Beginning in the 1970s, a men's razor company called Wilkinson Sword began an  
11 expansive effort to develop cooling compounds that did not have the attributes associated with the  
12 volatility of menthol—for example, menthol's distinctive odor. Wilkinson Sword developed over  
13 1,200 potential cooling compounds between 1971 and 1976. WS-3 was one such compound.

14 56. In 1975, WS-3 was recognized by FEMA as "Generally Recognized As Safe" for  
15 use in a number of consumer products. WS-3 is used extensively in flavored chewing gum, breath  
16 fresheners, confectionaries, oral care products, and cosmetics like aftershave lotions.

17 57. WS-3 is added to these products precisely because it generates *only* a cooling  
18 sensation when added in the concentrations used in consumable products, and does *not* interfere  
19 with any flavoring agents used in the product.

20 58. For example, WS-3 is added to cherry and coconut lip balm, but the resulting flavor  
21 remains cherry or coconut because WS-3 does not impart its own taste or aroma when added in the  
22 concentrations used in consumable products.

23 59. The reason that WS-3 does not impart a taste or aroma that is perceptible to humans  
24 when added in the concentrations used in consumable products is a matter of chemistry. Humans  
25 experience taste through molecular interactions with taste receptors. Taste receptors are proteins  
26 that recognize taste stimuli of varying types. Humans experience "taste" when molecules interact  
27 with saliva and specifically bind to those taste receptors in the mouth.

28 60. WS-3 molecules do not bind in any specific manner to human taste receptors.

61. Humans experience smell in a similar way to taste. That is, the perception of aroma is, from a chemistry perspective, a matter of the binding of chemical compounds or molecules to specialized proteins primarily in the nose. Humans experience aroma when chemical compounds specifically bind to proteins known as odorant or olfactory receptors.

62. The extent to which a human can detect an aroma from any chemical compound is dependent on the chemical compound's vapor pressure. A higher vapor pressure means that the compound evaporates quickly and releases more scent molecules into the air.

63. WS-3 has a very low vapor pressure. This means that WS-3 releases far fewer molecules that can interact with a person's odorant receptors, or sense of smell. In the concentrations used in the WS-3 Products, WS-3 has no odor perceptible by human beings.

64. The function of WS-3—as used in the WS-3 Products—is to impart a cooling sensation and *not* a taste or aroma. From a chemical perspective, WS-3 accomplishes this by activating a cooling receptor known as the TRPM8 thermoreceptor.

65. This receptor is distinct from a human's taste and odorant receptors.

66. WS-3 and menthol both activate the TRPM8 thermoreceptor, but WS-3 does so without activating the taste or odorant receptors, that is, without imparting a perceptible taste or aroma in humans.

67. As a result, while WS-3 and menthol both impart a cooling sensation, WS-3 does so without activating taste or odorant receptors.

## The WS-3 Products' Packaging and Advertising

68. California's characterizing flavor ban created what is known in consumer product marketing as a "moment of disruption"—an event that causes well-established products to change in character, or to no longer be available for purchase. During a moment of disruption, consumers reevaluate their purchasing decisions, and a company is at risk of losing those consumers to competitive or different products.

69. California's characterizing flavor ban created a moment of disruption. Previously available menthol cigarette products would no longer be available for purchase in California after the law's effective date, and adult tobacco consumers of menthol cigarettes in California would no

1 longer be able to purchase the brands of cigarettes they purchased before the ban. In anticipation  
2 of this moment of disruption, RJRT assessed its options to preserve the brand equity of the Camel  
3 and Newport brands while offering products that comply with the new law.

4 70. In a moment of disruption, consumers seek familiarities from their brand of choice,  
5 which includes logos, designs, fonts, and colors. Providing these familiarities is essential to avoid  
6 losing consumers to competitors.

7 71. Thus, RJRT wanted to provide adult tobacco consumers with new products that  
8 retained the familiarities, including the iconic logos, symbols, and colors long associated with the  
9 Camel and Newport brands, while also clearly stating that these are non-menthol products.

10 72. RJRT's marketing strategy for the WS-3 Products seeks to retain the core brand  
11 equities in both product quality and packaging, including the iconic logos, symbols, and colors long  
12 associated with the Camel and Newport brands, while clearly and accurately articulating the  
13 differences in the new non-menthol products to be offered in California after the ban. For example,  
14 the packaging of the new Camel Non-Menthol product retains various elements long-associated  
15 with the Camel brand, such as the camel icon, while clearly stating that the products inside are non-  
16 menthol.

17 73. As for the new Newport products, the packaging of the new Newport Non-Menthol  
18 Green Products and Newport Non-Menthol EXP Products uses various elements long-associated  
19 with the Newport brand (including non-menthol versions of Newport products), such as the  
20 spinnaker logo, the distinctive Newport lettering, and color and design elements on the pack, while  
21 clearly stating that the product inside is non-menthol.

22 74. Camel Crisp was never sold as a menthol brand. Its labeling and packaging leverage  
23 brand equity, while prominently telling adult tobacco consumers that the Camel Crisp style is not  
24 menthol-flavored. Similarly, there has never been a menthol style of Newport EXP on the market  
25 in California or anywhere else in the United States. Its labeling and packaging leverage brand  
26 equity, while prominently telling adult tobacco consumers that the Newport EXP styles are not  
27 menthol-flavored.

28 75. The WS-3 Products' marketing and packaging leverages the substantial brand equity

1 of the Camel and Newport brands, both of which have loyal adult customers who associate Camel-  
2 and Newport-branded product offerings with high quality and value. This can clearly be seen in  
3 the packaging of the products, which is reproduced below. These images depict the packages with  
4 the cellophane wrappers in which they are sold.

5 *Newport Non-Menthol Green*



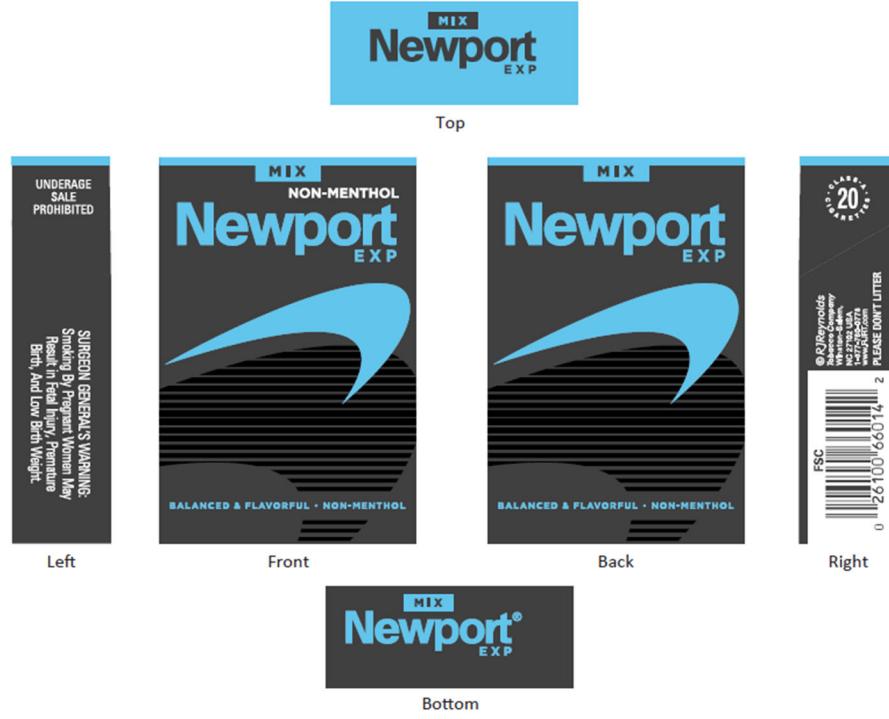
17 Top



1 *Newport Max EXP*



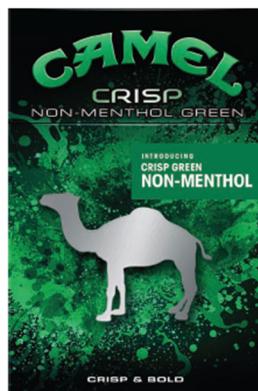
15 *Newport Mix EXP*



1 Camel Crisp Non-Menthol Green



Top



91 76. As shown in the above images, each of the WS-3 Products states prominently on the  
92 packaging that the product is “NON-MENTHOL.” This “NON-MENTHOL” branding is printed  
93 directly on the packs and on the cellophane wrappers in which the products are sold. The above  
94 images are also attached as Exhibit 6.

95 77. RJRT’s marketing materials also clearly communicate that the products are non-  
96 menthol. As shown in the below images, and as illustrated in the WS-3 Notices of Determination,  
97 the advertisements for the WS-3 Products have prominently stated that the products are “NON-  
98



1 MENTHOL" (red boxes added). The advertising for Camel Crisp also expressly and prominently  
2 refers to the product's "tobacco flavor" and explains that the "menthol styles are gone."



#### FDA Marketing Authorization

78. To market new tobacco products, manufacturers must seek FDA marketing authorization, including (among other possibilities) an order that the new product is "substantially equivalent" to a currently marketed product and "is in compliance with the requirements of [the Federal Food, Drug, and Cosmetic Act]." 21 U.S.C. § 387j(a)(2)(A)(i)(I); *see also* 21 C.F.R. § 1107.18(i).

79. FDA may issue an exemption from the substantial-equivalence requirements where (among other things) an exemption "would be appropriate for protection of the public health" and would be "otherwise appropriate." 21 U.S.C. § 387e(j)(3)(A).

80. RJRT applied for—and FDA granted—substantial-equivalence exemptions for the WS-3 Products. An appendix attached to FDA's letters expressly states that the characterizing flavor of the WS-3 Products is "none"—in contrast to the characterizing flavors of the predicate products, which are identified as "menthol."

## Enforcement Threats in California Relating to RJRT's New Cigarette Products

81. On April 25, 2023, the Attorney General’s Tobacco Control Unit sent the WS-3 Notices of Determination: three letters to RJRT regarding these products. *See* Exs. 1–3. In the WS-3 Notices of Determination, the Attorney General communicated his determination that the WS-3 Products had triggered the rebuttable presumption of the characterizing flavor ban through the labeling, packaging, and promotional materials of the products. *See, e.g.*, Ex. 1 [23-04-A2] at 1–2; Ex. 3 [23-04-A5] at 1–2. Each letter addresses one of the three sub-brands. *See* Ex. 1 [23-04-A2] (Camel Crisp); Ex. 2 [23-04-A3] (Newport EXP Non-Menthol Mix; Newport EXP Non-Menthol Max); Ex. 3 [23-04-A5] (Newport Non-Menthol Green).

82. According to the Attorney General, promotional materials for all of the WS-3 Products “purposefully target users of menthol-flavored tobacco products and promote the [WS-3] Products as substitutes or replacements for such menthol-flavored tobacco products.” *See* Exs. 1–3. The Attorney General also stated that “[l]abeling and packaging for [the WS-3 Products] uses brand names, text, and colors traditionally associated with menthol-flavored tobacco products.” *See* Exs. 1–3.

83. According to the Attorney General, the promotional materials for the Camel Crisp Green product “distinguish between the taste or aroma of tobacco and other sensory taste(s) or aroma(s) in the ‘smoking experience’ of the product, implying the inclusion of a non-tobacco taste or aroma.” Ex. 1 [23-04-A2] at 1.

84. The Attorney General stated that promotional materials for the Newport EXP Non-Menthol Mix, Newport EXP Non-Menthol Max, and Newport Non-Menthol Green Box each “use common selling message(s) with menthol-flavored tobacco products” and in the case of the Newport Non-Menthol Green Box, “use common selling message(s) with menthol-flavored tobacco products in the Newport brand line.” Ex. 2 [23-04-A3] at 2; Ex. 3 [23-04-A5] at 1.

85. The Attorney General alleged that the promotional materials for the Newport EXP Non-Menthol Mix and Newport EXP Non-Menthol Max “suggest sensory taste(s) or aroma(s) apart from taste(s) or aroma(s) of a solely tobacco flavored product.” Ex. 2 [23-04-A3] at 2.

86. The Attorney General supplied little to no detail to support these conclusory

1 assertions. Each of the three WS-3 Notices of Determination appended just two to three pages of  
2 attachments. Those attachments depict the WS-3 Products in a side-by-side comparison to a  
3 previously sold menthol product or examples of promotional materials for the relevant product.  
4 The WS-3 Notices of Determination offer no specific explanation as to how these comparisons or  
5 promotional materials trigger the rebuttable presumption.

6 87. As the URLs provided in Tab B of each WS-3 Notice of Determination show, the  
7 sample promotional materials are all drawn from the website of the Stanford Research Into the  
8 Impact of Tobacco Advertising (“SRITA”) collection. Specifically, they are drawn from the  
9 section of the website called “Collection: *Non-Menthol*.” *See* <https://tobacco.stanford.edu/cigarettes/menthol-medicates/nonmenthol/> (last visited on May 3, 2023) (emphasis added).

10 88. The WS-3 Notices of Determination contain a number of material errors, including  
11 multiple factual inaccuracies related to the images of the packs, the descriptions on the packs, and  
12 the promotional materials for the WS-3 Products.

13 89. First, the Attorney General ignores the fact that (as shown above) every single WS-  
14 3 Product contains the phrase “NON-MENTHOL” on the front of each package. Camel Crisp  
15 Green and Newport Non-Menthol Green additionally have “NON-MENTHOL” text on the top and  
16 bottom of the pack. The Attorney General also ignores the fact that all of the WS-3 Products are  
17 wrapped in cellophane packaging that contains a printed violator that reiterates that the products  
18 are “NON-MENTHOL.” By contrast, in a separate set of two Notices of Determination addressing  
19 RJRT’s menthol cigarettes (which it no longer makes available for sale in California following the  
20 characterizing flavor ban), the Attorney General determined that those products are “presumptively  
21 FLAVORED” because “[l]abeling for the Reviewed Products states that the products are menthol-  
22 flavored tobacco products.” Exs. 4–5 (Notices of Determination Nos. 23-10-A3 and 23-10-A7  
23 (collectively, “Menthol Notices of Determination”)).

24 90. Second, the WS-3 Notices of Determination publish a series of alleged  
25 “comparator” predicate products. But the pack image—“Newport EXP Menthe”—listed as a  
26 “comparison product[]” for Camel Crisp, Newport EXP Non-Menthol Mix, and Newport Non-  
27 Menthol Max is not a product that was ever sold in California, or anywhere else in the United  
28

1 States.

2 91. Third, the WS-3 Notices of Determination fail to include complete images of the  
3 WS-3 Products' promotional materials. For example, none of the promotional materials cited in  
4 the WS-3 Notices of Determination shows the federal warning.

5 92. And while the Attorney General alleges that the WS-3 Products "purposefully target  
6 users of menthol-flavored tobacco products and promote the [WS-3] Products as substitutes or  
7 replacements for such menthol-flavored tobacco products," the promotional materials to which the  
8 Attorney General cites expressly indicate that the WS-3 Products lack menthol and are "NON-  
9 MENTHOL" products. The Attorney General fails to explain how those promotional materials  
10 nevertheless imply that the products are menthol flavored or why it would be improper to market  
11 non-menthol products to former adult menthol smokers who wish to continue smoking cigarettes.  
12 That failure is particularly glaring in light of the Attorney General's determination in the Menthol  
13 Notices of Determination that RJRT's menthol cigarettes are presumptively flavored because their  
14 labeling "states that the products are menthol-flavored tobacco products." Exs. 4-5.

15 93. Finally, the WS-3 Notices of Determination also ignore the fact that the cited  
16 promotional materials for the Camel Crisp Green product indicate the product has a "smooth  
17 *tobacco flavor.*" (Emphasis added.) The Attorney General ignores this clear statement that the  
18 product is tobacco-flavored.

19 94. In each WS-3 Notice of Determination, the Attorney General states that retailers and  
20 distributors of the WS-3 Products may be subject to fines and penalties, including under the  
21 characterizing flavor ban and under Business and Professions Code § 17200. Specifically, the WS-  
22 3 Notices of Determination state that "[u]nder the California flavor ban law, retailers and their  
23 agents are subject to fines for the possession and sale of such flavored tobacco products." And,  
24 citing Business and Professions Code § 17200, the WS-3 Notices of Determination state that  
25 "[o]ther state statutes and local ordinances may impose additional penalties on retailers or other  
26 vendors as well." The WS-3 Notices of Determination also "encourage[]" RJRT "to provide a copy  
27 to your California distributor and retail customers as well."

28 95. Both the Attorney General and District Attorney Smittcamp have the authority to

1 enforce Business and Professions Code § 17200. *See* Bus. & Prof. Code, § 17204. Both the  
2 Attorney General and District Attorney Smittcamp have enforcement authority under another  
3 consumer protection statute, Business and Professions Code § 17500. *See* Bus. & Prof. Code,  
4 § 17508.

5 96. The WS-3 Notices of Determination additionally “encourage” RJRT “to submit a  
6 response with any supporting materials … on or before June 23, 2023” “if you believe these  
7 determinations or conclusions are in error, or if you believe any Reviewed Product(s) is properly  
8 classified as UNFLAVORED.”

9 97. Politico, a media outlet, obtained the WS-3 Notices of Determination and published  
10 an article about them on May 3, 2023, which included a link to a copy of the WS-3 Notices of  
11 Determination themselves. Rachel Bluth, *California AG Warns Tobacco Companies Their New*  
12 *Cigarettes Are Banned In The State*, POLITICO PRO (May 3, 2023), <https://tinyurl.com/3hsv8pyd>;  
13 Notices of Determination, *Politico Pro* (May 3, 2023) <https://tinyurl.com/yerru7hx>. RJRT did not  
14 authorize the release of the WS-3 Notices of Determination to Politico.

15 98. The next day, the Campaign for Tobacco-Free Kids (“CTFK”) issued a press release  
16 entitled “California AG Warns Tobacco Companies Their New Menthol-Like Cigarettes Violate  
17 State’s Law Banning Flavored Tobacco Sales.” *See* Statement of Matthew L. Myers (May 4, 2023),  
18 <https://tinyurl.com/42a2v4bs>. In that press release, CTFK stated that “[w]ith these letters, Attorney  
19 General Bonta is sending a clear message that California is serious about enforcing the law and will  
20 not tolerate the tobacco industry’s efforts to evade it.” CTFK additionally “urge[d] Attorney  
21 General Bonta to move as quickly as possible to get these products off the shelves” and  
22 “applaud[e]d his leadership” in “enforcing the law in California.”

23 99. The WS-3 Notices of Determination are phrased and formatted in a way that  
24 incorrectly suggests to the reader that the Attorney General has determined that the products are  
25 *flavored* rather than *presumptively* flavored. First, in the phrase “presumptively FLAVORED,”  
26 only the second word is capitalized. Second, the WS-3 Notices of Determination include a chart  
27 that includes a “Determination” of simply “FLAVORED.” This confusing framing appears to have  
28 misled Politico and CTFK into believing that the Attorney General had deemed the products

1       unlawful in California. For instance, CTFK stated that the Attorney General “issu[ed] warning  
2       letters to R.J. Reynolds and ITG Brands that their new menthol-like flavored cigarettes *violate the*  
3       *state’s new law* prohibiting sales of flavored tobacco products.” Myers, *supra* (emphasis added).  
4       And Politico stated that the WS-3 Notices of Determination “inform” RJRT that its WS-3 Products  
5       “have all been *determined to be in violation of the ban* that’s been in effect since December 2022.”  
6       Bluth, *supra* (emphasis added).

7           100. Within days of the publication of the WS-3 Notices of Determination, one  
8       jurisdiction began relying on the WS-3 Notices of Determination to instruct retailers to stop selling  
9       the WS-3 Products. First, the City of Ukiah’s Code Enforcement office sent at least one agent to a  
10      retailer in Ukiah; that agent delivered copies of the WS-3 Notices of Determination to that retailer  
11      and directed the retailer to remove the WS-3 Products or the agent would return with a citation for  
12      the retailer.

13           101. Second, Costco—one of RJRT’s largest California customers, accounting for  
14       approximately 18% of RJRT’s California sales of the new products—decided to pull all of the WS-  
15      3 Products from its sales floors and its Business Center website based on the WS-3 Notices of  
16      Determination. On May 12, 2023, a Costco employee responsible for purchasing tobacco products  
17      in California for resale to Costco wholesale and retail customers in California communicated this  
18      decision to Costco’s Regional Tobacco teams. That employee cited “the California State Attorney  
19      General’s determination in late April” that the WS-3 Products “are flavored and restricted by” the  
20      characterizing flavor ban. He went on to say that “auditors are giving notice that the products are  
21      illegal to sell in CA” and so Costco would “immediately stop selling” the WS-3 Products. Later  
22      that day, an Assistant Buyer at Costco emailed “Mainland Warehouses,” also citing the WS-3  
23      Notices of Determination, and stated that “[w]e need [the New Products] pulled from the floor, and  
24      shrink wrapped together and with a label Do Not Sell.” Costco has sought to return these items to  
25      RJRT at RJRT’s expense.

26           102. In addition to Costco, multiple other retailers have also stopped selling the WS-3  
27      Products because of the WS-3 Notices of Determination. On May 9, 2023, 7-Eleven instructed  
28      certain company-owned stores to remove all existing stock and to stop selling the WS-3 Products.

1 One of 7-Eleven's product directors sent an email to the franchisees titled "California Flavor Ban  
2 Update" in which he expressly cited the WS-3 Notices of Determination and informed the  
3 franchisees that the Attorney General had issued a warning letter to RJRT stating that the WS-3  
4 Products "violated the state's new law prohibiting the sales of flavored tobacco products."

5 103. On May 20, 2023, Sam's Club also removed all existing stock and stopped selling  
6 the WS-3 Products because of the WS-3 Notices of Determination; and on May 12, 2023, Walmart  
7 informed RJRT that it was reversing its decision to stock and sell the WS-3 Products based on the  
8 WS-3 Notices of Determination as well.

9 104. In early May 2023, one of 7-Eleven's product directors sent an email to the  
10 company-owned stores, as well as franchisees, titled "California Flavor Ban Update." The email  
11 described the WS-3 Notices of Determination and noted that "[s]tores in cities or counties that have  
12 issued warnings have already been notified with recommendations to remove the impacted product  
13 from the shelves." It went on to recommend that "[i]f your store is visited by an enforcement  
14 agency or is notified about selling restricted products, remove from the shelves immediately." And,  
15 addressing franchisees, the email noted that "[i]t is each Franchisee's responsibility to ensure that  
16 their store complies with all applicable laws, including laws concerning the sale of tobacco  
17 products."

18 105. On May 4, 2023, an RJRT representative contacted a Walmart representative to  
19 explain RJRT's position that the WS-3 Notices of Determination were issued in error and that the  
20 WS-3 Products were lawful in California. On May 12, 2023, the Walmart representative responded,  
21 stating: "Just wanted to give you a heads up that after the meeting with our compliance and legal  
22 teams we are not going to be including these Menthol alternative items in our [modular] for  
23 California."

24 106. On May 17, 2023, an RJRT representative contacted a Sam's Club representative,  
25 explaining RJRT's position that the WS-3 Notices of Determination were issued in error and that  
26 the WS-3 Products were lawful in California. On May 20, 2023, the Sam's Club representative  
27 responded, stating "The products are being put on pull and hold and blocked from being able to sell  
28 them."

1       107. Separately, on April 25, 2023, the Attorney General’s office sent a different letter to  
2 RJRT, this one signed by Deputy Attorney General Taylor Ann Whittemore and entitled “California  
3 Health and Safety Code section 104559.5.” The letter stated that the Attorney General’s Office  
4 intends to publish a list of “product certifications and case-by-case determinations made by our  
5 office and other agencies under” the California characterizing flavor ban. This list is to be  
6 “similar[]” to the “list of all cigarette manufacturers and their brands found in compliance with  
7 California Revenue and Taxation Code section 30165.1.”

8       108. The letter explained that the Attorney General’s Office was “reaching out to tobacco  
9 product manufacturers to request they fill out a spreadsheet with information about their products.”  
10 Per the letter, this information would “facilitate reconciliation of public and non-public information  
11 regarding domestically marketed tobacco products” and provide “input regarding manufacturers’  
12 own assessments of compliance under” the characterizing flavor ban. The letter went on to explain  
13 that, while “[p]roviding this information is voluntary,” “tobacco products not certified by a tobacco  
14 product manufacturer may not be affirmatively listed on the Attorney General’s website.”

15        109. Along with the letter, Whittemore attached a spreadsheet soliciting information  
16 about RJRT's tobacco products. Among other things, the spreadsheet asks manufacturers to certify  
17 whether each of their tobacco products is flavored or unflavored within the meaning of the  
18 California characterizing flavor ban. The instructions also ask manufacturers to "attach electronic  
19 sample packaging for each of the identified tobacco products."

110. The letter further provides that “[t]he Attorney General’s Office anticipates publishing its initial list of product certifications and case-by-case determinations on or after June 1, 2023.” In light of that, tobacco product manufacturers were asked to complete and return the spreadsheet by May 25, 2023 if they “wish [their] submission to be included in the initial posting.”

24 Lack of Enforcement by the California AG, Fresno DA, and CDPH Against Flavored Disposable  
25 E-cigarettes

26 111. RJRT is not aware of any efforts by the Attorney General, District Attorney  
27 Smittcamp, or CDPH to enforce the characterizing flavor ban against companies deliberately and  
28 obviously violating the law by selling flavored e-cigarettes. The main catalyst for S.B. 793 was the

1 rise in youth vaping in 2018 and 2019, though those rates have thankfully come down precipitously.  
2 See Senate Floor Analysis of S.B. 793, at 4 (2020).<sup>5</sup> California legislators attempted to tackle the  
3 youth vaping problem by banning non-tobacco characterizing flavors in tobacco products on the  
4 theory that flavors help drive youth to use the products. Instead of targeting those products,  
5 however, the Attorney General is instead targeting a major *cigarette* manufacturer whose products  
6 are in full compliance with the law. That is arbitrary and capricious.

7 112. Youth use of *cigarettes* is at an all-time low. And, as noted, the characterizing flavor  
8 ban was primarily meant to bring down the rates of youth use of *e-cigarettes*. Those are now the  
9 most popular tobacco product among youth who use tobacco products (though the use of tobacco  
10 products among youth is on the decline). Moreover, disposable e-cigarettes are the most popular  
11 type of e-cigarette with youth who use e-cigarettes.<sup>6</sup> As FDA researchers recently found, “[a]mong  
12 middle and high school current e-cigarette users ... use of disposable e-cigarette devices increased  
13 significantly between 2019 and 2020 ... and [disposable e-cigarettes] [were] the most commonly  
14 used device type reported in 2021.” Cooper, *supra*. In fact, disposables are more than 75% more  
15 popular than cartridge-based e-cigarettes. Disposables rose to popularity with youth after FDA  
16 effectively banned all characterizing flavors in cartridge-based e-cigarettes (other than tobacco and  
17 menthol) in 2020.<sup>7</sup>

18 113. Retailers in California continue to sell e-cigarettes, particularly disposables, with  
19  
20

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21 <sup>5</sup> Compare Maria Cooper, et al., *Notes from the Field: E Cigarette Use Among Middle and High*  
22 *School Students—United States, 2022* (Oct. 2022), <https://tinyurl.com/44fk6y8p>, with Teresa W.  
23 Wang, et al., *E Cigarette Use Among Middle and High School Students—United States, 2020* (Sept.  
24 2020), <https://tinyurl.com/5763s6a9>; and see U.S. Food & Drug Admin., *National Survey Shows*  
*Drop in E-Cigarette Use Among High School Students* (Nov. 2, 2023),  
<https://tinyurl.com/2p98k55s> (indicating that disposable e-cigarettes are now the most popular e-  
cigarettes among youth).

25 <sup>6</sup> See Cooper, *supra*.

26 <sup>7</sup> U.S. Food & Drug Admin., *Enforcement Priorities for Electronic Nicotine Delivery Systems* 21–  
27 22 (rev. Apr. 2020) (“2020 Guidance”), <https://tinyurl.com/8j58axb7>; see also Callie Holtermann,  
28 *Vapes Get a Gen Z Makeover*, N.Y. TIMES (Nov. 6, 2023), <https://tinyurl.com/yp63z39f>  
(highlighting the increasing popularity of newly redesigned disposable e-cigarettes among youth);  
Christina Jewett, *Illicit E-Cigarettes Flood Stores as F.D.A. Struggles to Combat Imports*, N.Y.  
Times (Oct. 10, 2023), <https://tinyurl.com/25c39tbw>.

1 characterizing flavors other than tobacco, in open defiance of the characterizing flavor ban.<sup>8</sup> For  
2 example, disposable e-cigarettes with flavors such as “Watermelon Bubble Gum” and “Rainbow  
3 Candy” are being sold at retail in California despite having a prohibited characterizing flavor.

4 **FIRST CAUSE OF ACTION**

5 **(By Plaintiffs against all Defendants for Declaratory Relief Relating to the Application of  
6 the Characterizing Flavor Ban to the WS-3 Products)**

7 114. Plaintiffs reallege paragraphs 1 through 113 of the Complaint as though fully  
8 incorporated and re-alleged here.

9 115. The Code of Civil Procedure allows “any person . . . who desires a declaration of  
10 his or her rights or duties with respect to another to seek declaratory relief.” Civ. Proc. Code,  
11 § 1060. It permits a request for a “declaration of rights or duties, either alone or with other relief,”  
12 and it provides that “the court may make a binding declaration of these rights or duties, whether or  
13 not further relief is or could be claimed at the time.” *Id.*

14 116. California courts have long held that “[t]he interpretation of ordinances and statutes  
15 are proper matters for declaratory relief.” *Walker v. Los Angeles County* (1961) 55 Cal.2d 626,  
16 637. In particular, declaratory relief is an appropriate remedy for professionals and businesses  
17 “attempting to steer a legitimate course among a maze of prohibitory laws.” *Manchel v. Los  
18 Angeles County* (1966) 245 Cal.App.2d 501, 509. That is precisely what Plaintiffs seek.

19 117. There is a live dispute about the meaning of the characterizing flavor ban and its  
20 application to RJRT’s WS-3 Products. Plaintiffs contend that it is improper for the Attorney  
21 General to make a “determination” regarding the rebuttable presumption of the characterizing  
22 flavor ban, Health & Safety Code § 104559.5(b)(2), outside the context of a judicial proceeding;  
23 that the rebuttable presumption cannot properly be applied in a civil proceeding that incorporates  
24 the substantive standards of the characterizing flavor ban; that the WS-3 Products and the labeling,  
25 packaging, and promotional materials identified in the WS-3 Notices of Determination do not  
26 trigger, and have not triggered, the characterizing flavor ban’s rebuttable presumption; that the WS-

27  
28 

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<sup>8</sup> Nicholas Florko, *It’s Easy To Buy Flavored Vapes In California, Even In Cities With Longtime  
Bans*, STAT (Jan. 27, 2023), <https://tinyurl.com/y8e2vet3>.

1       3 Notices of Determination have no legal effect or evidentiary value and are not binding in any  
2       judicial or administrative proceeding; and that the sale, offer for sale, or possession with intent to  
3       sell or offer for sale of the WS-3 Products at issue here is not within the scope of Health and Safety  
4       Code § 104559.5(b)(2). Defendant Bonta contends that the WS-3 Products have triggered the  
5       rebuttable presumption, and that it was appropriate to make such a determination in the WS-3  
6       Notices of Determination; he further contends that the WS-3 Products are potentially subject to  
7       enforcement action—which could be brought by, among others, Defendant Smittcamp—for  
8       violations of the characterizing flavor ban.

9           118. Further, the Attorney General’s WS-3 Notices of Determination, which were  
10       disclosed to and then made public by Politico, leave no doubt that this action is ripe for resolution.  
11       *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1012–13 (“The threat of a lawsuit can satisfy the  
12       actual controversy requirement for a declaratory relief action.”); *Am. Meat Inst. v. Leeman* (2009)  
13       180 Cal.App.4th 728, 742–43 (suit was ripe in light of letter threatening a lawsuit and federal  
14       agency’s stated disapproval); *Alameda Cnty. Land Use Ass’n v. City of Hayward* (1995) 38  
15       Cal.App.4th 1716, 1723–24 (suit for declaratory relief was ripe where the plaintiffs and defendant  
16       city and county disagreed on the scope of a memorandum of understanding that affected property).

17           119. CTFK’s press release, which interpreted the WS-3 Notices of Determination as  
18       concluding that the WS-3 Products were unlawful, further illustrates that there is significant  
19       uncertainty about—and interest in—the application of the ban to the WS-3 Products. There is  
20       significant public interest in resolving that uncertainty.

21           120. Ripeness is also demonstrated by the Attorney General’s statement to another  
22       cigarette manufacturer that one of its products is not flavored under the ban in part because the  
23       AG’s review did not detect “cooling agents,” which only confirms that the Attorney General views  
24       “cooling agents” such as WS-3 as imparting a characterizing flavor in violation of the  
25       characterizing flavor ban. Rachel Bluth, *Bonta Gives Green Light to Kool*, POLITICO PRO (June 16,  
26       2023), <https://tinyurl.com/2268rvrh>. The dispute is ripe for resolution.

27           121. Without judicial intervention, RJRT will suffer imminent harm. The WS-3 Notices  
28       of Determination will cause and have caused some retailers to pull RJRT’s lawful WS-3 Products

1 from shelves, halting all sales of such products. At least one jurisdiction has already started relying  
2 on the WS-3 Notices of Determination to instruct retailers to stop selling the WS-3 Products. This  
3 will impose significant economic harms on RJRT, which will be unable to sell several important  
4 new products from well-known and popular brands in California, a large and important market.

5 122. RJRT will also suffer significant financial losses due to the non-use of existing  
6 inventory. RJRT is manufacturing and producing the WS-3 Products based on anticipated demand  
7 in California. Part of that process includes “tax stamping” the products with a California Cigarette  
8 Tax Stamp on the product’s external packaging. State-specific product coupons and offers may  
9 also be included in products intended for California retailers. Without judicial intervention, RJRT  
10 will be forced to dispose of already-manufactured products. The products cannot be redirected to  
11 other markets.

12 123. RJRT has suffered and is continuing to suffer significant financial losses associated  
13 with withdrawing already-delivered products from California wholesalers and retailers. California  
14 retailers who remove products from their shelves can and will look to RJRT to (i) physically remove  
15 the products from the retailers’ storerooms and wholesale stock and (ii) refund those purchases.

16 124. RJRT will also suffer significant permanent harm to the future prospects of these  
17 new products. The purpose of the WS-3 Notices of Determination is to remove these products from  
18 the market less than six months after introduction. The introductory period, typically the first  
19 eighteen months, is critical for any new product, because it takes new products time to get to the  
20 desired awareness and consumer acceptance levels. RJRT will lose shelf space in retailers that will  
21 be filled by competitor products, and adult tobacco consumers who choose to continue smoking  
22 will be forced to select an alternative product.

23 125. RJRT will also suffer significant (but difficult to quantify) harm beyond just the new  
24 non-menthol products. RJRT will suffer reputational harm associated with the removal of the new  
25 non-menthol products because adult tobacco consumers and others may believe that “something is  
26 wrong” with the new products. Worse, adult tobacco consumers and others may believe that  
27 “something is wrong” with the *entire* Camel or Newport brand and product styles, and they may  
28 choose to abandon the brand in favor of competitor products. This spillover effect would not be

1 limited to California.

2 126. Without judicial intervention, APCA member stores will also suffer imminent harm.  
3 The WS-3 Notices of Determination are putting APCA member stores to the choice of (i) pulling  
4 lawful products from shelves, halting all sales of such products in California, and thereby suffering  
5 severe economic harms, or (ii) continuing to sell the products and risking enforcement actions,  
6 fines, and criminal liability.

7 127. As such, what is at issue here is far from a mere “difference of opinion”—to the  
8 contrary, there is “an imminent and significant hardship [to Plaintiffs] inherent in further delay.”  
9 *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540.

10 128. RJRT is entitled to declaratory relief because its WS-3 Products do not contain any  
11 constituent that imparts any characterizing flavor.

12 129. APCA is entitled to declaratory relief because the WS-3 Products manufactured by  
13 RJRT that its member stores wish to sell to adult tobacco consumers do not contain any constituent  
14 that imparts any characterizing flavor.

15 130. The text of the statute is clear and unambiguous. The only products that the law  
16 proscribes are “flavored tobacco products” that contain a constituent that imparts a “characterizing  
17 flavor.” Health & Saf. Code, §§ 104559.5(b)(1), (a)(4). In order to have a “characterizing flavor,”  
18 the flavored tobacco product must have “a distinguishable taste or aroma” other than that of  
19 tobacco. *Id.*, § 104559.5(a)(1).

20 131. None of the WS-3 Products at issue satisfy the statutory test.

21 132. First, the WS-3 Products are tobacco-flavored and have no other distinguishable  
22 taste or aroma.

23 133. WS-3 is a cooling agent that has been used for decades in food and cosmetics  
24 because it does not impart any taste or aroma in the concentrations used in consumable products.

25 134. As a result, the WS-3 Products have no distinguishable taste or aroma other than  
26 that of tobacco, and therefore they are not within the scope of the characterizing flavor ban.

27 135. Second, the characterizing flavor ban’s rebuttable presumption provision, Health &  
28 Safety Code § 104559.5(b)(2), has not been triggered.

136. RJRT, its employees, and its agents have made no claims or statements directed to adult tobacco consumers or to the public that any of RJRT's WS-3 Products have or produce a characterizing flavor. To the contrary, RJRT has clearly and repeatedly communicated that the cigarettes are "NON-MENTHOL," which, in light of the federal prohibition on cigarettes with characterizing flavors other than tobacco and menthol, puts adult tobacco consumers and the public on notice that the cigarettes are tobacco-flavored. Finally, any presumption would be rebutted because the WS-3 Products contain no constituent that imparts a characterizing flavor.

137. Plaintiffs seek a declaration from the Court that the sale, offer for sale, or possession with intent to sell or offer for sale of the WS-3 Products at issue here is not within the scope of Health and Safety Code § 104559.5.

138. Plaintiffs seek a declaration that the WS-3 Products and the labeling, packaging, and promotional materials identified in the WS-3 Notices of Determination do not trigger, and have not triggered, the characterizing flavor ban's rebuttable presumption.

## **SECOND CAUSE OF ACTION**

**(By Plaintiffs against all Defendants for Injunctive Relief Relating to the Application of the  
Characterizing Flavor Ban to the WS-3 Products)**

139. Plaintiffs reallege paragraphs 1 through 138 of the Complaint as though fully incorporated and re-alleged here.

140. Plaintiffs are entitled to the relief demanded, which includes a declaration that RJRT's WS-3 Products do not have a characterizing flavor and do not violate the characterizing flavor ban, and that the characterizing flavor ban's rebuttable presumption is not triggered here.

141. Because they are entitled to declaratory relief, Plaintiffs are further entitled to injunctions prohibiting Defendants from enforcing the characterizing flavor ban against tobacco retailers and their agents regarding the sale of RJRT's WS-3 Products, and from taking any other enforcement actions or filing any lawsuits premised on the notion that RJRT's WS-3 Products violate the characterizing flavor ban or based on the notion that the characterizing flavor ban's rebuttable presumption has been triggered.

142. Plaintiffs do not otherwise have a plain, speedy, or adequate remedy at law and will

1 suffer irreparable harm unless this Court grants the requested injunctive relief.

2 143. Plaintiffs seek a permanent order enjoining Defendants from enforcing the  
3 characterizing flavor ban against tobacco retailers and their agents regarding the sale of RJRT's  
4 WS-3 Products, and from taking any other enforcement actions or filing any lawsuits premised on  
5 the notion that RJRT's WS-3 Products violate the characterizing flavor ban or based on the notion  
6 that the characterizing flavor ban's rebuttable presumption has been triggered.

7 **THIRD CAUSE OF ACTION**

8 **(By Plaintiffs Against All Defendants For Declaratory Relief Relating to the Determinations  
9 Communicated In The WS-3 Notices of Determination)**

10 144. Plaintiffs reallege paragraphs 1 through 143 of the Complaint as though fully  
11 incorporated and re-alleged here.

12 145. The characterizing flavor ban's rebuttable presumption provision, Health & Safety  
13 Code § 104559.5(b)(2), may not be used in the way the Attorney General has sought to use it.

14 146. The Attorney General misunderstands the role of the presumption in the statute by  
15 treating it as a substantive standard rather than an evidentiary presumption.

16 147. Moreover, the determinations made in the WS-3 Notices of Determination are  
17 erroneous because they allege that the characterizing flavor ban's rebuttable presumption provision,  
18 Health & Safety Code § 104559.5(b)(2), has been triggered when it plainly has not.

19 148. RJRT, its employees, and its agents have made no claims or statements directed to  
20 adult tobacco consumers or to the public that any of RJRT's WS-3 Products have or produce a  
21 characterizing flavor. To the contrary, RJRT has clearly and repeatedly communicated that the  
22 cigarettes are "NON-MENTHOL," which, in light of the federal prohibition on cigarettes with  
23 characterizing flavors other than tobacco and menthol, puts adult tobacco consumers and the public  
24 on notice that the cigarettes are tobacco-flavored. Finally, any presumption would be rebutted  
25 because the WS-3 Products contain no constituent that imparts a characterizing flavor.

26 149. Plaintiffs seek a declaration that it is improper for the Attorney General to make a  
27 "determination" regarding the rebuttable presumption outside the context of a judicial proceeding.

28 150. Plaintiffs seek a declaration that the determination in the WS-3 Notices of

1 Determination served on Plaintiff RJRT on April 25, 2023, that the WS-3 Products are  
2 presumptively flavored, is erroneous because the labeling, packaging, and promotional materials  
3 identified in the WS-3 Notices of Determination do not trigger, and have not triggered, the  
4 characterizing flavor ban's rebuttable presumption.

5 151. Plaintiffs seek a declaration that the WS-3 Notices of Determination served on  
6 Plaintiff RJRT on April 25, 2023, have no legal effect or evidentiary value and are not binding in  
7 any judicial or administrative proceeding.

#### 8 **FOURTH CAUSE OF ACTION**

##### 9 **(By Plaintiffs against all Defendants for Injunctive Relief Relating to the Determinations**

##### 10 **Communicated in the WS-3 Notices of Determination)**

11 152. Plaintiffs reallege paragraphs 1 through 151 of the Complaint as though fully  
12 incorporated and re-alleged here.

13 153. Plaintiffs are entitled to the relief demanded, which includes a declaration that the  
14 characterizing flavor ban's rebuttable presumption cannot be applied in a civil proceeding that  
15 incorporates the substantive standards of the characterizing flavor ban; that it is improper for the  
16 Attorney General to make a "determination" based on the rebuttable presumption outside the  
17 context of a judicial proceeding; and that the WS-3 Notices of Determination served on RJRT on  
18 April 25, 2023 have no legal effect or evidentiary value and are not binding on any court of law or  
19 administrative proceeding.

20 154. Because they are entitled to declaratory relief, Plaintiffs are further entitled to  
21 injunctions prohibiting Defendants from enforcing the characterizing flavor ban against tobacco  
22 retailers and their agents regarding the sale of RJRT's WS-3 Products, based on the WS-3 Notices  
23 of Determination.

24 155. Plaintiffs do not otherwise have a plain, speedy, or adequate remedy at law and will  
25 suffer irreparable harm unless this Court grants the requested injunctive relief.

26 156. Plaintiffs seek a permanent order requiring Defendant Bonta to rescind the  
27 determinations communicated in the WS-3 Notices of Determination served on Plaintiff RJRT on  
28 April 25, 2023.

157. Plaintiffs seek a permanent order requiring Defendant Bonta to issue corrective notices indicating that the WS-3 Products have no characterizing flavor and are not prohibited under California law.

158. Plaintiffs seek a permanent order precluding the Attorney General from posting the WS-3 Notices of Determination on the California Department of Justice website or elsewhere.

## **FIFTH CAUSE OF ACTION**

**(By Plaintiffs and against the Attorney General for Writ of Mandate)**

159. Plaintiffs reallege paragraphs 1 through 158 of the Complaint as though fully incorporated and re-alleged here.

160. The Code of Civil Procedure allows a party to seek a writ of mandate “to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded.” Civ. Proc. Code, § 1085(a). California courts recognize “the established principle that mandamus may issue to ... correct an abuse of discretion.” *Glendale City Emps. Ass’n v. City of Glendale* (1975) 15 Cal.3d 328, 344 (en banc).

161. A party may challenge the Attorney General's exercise of discretion by writ of mandate. *Int'l Ass'n of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 697. The Attorney General may not abuse his discretion by issuing a decision that is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." *Khan v. Los Angeles City Emps. ' Ret. Sys.* (2010) 187 Cal.App.4th 98, 106; *see City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297 ("Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion.").

162. The Attorney General has a clear obligation to comply with the requirements of the characterizing flavor ban.

163. Plaintiffs have “a clear, present, and beneficial right” to performance of that obligation. *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491. Plaintiffs have no other plain, speedy, or adequate remedy at law because the harms suffered cannot be

1       remedied by money damages.

2       164. For the reasons described above, the Attorney General acted arbitrarily and  
3       capriciously in issuing the WS-3 Notices of Determination, and his decision lacks evidentiary  
4       support. The evidence that the Attorney General cites in the WS-3 Notices of Determination does  
5       not support the determination that the WS-3 Products are “presumptively FLAVORED,” and to the  
6       contrary supports a determination that the WS-3 Products lack any characterizing flavor.

7       165. The Attorney General’s WS-3 Notices of Determination are further based on critical  
8       legal errors. The WS-3 Notices of Determination treat the characterizing flavor ban’s rebuttable  
9       presumption as a substantive legal standard rather than an evidentiary mechanism to be used in the  
10       course of a judicial proceeding. The Attorney General’s actions in issuing the WS-3 Notices of  
11       Determination were therefore arbitrary, capricious, and unlawful.

12       166. The Attorney General also acted arbitrarily and capriciously by seeking to prevent  
13       the sale of the WS-3 Products without first making a determination that the products impart a  
14       characterizing flavor.

15       167. Finally, the Attorney General has acted in an irrational and discriminatory manner,  
16       rendering the WS-3 Notices of Determination and any future enforcement efforts arbitrary and  
17       capricious. *Cal. Hotel & Motel Ass’n v. Indus. Welfare Comm’n* (1979) 25 Cal.3d 200, 214  
18       (administrative action that “differentiates among classes” of regulated entities “must show that the  
19       distinctions drawn are reasonably supported by the administrative record and are reasonably related  
20       to the purposes of the enabling statute”); *Martin v. Alcoholic Beverage Control Appeals Bd.* (1961)  
21       55 Cal.2d 867, 872, 880 (agency acted arbitrarily where it denied an alcohol license to a restaurant  
22       based on its proximity to a church but “refuse[d] to consider” that “[w]ithin a 600-foot radius of  
23       such premises there already exist[ed] eight premises licensed by the department”); *see also*  
24       *LePage’s 2000, Inc. v. Postal Reg. Comm’n*, 674 F.3d 862, 866 (D.C. Cir. 2012) (per curiam)  
25       (“[A]n agency’s unjustifiably disparate treatment of two similarly situated parties works a violation  
26       of the arbitrary-and-capricious standard.”). “Where an agency applies different standards to  
27       similarly situated entities and fails to support this disparate treatment with a reasoned explanation  
28       and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.”

*Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005).

168. As explained above, RJRT's products are in full compliance with California law. But many tobacco-product retailers in California are not. Many retailers continue to sell disposable e-cigarettes with characterizing flavors other than tobacco, in defiance of California's law. Despite that, the Attorney General ignores those violators and instead has targeted a law-abiding company. That is arbitrary and unlawful.

169. Plaintiffs, proceeding under Civil Procedure Code § 1088.5, seek a writ of mandate requiring Defendant Bonta to rescind the WS-3 Notices of Determination served on Plaintiff RJRT on April 25, 2023, requiring Defendant Bonta to issue corrective notices indicating that the WS-3 Products have no characterizing flavor and are not prohibited under California law, and precluding the Attorney General from posting the WS-3 Notices of Determination on the California Department of Justice website or elsewhere.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment and relief as set forth below:

## **On the First Cause of Action:**

1. Pursuant to California Code of Civil Procedure § 1060, declare that the sale, offer for sale, or possession with intent to sell or offer for sale of RJRT's WS-3 Products (Newport Non-Menthol Green Box, Newport Non-Menthol Green 100 Box, Newport EXP Non-Menthol Mix Box, Newport EXP Non-Menthol Mix 100 Box, Newport EXP Non-Menthol Max Box, Newport Non-Menthol EXP Max 100 Box, and Camel Crisp Non-Menthol Green Box) is not within the scope of Health and Safety Code § 104559.5.

2. Pursuant to California Code of Civil Procedure § 1060, declare that the labeling, packaging, and promotional materials for RJRT's WS-3 Products (Newport Non-Menthol Green Box, Newport Non-Menthol Green 100 Box, Newport EXP Non-Menthol Mix Box, Newport EXP Non-Menthol Mix 100 Box, Newport EXP Non-Menthol Max Box, Newport Non-Menthol EXP Max 100 Box, and Camel Crisp Non-Menthol Green Box) do not trigger, and have not triggered, the characterizing flavor ban's rebuttable presumption.

1                   **On the Second Cause of Action:**

2                   1. Pursuant to California Code of Civil Procedure § 527(a), preliminarily enjoin  
3 Defendants from enforcing the characterizing flavor ban against tobacco retailers and their agents  
4 regarding the sale of RJRT's WS-3 Products, and from taking any other enforcement actions or  
5 filing any lawsuits based on the WS-3 Notices of Determination or based on the notion that the  
6 characterizing flavor ban's rebuttable presumption has been triggered.

7                   2. Pursuant to California Code of Civil Procedure § 527(a), preliminarily enjoin  
8 Defendants from enforcing the characterizing flavor ban against tobacco retailers and their agents  
9 regarding the sale of RJRT's WS-3 Products, and from taking any other enforcement actions or  
10 filing any lawsuits premised on the notion that RJRT's WS-3 Products violate the characterizing  
11 flavor ban.

12                   3. Enjoin Defendants from enforcing the characterizing flavor ban against tobacco  
13 retailers and their agents regarding the sale of RJRT's WS-3 Products, and from taking any other  
14 enforcement actions or filing any lawsuits premised on the notion that RJRT's WS-3 Products  
15 violate the characterizing flavor ban.

16                   **On the Third Cause of Action:**

17                   1. Pursuant to California Code of Civil Procedure § 1060, declare that it is improper  
18 for the Attorney General to make a "determination" regarding the rebuttable presumption outside  
19 the context of a judicial proceeding.

20                   2. Pursuant to California Code of Civil Procedure § 1060, declare that the WS-3  
21 Notices of Determination served on Plaintiff RJRT on April 25, 2023 have no legal effect or  
22 evidentiary value and are not binding on any court of law or administrative proceeding.

23                   3. Pursuant to California Code of Civil Procedure § 1060, declare that the  
24 determination in the WS-3 Notices of Determination served on Plaintiff RJRT on April 25, 2023,  
25 that the WS-3 Products are presumptively flavored, is erroneous because the labeling, packaging,  
26 and promotional materials for RJRT's WS-3 Products (Newport Non-Menthol Green Box, Newport  
27 Non-Menthol Green 100 Box, Newport EXP Non-Menthol Mix Box, Newport EXP Non-Menthol  
28 Mix 100 Box, Newport EXP Non-Menthol Max Box, Newport Non-Menthol EXP Max 100 Box,

1 and Camel Crisp Non-Menthol Green Box) do not trigger, and have not triggered, the characterizing  
2 flavor ban's rebuttable presumption.

3 **On the Fourth Cause of Action:**

4 1. Order Defendant Bonta to rescind the WS-3 Notices of Determination served on  
5 Plaintiff RJRT on April 25, 2023.

6 2. Enjoin the Attorney General from posting the WS-3 Notices of Determination on  
7 the California Department of Justice website or elsewhere.

8 3. Order Defendant Bonta to issue corrective notices indicating that the WS-3 Products  
9 have no characterizing flavor and are not prohibited under California law.

10 4. Enjoin Defendants from enforcing the characterizing flavor ban against tobacco  
11 retailers and their agents regarding the sale of RJRT's WS-3 Products, and from initiating any  
12 enforcement action or filing any lawsuits against Plaintiffs based on the WS-3 Notices of  
13 Determination or based on the notion that the characterizing flavor ban's rebuttable presumption  
14 has been triggered.

15 **On the Fifth Cause of Action:**

16 1. Pursuant to California Code of Civil Procedure § 1085(a), issue a writ of mandate  
17 requiring the Attorney General to rescind the WS-3 Notices of Determination served on Plaintiff  
18 RJRT on April 25, 2023.

19 2. Pursuant to California Code of Civil Procedure § 1085(a), issue a writ of mandate  
20 requiring the Attorney General to issue corrective notices indicating that the WS-3 Products have  
21 no characterizing flavor and are not prohibited under California law.

22 3. Pursuant to California Code of Civil Procedure § 1085(a), issue a writ of mandate  
23 precluding the Attorney General from posting the WS-3 Notices of Determination on the California  
24 Department of Justice website or elsewhere.

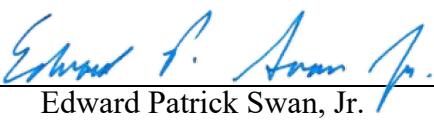
25 **On All Causes of Action:**

26 1. For costs of suit incurred herein; and,

27 2. For such other and further relief as this Court deems just and proper.

1 Dated: December 4, 2023

JONES DAY

2 By:   
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26 and Convenience Store Association

## **VERIFICATION**

I have read the foregoing First Amended Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate and know its contents.

I am an officer of R.J. Reynolds Tobacco Company, a party to this action, and I am authorized to make this verification for and on its behalf, and I make this verification for that reason.

I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 4th, 2023

  
ANDREW R. BURNS

ANDREW P. BURNS

# **EXHIBIT 1**



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April 25, 2023

Jonathan Reed  
CEO & Chief Commercial Officer  
RJ Reynolds Tobacco Company  
401 North Main Street  
Winston-Salem, NC 27101

RE: California Flavor Ban, Health & Safety Code § 104559.5  
Notice of Determination 23-04-A2

Dear Mr. Reed:

Since December 21, 2022, California has restricted retailer possession, distribution, and sale of flavored tobacco products. *See* Cal. Health & Saf. § 104559.5. This California “flavor ban” law establishes a rebuttable presumption that a tobacco product is flavored where its manufacturer “has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, images, or all, on the product’s labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.” *Id.* at § 104559.5(b)(2).

This letter is to advise you that the Tobacco Unit of the California Department of Justice has reviewed referred packaging and promotional materials for Camel Crisp and determined that it is presumptively FLAVORED under the California flavor ban law. *Id.*

Determination Number	Reviewed Product(s)	UPC(s)	Determination
23-04-A2	Camel Crisp	012300127509 012300127530	FLAVORED

We specifically conclude:

- (1) Labeling and packaging for Camel Crisp uses brand names, shapes, text, and colors traditionally associated with menthol-flavored tobacco products. *See* TAB A.
- (2) Promotional materials for Camel Crisp distinguish between the taste or aroma of tobacco and other sensory taste(s) or aroma(s) in the “smoking experience” of the product, implying the inclusion of a non-tobacco taste or aroma. *See* TAB B.

(3) Promotional materials for Camel Crisp purposefully target users of menthol-flavored tobacco products and promote the Reviewed Products as substitutes or replacements for such menthol-flavored tobacco products. *See TAB B.*

The California flavor ban law restricts the retail distribution and sale of flavored tobacco products to California consumers. Under the California flavor ban law, retailers and their agents are subject to fines for the possession and sale of such flavored tobacco products. *See* Cal. Health & Saf. § 104559.5(f). Other state statutes and local ordinances may impose additional penalties on retailers or other vendors as well. *Id.* at § 104559.5(g); *see also* Cal. Bus. & Prof. § 17200. To encourage uniform application of the California flavor ban law, this Notice of Determination will be posted on the California Department of Justice's public website.

You are encouraged to provide a copy to your California distributor and retailer customers as well.

If you believe these determinations or conclusions are in error, or if you believe any Reviewed Product(s) is properly classified as UNFLAVORED, we encourage you to submit a response with any supporting materials to the mailing or email address below on or before June 23, 2023, identifying the Notice of Determination number in your response. The Tobacco Unit will review any such submission and may, in its discretion, update, modify, or rescind this determination in response. In such case, an updated Notice of Determination will be issued.

**Flavor Determination [Determination Number(s)]**

**Office of the Attorney General  
California Department of Justice  
1300 "I" Street, PO Box 944255  
Sacramento, California 94244-2550  
[Tobacco@doj.ca.gov](mailto:Tobacco@doj.ca.gov)**

<https://oag.ca.gov/tobacco/contact>

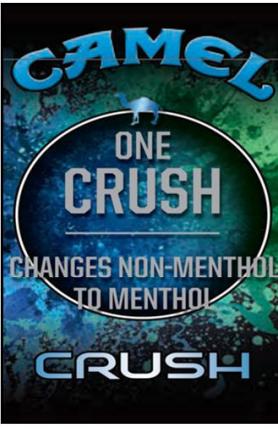
Sincerely,



**BYRON M. MILLER**  
Deputy Attorney General

For      ROB BONTA  
            Attorney General

**TAB A – PACKAGING IMAGES**

REVIEWED PRODUCT(S)	COMPARISON PRODUCT(S)
 The image shows a pack of Camel Crisp Non-Menthol Green cigarettes. The pack is green with a textured, watercolor-like background. The Camel logo is at the top in a stylized green font. Below it, the words "CRISP EXPERIENCE" are written in white. Underneath that, "NON-MENTHOL SIGNATURE BLEND" is written. At the bottom, "CRISP" is written in a large, bold, white font, with "NON-MENTHOL GREEN" in smaller white text below it.	 The image shows a pack of Camel Crush Smooth Menthol King cigarettes. The pack is dark with a blue and green textured background. The Camel logo is at the top in a stylized blue font. In the center, there is a circular graphic with the words "ONE CRUSH" and "CHANGES NON-MENTHOL TO MENTHOL" around the perimeter, with "CRUSH" at the bottom.  The image shows a pack of Newport EXP Menthe cigarettes. The pack is dark with a green and black textured background. The word "MENTHE" is at the top in a small white box. The word "Newport" is written in a large, bold, green font. Below it, "EXP" is written in a smaller white font. At the bottom, "BOLD & FLAVORFUL • MENTHOL" is written.

CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "CAMEL CRISP NON-MENTHOL GREEN BOX PACK", 2022 RENEWAL SUBMISSION.

CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "CAMEL CRUSH KING BOX", 2022 RENEWAL SUBMISSION.  
CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "CAMEL CRUSH SMOOTH MENTHOL KING BOX", 2022 RENEWAL SUBMISSION.

April 25, 2023

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**TAB B – PROMOTIONAL MATERIALS**

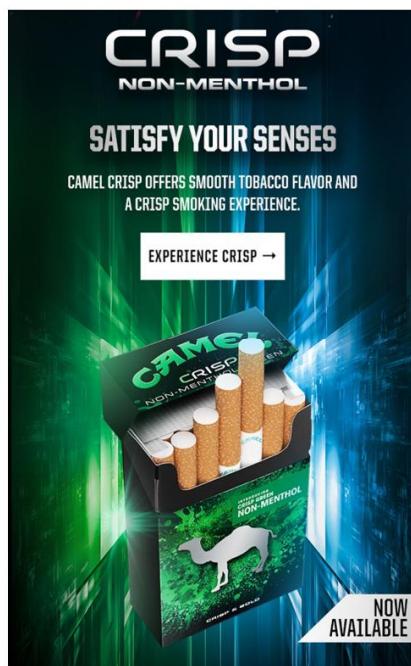
**REVIEWED PRODUCT(S)**

Stanford Research into the Impact of  
Tobacco Advertising Ad Collection,  
accessed at  
<https://tobacco.stanford.edu/cigarettes/menthol-medicates/nonmenthol/#collection-14>



**REVIEWED PRODUCT(S)**

Stanford Research into the Impact of  
Tobacco Advertising Ad Collection,  
accessed at  
<https://tobacco.stanford.edu/cigarettes/menthol-medicates/nonmenthol/#collection-17>

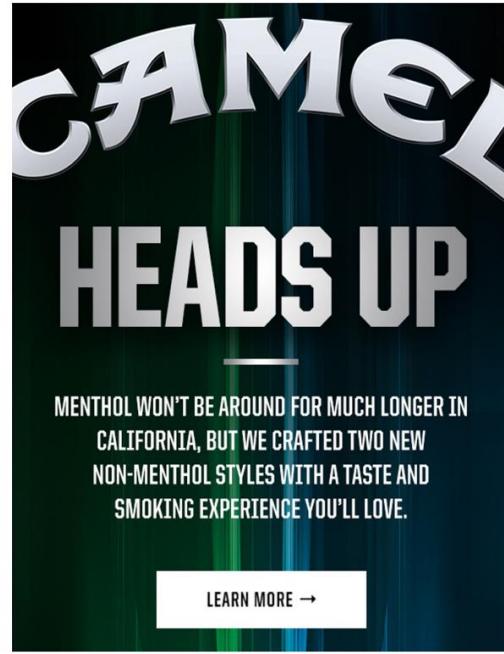


April 25, 2023

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**REVIEWED PRODUCT(S)**

Stanford Research into the Impact of  
Tobacco Advertising Ad Collection,  
accessed at  
<https://tobacco.stanford.edu/cigarettes/menthol-medicates/nonmenthol/#collection-18>



## **EXHIBIT 2**



1300 I STREET, SUITE 125  
P.O. BOX 944255  
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555  
Telephone: (916) 210-7353  
Facsimile: (916) 323-2319  
E-Mail: [Byron.Miller@doj.ca.gov](mailto:Byron.Miller@doj.ca.gov)

April 25, 2023

Jonathan Reed  
CEO & Chief Commercial Officer  
RJ Reynolds Tobacco Company  
401 North Main Street  
Winston-Salem, NC 27101

RE: California Flavor Ban, Health & Safety Code § 104559.5  
Notice of Determination 23-04-A3

Dear Mr. Reed:

Since December 21, 2022, California has restricted retailer possession, distribution, and sale of flavored tobacco products. *See* Cal. Health & Saf. § 104559.5. This California “flavor ban” law establishes a rebuttable presumption that a tobacco product is flavored where its manufacturer “has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, images, or all, on the product’s labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.” *Id.* at § 104559.5(b)(2).

This letter is to advise you that the Tobacco Unit of the California Department of Justice has reviewed referred packaging and promotional materials for Newport EXP Non-Menthol Mix and Newport EXP Non-Menthol Max (collectively, the “Reviewed Products”) and determined that they are presumptively FLAVORED under the California flavor ban law. *Id.*

Determination Number	Reviewed Product(s)	UPC(s)	Determination
23-04-A3-1	Newport EXP Non-Menthol Mix	026100220087 026100660159 026100660180 026100660241 026100660272 026100220179	FLAVORED
23-04-A3-2	Newport EXP Non-Menthol Max	026100219906 026100219937 026100219999 026100220025	FLAVORED

We specifically conclude:

- (1) Labeling and packaging for the Reviewed Products uses brand names, text, and colors traditionally associated with menthol-flavored tobacco products. *See* TAB A.

- (2) Promotional materials for the Reviewed Products use common selling message(s) with menthol-flavored tobacco products. *See TAB B.*
- (3) Promotional materials for the Reviewed Products suggest sensory taste(s) or aroma(s) apart from taste(s) or aroma(s) of a solely tobacco flavored product. *See TAB B.*
- (4) Promotional materials for the Reviewed Products purposefully target users of menthol-flavored tobacco products and promote the Reviewed Products as substitutes or replacements for such menthol-flavored tobacco products. *See TAB B.*

The California flavor ban law restricts the retail distribution and sale of flavored tobacco products to California consumers. Under the California flavor ban law, retailers and their agents are subject to fines for the possession and sale of such flavored tobacco products. *See Cal. Health & Saf. § 104559.5(f).* Other state statutes and local ordinances may impose additional penalties on retailers or other vendors as well. *Id.* at § 104559.5(g); *see also* Cal. Bus. & Prof. § 17200. To encourage uniform application of the California flavor ban law, this Notice of Determination will be posted on the California Department of Justice's public website.

You are encouraged to provide a copy to your California distributor and retailer customers as well.

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April 25, 2023

Page 3

If you believe these determinations or conclusions are in error, or if you believe any Reviewed Product(s) is properly classified as UNFLAVORED, we encourage you to submit a response with any supporting materials to the mailing or email address below on or before June 23, 2023, identifying the Notice of Determination number in your response. The Tobacco Unit will review any such submission and may, in its discretion, update, modify, or rescind this determination in response. In such case, an updated Notice of Determination will be issued.

**Flavor Determination [Determination Number(s)]**

**Office of the Attorney General  
California Department of Justice  
1300 "I" Street, PO Box 944255  
Sacramento, California 94244-2550**

**Tobacco@doj.ca.gov**

**<https://oag.ca.gov/tobacco/contact>**

Sincerely,

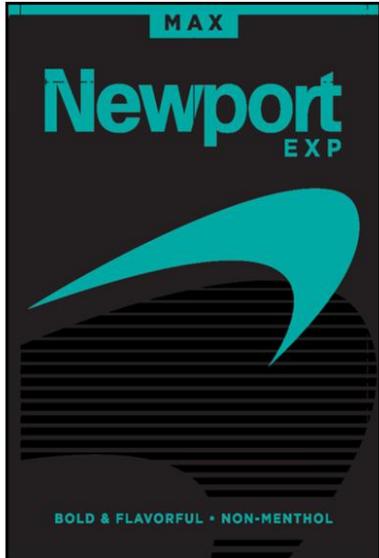


**BYRON M. MILLER**  
Deputy Attorney General

For      **ROB BONTA**  
            Attorney General

**TAB A – PACKAGING IMAGES**

**REVIEWED PRODUCT(S)**



CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "NEWPORT EXP NON-MENTHOL MAX", 2022 RENEWAL SUBMISSION.

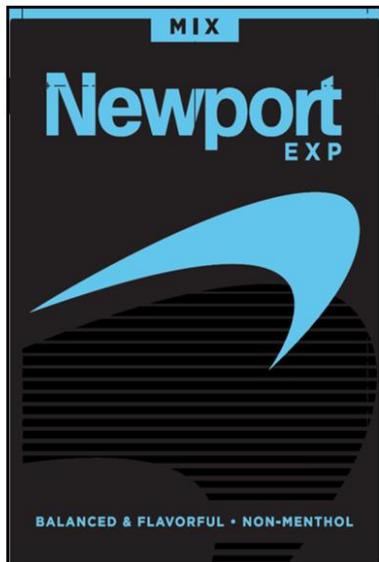
**COMPARISON PRODUCT(S)**



CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "NEWPORT BOOST MENTHOL KING BOX", 2022 RENEWAL SUBMISSION.  
CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "NEWPORT EXP MENTHE BOX", 2022 RENEWAL SUBMISSION.



**REVIEWED PRODUCT(S)**

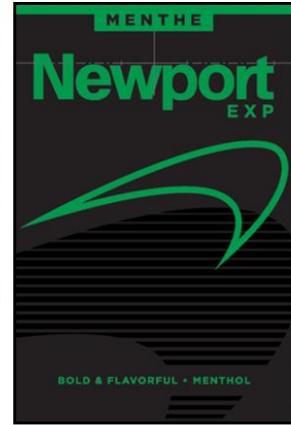


CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "NEWPORT EXP NON-MENTHOL MIX", 2022 RENEWAL SUBMISSION.

**COMPARISON PRODUCT(S)**



CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "NEWPORT MENTHOL PLATINUM BLUE KING BOX", 2022 RENEWAL SUBMISSION.  
CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "NEWPORT EXP MENTHE BOX", 2022 RENEWAL SUBMISSION.



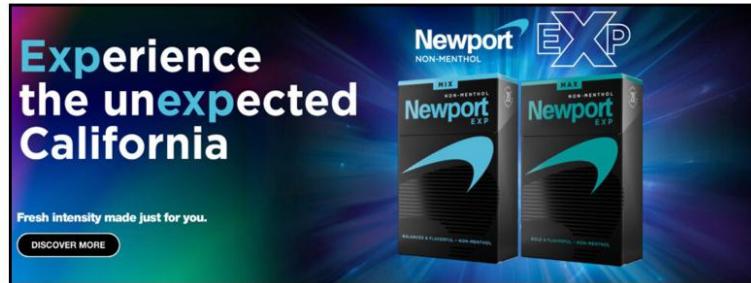
April 25, 2023

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## TAB B – PROMOTIONAL MATERIALS

### REVIEWED PRODUCT(S)

Stanford Research into the Impact of Tobacco Advertising Ad Collection, accessed at <https://tobacco.stanford.edu/cigarettes/menthol/medicates/nonmenthol/#collection-2>

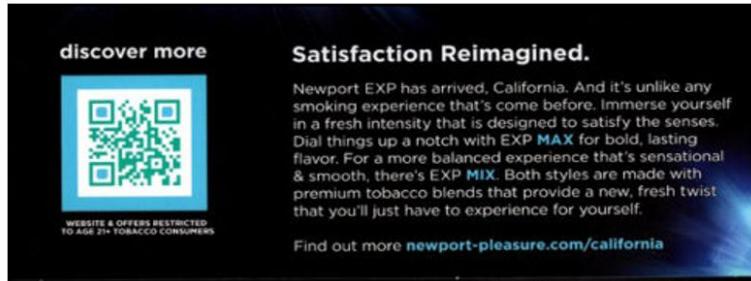


Stanford Research into the Impact of Tobacco Advertising Ad Collection, accessed at <https://tobacco.stanford.edu/cigarettes/menthol/medicates/nonmenthol/#collection-6>



### REVIEWED PRODUCT(S)

Stanford Research into the Impact of Tobacco Advertising Ad Collection, accessed at <https://tobacco.stanford.edu/cigarettes/menthol/medicates/nonmenthol/#collection-7>



Stanford Research into the Impact of Tobacco Advertising Ad Collection, accessed at <https://tobacco.stanford.edu/cigarettes/menthol/medicates/nonmenthol/#collection-7>



# **EXHIBIT 3**



1300 I STREET, SUITE 125  
P.O. BOX 944255  
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555  
Telephone: (916) 210-7353  
Facsimile: (916) 323-2319  
E-Mail: [Byron.Miller@doj.ca.gov](mailto:Byron.Miller@doj.ca.gov)

April 25, 2023

Jonathan Reed  
CEO & Chief Commercial Officer  
RJ Reynolds Tobacco Company  
401 North Main Street  
Winston-Salem, NC 27101

RE: California Flavor Ban, Health & Safety Code § 104559.5  
Notice of Determination 23-04-A5

Dear Mr. Reed:

Since December 21, 2022, California has restricted retailer possession, distribution, and sale of flavored tobacco products. *See* Cal. Health & Saf. § 104559.5. This California “flavor ban” law establishes a rebuttable presumption that a tobacco product is flavored where its manufacturer “has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, images, or all, on the product’s labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.” *Id.* at § 104559.5(b)(2).

This letter is to advise you that the Tobacco Unit of the California Department of Justice has reviewed referred packaging and promotional materials for Newport Non-Menthol Green and determined that this product is presumptively FLAVORED under the California flavor ban law. *Id.*

Determination Number	Reviewed Product(s)	UPC(s)	Determination
23-04-A5	Newport Non-Menthol Green	026100911459 026100911428 026100911541 026100911510	FLAVORED

We specifically conclude:

- (1) Labeling and packaging for Newport Non-Menthol Green uses brand names, text, and colors traditionally associated with menthol-flavored tobacco products. *See* TAB A.
- (2) Promotional materials for Newport Non-Menthol Green use common selling message(s) with menthol-flavored tobacco products in the Newport brand line. *See* TAB B.

(3) Promotional materials for Newport Non-Menthol Green purposefully target users of menthol-flavored tobacco products and promote the Reviewed Products as substitutes or replacements for such menthol-flavored tobacco products. *See TAB B.*

The California flavor ban law restricts the retail distribution and sale of flavored tobacco products to California consumers. Under the California flavor ban law, retailers and their agents are subject to fines for the possession and sale of such flavored tobacco products. *See Cal. Health & Saf. § 104559.5(f).* Other state statutes and local ordinances may impose additional penalties on retailers or other vendors as well. *Id.* at § 104559.5(g); *see also* Cal. Bus. & Prof. § 17200. To encourage uniform application of the California flavor ban law, this Notice of Determination will be posted on the California Department of Justice's public website.

You are encouraged to provide a copy to your California distributor and retailer customers as well.

If you believe these determinations or conclusions are in error, or if you believe any Reviewed Product(s) is properly classified as UNFLAVORED, we encourage you to submit a response with any supporting materials to the mailing or email address below on or before June 23, 2023, identifying the Notice of Determination number in your response. The Tobacco Unit will review any such submission and may, in its discretion, update, modify, or rescind this determination in response. In such case, an updated Notice of Determination will be issued.

**Flavor Determination [Determination Number(s)]**

**Office of the Attorney General  
California Department of Justice  
1300 "I" Street, PO Box 944255  
Sacramento, California 94244-2550  
[Tobacco@doj.ca.gov](mailto:Tobacco@doj.ca.gov)**

<https://oag.ca.gov/tobacco/contact>

Sincerely,



**BYRON M. MILLER**  
Deputy Attorney General

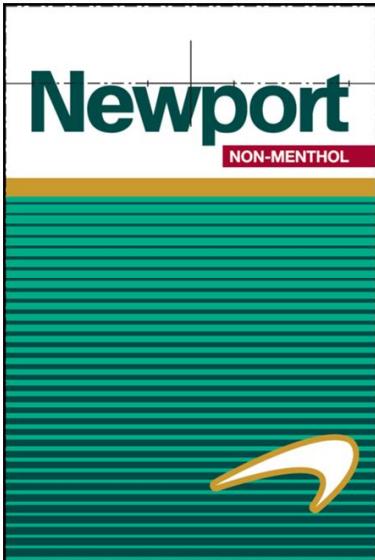
For      ROB BONTA  
            Attorney General

April 25, 2023

Page 3

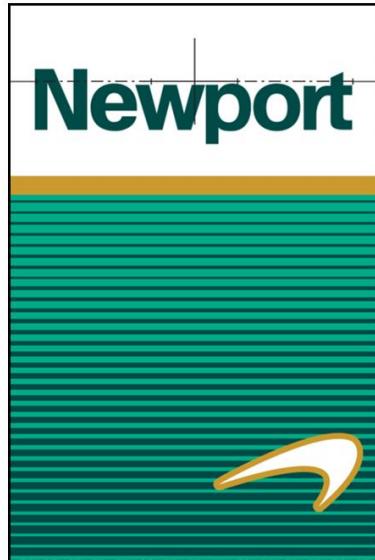
**TAB A – PACKAGING IMAGES**

**REVIEWED PRODUCT(S)**



CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "NEWPORT NON-MENTHOL GREEN KING BOX PACK", 2022 RENEWAL SUBMISSION.

**COMPARISON PRODUCT(S)**



CALIFORNIA AG PACKAGE REPOSITORY, R.J. REYNOLDS, "NEWPORT MENTHOL KING BOX", 2022 RENEWAL SUBMISSION.

April 25, 2023

Page 4

**TAB B – PROMOTIONAL MATERIALS**

**REVIEWED PRODUCT(S)**

Stanford Research into the Impact of Tobacco Advertising Ad Collection, accessed at <https://tobacco.stanford.edu/cigarettes/menthol-medicates/nonmenthol/#collection-4>



**REVIEWED PRODUCT(S)**

Stanford Research into the Impact of Tobacco Advertising Ad Collection, accessed at <https://tobacco.stanford.edu/cigarettes/menthol-medicates/nonmenthol/#collection-5>



## **EXHIBIT 4**

**ROB BONTA**  
**Attorney General**

***State of California***  
**DEPARTMENT OF JUSTICE**



1515 CLAY STREET, 20TH FLOOR  
P.O. BOX 70550  
OAKLAND, CA 94612-0550

Public: (510) 879-1300  
Telephone: (510) 879-3310  
Facsimile: (510) 622-2170  
E-Mail: TaylorAnn.Whittemore@doj.ca.gov

October 6, 2023

Santa Fe Natural Tobacco Company, Inc.  
c/o RAI Services Company  
Attn: Steven Gentry  
P.O. Box 464  
Winston-Salem, NC 27102

RE: California Flavor Ban, Health & Safety Code § 104559.5  
Notice of Determination 23-10-A3

Dear Mr. Gentry:

Since June 30, 2004, the Attorney General's Office has maintained and published a list of all cigarette manufacturers and their brands found in compliance with California Revenue and Taxation Code section 30165.1 ("Tobacco Directory"). See <https://oag.ca.gov/tobacco/directory>. However, not all products listed on the Tobacco Directory are lawful for sale in California.

California has restricted retailer possession, distribution, and sale of flavored tobacco products since December 21, 2022. See Cal. Health & Saf. § 104559.5. This California "flavor ban" law establishes a rebuttable presumption that a tobacco product is flavored where its manufacturer "has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, images, or all, on the product's labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor." *Id.* at § 104559.5(b)(2).

You submitted the products listed below (collectively, the "Reviewed Products") for submission on the Tobacco Directory. This letter is to advise you that the Tobacco Unit of the California Department of Justice has determined that the Reviewed Products are presumptively FLAVORED under the California flavor ban law. *Id.*

Determination Number	Reviewed Product(s)	UPC(s)	Determination
23-10-A3-1	Natural American Spirit Full Bodied Menthol King Box	047995855321 047995855222	FLAVORED
23-10-A3-2	Natural American Spirit Menthol Mellow King Box	047995855154 047995855055	FLAVORED

We specifically conclude:

(1) Labeling for the Reviewed Products states that products are menthol-flavored tobacco products.

The California flavor ban law restricts the retail distribution and sale of flavored tobacco products to California consumers. Under the California flavor ban law, retailers and their agents are subject to fines for the possession and sale of such flavored tobacco products. *See* Cal. Health & Saf. § 104559.5(f). Other state statutes and local ordinances may impose additional penalties on retailers or other vendors as well. *Id.* at § 104559.5(g); *see also* Cal. Bus. & Prof. § 17200.

To encourage uniform application of the California flavor ban law, this Notice of Determination will be posted on the California Department of Justice's public website on or after November 6, 2023.

You are encouraged to provide a copy to your California distributor and retailer customers as well.

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//  
//

October 6, 2023

Page 3

If you believe these determinations or conclusions are in error, or if you believe any Reviewed Product(s) is properly classified as UNFLAVORED, we encourage you to submit a response with any supporting materials to the mailing or email address below on or before November 6, 2023, identifying the Notice of Determination number in your response. The Tobacco Unit will review any such submission and may, in its discretion, update, modify, or rescind this determination in response. In such case, an updated Notice of Determination will be issued.

**Flavor Determination [Determination Number(s)]**

**Office of the Attorney General  
California Department of Justice  
1300 "I" Street, PO Box 944255  
Sacramento, California 94244-2550**

**Tobacco@doj.ca.gov**

**<https://oag.ca.gov/tobacco/contact>**

Sincerely,

*Taylor Ann Whittemore*

TAYLOR ANN WHITTEMORE  
Deputy Attorney General

For ROB BONTA  
Attorney General

## **EXHIBIT 5**



1515 CLAY STREET, 20TH FLOOR  
P.O. BOX 70550  
OAKLAND, CA 94612-0550

Public: (510) 879-1300  
Telephone: (510) 879-3310  
Facsimile: (510) 622-2170  
E-Mail: TaylorAnn.Whittemore@doj.ca.gov

October 6, 2023

Jonathan Reed  
CEO & Chief Commercial Officer  
RJ Reynolds Tobacco Company  
401 North Main Street  
Winston-Salem, NC 27101

RE: California Flavor Ban, Health & Safety Code § 104559.5  
Notice of Determination 23-10-A7

Dear Mr. Reed:

Since June 30, 2004, the Attorney General's Office has maintained and published a list of all cigarette manufacturers and their brands found in compliance with California Revenue and Taxation Code section 30165.1 ("Tobacco Directory"). See <https://oag.ca.gov/tobacco/directory>. However, not all products listed on the Tobacco Directory are lawful for sale in California.

California has restricted retailer possession, distribution, and sale of flavored tobacco products since December 21, 2022. See Cal. Health & Saf. § 104559.5. This California "flavor ban" law establishes a rebuttable presumption that a tobacco product is flavored where its manufacturer "has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, images, or all, on the product's labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor." *Id.* at § 104559.5(b)(2).

You submitted the products listed below (collectively, the "Reviewed Products") for submission on the Tobacco Directory. This letter is to advise you that the Tobacco Unit of the California Department of Justice has determined that the Reviewed Products are presumptively FLAVORED under the California flavor ban law. *Id.*

Determination Number	Reviewed Product(s)	UPC(s)	Determination
23-10-A7-1	Camel Crush King Box (With Menthol Option)	012300197403 012300197410	FLAVORED
23-10-A7-2	Camel Filter Menthol King Box	012300193139 012300000932	FLAVORED
23-10-A7-3	Camel Menthol Silver King Box	012300194136 012300000949	FLAVORED
23-10-A7-4	Camel Classic Menthol King Box	012300368278 012300368261	FLAVORED
23-10-A7-5	Camel Classic Menthol Silver King Box	012300368310 012300368292	FLAVORED

## Notice of Determination 23-10-A7

October 6, 2023

Page 2

23-10-A7-6	Camel No. 9 Smooth Menthe King Box	<b>012300356954</b> <b>012300356947</b>	FLAVORED
23-10-A7-7	Camel Crush Rich King Box (With Menthol Option)	<b>012300110751</b> <b>012300110744</b>	FLAVORED
23-10-A7-8	Camel Crush Smooth Menthol King Box	<b>012300119818</b> <b>012300119801</b>	FLAVORED
23-10-A7-9	Camel Crush Smooth Menthol Silver King Box	<b>012300119900</b> <b>012300119894</b>	FLAVORED
23-10-A7-10	Camel Wides Classic Menthol 80 Box	<b>012300340793</b> <b>012300340786</b>	FLAVORED
23-10-A7-11	Camel Wides Classic Menthol Silver 80 Box	<b>012300341047</b> <b>012300341030</b>	FLAVORED
23-10-A7-12	Capri Menthol Jade 100 Box	<b>027200032518</b> <b>027200006618</b>	FLAVORED
23-10-A7-13	Capri Menthol Indigo 100 Box	<b>027200011643</b> <b>027200002399</b>	FLAVORED
23-10-A7-14	Capri Menthol Indigo 120 Box	<b>027200011179</b> <b>027200002177</b>	FLAVORED
23-10-A7-15	Capri Menthol Indigo Super Slim 100 Box	<b>027200207022</b> <b>02723929</b>	FLAVORED
23-10-A7-16	Capri Menthol Indigo Super Slim 120 Box	<b>027200011179</b> <b>02721727</b>	FLAVORED
23-10-A7-17	Capri Menthol Jade Super Slim 100 Box	<b>027200207060</b> <b>02766128</b>	FLAVORED
23-10-A7-18	Carlton Menthol 100 Box	<b>043300020583</b> <b>043300000363</b>	FLAVORED
23-10-A7-19	Carlton Menthol 120 Soft	<b>043300022102</b> <b>04330000400</b>	FLAVORED
23-10-A7-20	Carlton Menthol King Soft	<b>043300020484</b> <b>043300000042</b>	FLAVORED
23-10-A7-21	Carlton Menthol Green 100 Box	<b>043300020583</b> <b>04333633</b>	FLAVORED
23-10-A7-22	Carlton Menthol Green 120 Soft	<b>043300022102</b> <b>04334030</b>	FLAVORED
23-10-A7-23	Carlton Menthol Green King Soft	<b>043300020484</b> <b>043300000042</b>	FLAVORED
23-10-A7-24	Doral Menthol King Box	<b>012300232845</b> <b>012300232838</b>	FLAVORED
23-10-A7-25	Doral Menthol 100 Box	<b>012301039136</b> <b>012301039990</b>	FLAVORED
23-10-A7-26	Doral Menthol Gold King Box	<b>012301042136</b> <b>012301042990</b>	FLAVORED
23-10-A7-27	Doral Menthol Gold 100 Box	<b>012300158138</b> <b>012300000581</b>	FLAVORED
23-10-A7-28	Doral Classic Menthol King Box	<b>012300232845</b> <b>012300232838</b>	FLAVORED
23-10-A7-29	Doral Classic Menthol Gold King Box	<b>012301042136</b> <b>012301042990</b>	FLAVORED
23-10-A7-30	Doral Classic Menthol 100 Box	<b>012301039136</b> <b>012301039990</b>	FLAVORED
23-10-A7-31	Eclipse Menthol King Box	<b>012300186131</b> <b>012300001064</b>	FLAVORED
23-10-A7-32	GPC Classic Menthol 100 Soft	<b>075926050279</b> <b>075926050262</b>	FLAVORED
23-10-A7-33	GPC Classic Menthol Gold 100 Soft	<b>075926002551</b> <b>075926002544</b>	FLAVORED
23-10-A7-34	GPC Classic Menthol Gold King Soft	<b>075926002537</b> <b>075926002520</b>	FLAVORED
23-10-A7-35	GPC Classic Menthol King Soft	<b>075926050255</b> <b>075926050248</b>	FLAVORED
23-10-A7-36	GPC Classic Menthol Silver 100 Soft	<b>075926050491</b> <b>075926050484</b>	FLAVORED
23-10-A7-37	Lucky Strike Activate Green Menthol King Box	<b>043300187514</b> <b>043300187507</b>	FLAVORED
23-10-A7-38	Lucky Strike Menthol 100 Box	<b>043300187590</b>	FLAVORED

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		<b>043300187170</b>	
23-10-A7-39	Lucky Strike Menthol King Box	<b>043300187156</b> <b>043300187149</b>	FLAVORED
23-10-A7-40	Lucky Strike Menthol Silver 100 Box	<b>043300187361</b> <b>043300187354</b>	FLAVORED
23-10-A7-41	Lucky Strike Menthol Silver King Box	<b>043300187330</b> <b>043300187323</b>	FLAVORED
23-10-A7-42	Misty Menthol Silver 100 Box	<b>020400052683</b> <b>02040000035</b>	FLAVORED
23-10-A7-43	Misty Menthol Green 100 Box	<b>043300052109</b> <b>043300000950</b>	FLAVORED
23-10-A7-44	Misty Menthol Green 120 Box	<b>020400053581</b> <b>020400000356</b>	FLAVORED
23-10-A7-45	Misty Menthol Green Slim 100 Box	<b>043300052109</b> <b>04339530</b>	FLAVORED
23-10-A7-46	Misty Menthol Green Slim 120 Box	<b>020400053581</b> <b>02043536</b>	FLAVORED
23-10-A7-47	Misty Menthol Silver Slim 100 Box	<b>020400052683</b> <b>02040335</b>	FLAVORED
23-10-A7-48	Monarch Classic Menthol King Soft	<b>012300336130</b> <b>012300336994</b>	FLAVORED
23-10-A7-49	Monarch Classic Menthol 100 Soft	<b>012300337137</b> <b>012300337991</b>	FLAVORED
23-10-A7-50	Monarch Classic Menthol Gold King Soft	<b>012300338134</b> <b>012300338998</b>	FLAVORED
23-10-A7-51	Monarch Classic Menthol Gold 100 Soft	<b>012300231138</b> <b>012300231992</b>	FLAVORED
23-10-A7-52	More 120 Menthol Slim 120 Soft	<b>012300160131</b> <b>01236034</b>	FLAVORED
23-10-A7-53	More 120 Menthol Silver Slim 120 Soft	<b>012300174138</b> <b>01237431</b>	FLAVORED
23-10-A7-54	Newport Menthol 100 Box	<b>026101005734</b> <b>026100005738</b>	FLAVORED
23-10-A7-55	Newport Menthol 100 Soft	<b>026101005772</b> <b>026100005776</b>	FLAVORED
23-10-A7-56	Newport Menthol Blue 100 Box	<b>026101005802</b> <b>026100005806</b>	FLAVORED
23-10-A7-57	Newport Menthol Blue King Box	<b>026101005833</b> <b>026100005837</b>	FLAVORED
23-10-A7-58	Newport Menthol Gold 100 Box	<b>026101005727</b> <b>026100005721</b>	FLAVORED
23-10-A7-59	Newport Menthol Gold 100 Soft	<b>026101005857</b> <b>026100005851</b>	FLAVORED
23-10-A7-60	Newport Menthol Gold King Box	<b>026101005765</b> <b>026100005769</b>	FLAVORED
23-10-A7-61	Newport Menthol Gold King Soft	<b>026101005796</b> <b>026100005790</b>	FLAVORED
23-10-A7-62	Newport Menthol King Box	<b>026101005758</b> <b>026100005752</b>	FLAVORED
23-10-A7-63	Newport Menthol King Soft	<b>026101005789</b> <b>026100005783</b>	FLAVORED
23-10-A7-64	Newport Menthol Platinum Blue 100 Box	<b>026100016239</b> <b>026100016222</b>	FLAVORED
23-10-A7-65	Newport Menthol Platinum Blue King Box	<b>026100016291</b> <b>026100016284</b>	FLAVORED
23-10-A7-66	Newport Menthol Smooth Select 100 Box	<b>026101006687</b> <b>026100006681</b>	FLAVORED
23-10-A7-67	Newport Menthol Smooth Select King Box	<b>026101006700</b> <b>026100006704</b>	FLAVORED
23-10-A7-68	Newport Menthol Gold Classic King Box	<b>026101005765</b> <b>026100005769</b>	FLAVORED
23-10-A7-69	Newport Menthol Gold Classic King Soft	<b>026101005796</b> <b>026100005790</b>	FLAVORED
23-10-A7-70	Newport Menthol Gold Classic 100 Box	<b>026101005727</b> <b>026100005721</b>	FLAVORED

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23-10-A7-71	Newport Menthol Blue Classic 100 Box	<b>026101005802</b> <b>026100005806</b>	FLAVORED
23-10-A7-72	Newport Menthol Blue Classic King Box	<b>026101005833</b> <b>026100005837</b>	FLAVORED
23-10-A7-73	Newport Boost Menthol King Box	<b>026100016758</b> <b>026100016741</b>	FLAVORED
23-10-A7-74	Newport Menthol Gold Classic 100 Soft	<b>026101005857</b> <b>02658511</b>	FLAVORED
23-10-A7-75	Now Menthol Green 100 Soft	<b>012300192132</b> <b>01230000925</b>	FLAVORED
23-10-A7-76	Now Menthol Green King Soft	<b>012300139137</b> <b>012300000390</b>	FLAVORED
23-10-A7-77	Pall Mall Classic Menthol 100 Box	<b>027201046696</b> <b>027200041721</b>	FLAVORED
23-10-A7-78	Pall Mall Menthol Black Filter 100 Box	<b>027200347278</b> <b>027200347285</b>	FLAVORED
23-10-A7-79	Pall Mall Menthol Black Filter King Box	<b>027200347247</b> <b>027200347254</b>	FLAVORED
23-10-A7-80	Pall Mall Menthol Green Filter 100 Box	<b>027200018659</b> <b>02786520</b>	FLAVORED
23-10-A7-81	Pall Mall Menthol Green Filter King Box	<b>027200018598</b> <b>02785929</b>	FLAVORED
23-10-A7-82	Pall Mall Menthol White Filter 100 Box	<b>027200347339</b> <b>027200347346</b>	FLAVORED
23-10-A7-83	Pall Mall Menthol White Filter King Box	<b>027200347310</b> <b>027200347315</b>	FLAVORED
23-10-A7-84	Pall Mall Classic Menthol King Box	<b>027200846627</b> <b>027200041624</b>	FLAVORED
23-10-A7-85	Pall Mall Select Menthol Box	<b>027200205875</b> <b>027200205868</b>	FLAVORED
23-10-A7-86	Pall Mall Select Menthol 100 Box	<b>027200210623</b> <b>027200210616</b>	FLAVORED
23-10-A7-87	True Menthol Green King Soft	<b>026100002676</b> <b>026100002645</b>	FLAVORED
23-10-A7-88	True Menthol Green 100 Soft	<b>026100002973</b> <b>026100002942</b>	FLAVORED
23-10-A7-89	Vantage Classic Menthol King Soft	<b>012300132138</b> <b>012300000321</b>	FLAVORED
23-10-A7-90	Vantage Classic Menthol 100 Soft	<b>012300134132</b> <b>01233435</b>	FLAVORED

We specifically conclude:

(1) Labeling for the Reviewed Products states that products are menthe- or menthol-flavored tobacco products.

The California flavor ban law restricts the retail distribution and sale of flavored tobacco products to California consumers. Under the California flavor ban law, retailers and their agents are subject to fines for the possession and sale of such flavored tobacco products. *See* Cal. Health & Saf. § 104559.5(f). Other state statutes and local ordinances may impose additional penalties on retailers or other vendors as well. *Id.* at § 104559.5(g); *see also* Cal. Bus. & Prof. § 17200.

To encourage uniform application of the California flavor ban law, this Notice of Determination will be posted on the California Department of Justice's public website on or after November 6, 2023.

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You are encouraged to provide a copy to your California distributor and retailer customers as well.

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If you believe these determinations or conclusions are in error, or if you believe any Reviewed Product(s) is properly classified as UNFLAVORED, we encourage you to submit a response with any supporting materials to the mailing or email address below on or before November 6, 2023, identifying the Notice of Determination number in your response. The Tobacco Unit will review any such submission and may, in its discretion, update, modify, or rescind this determination in response. In such case, an updated Notice of Determination will be issued.

**Flavor Determination [Determination Number(s)]**

Office of the Attorney General  
California Department of Justice  
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Sacramento, California 94244-2550

[Tobacco@doj.ca.gov](mailto:Tobacco@doj.ca.gov)

<https://oag.ca.gov/tobacco/contact>

Sincerely,

*Taylor Ann Whittemore*

TAYLOR ANN WHITTEMORE  
Deputy Attorney General

For ROB BONTA  
Attorney General

# **EXHIBIT 6**

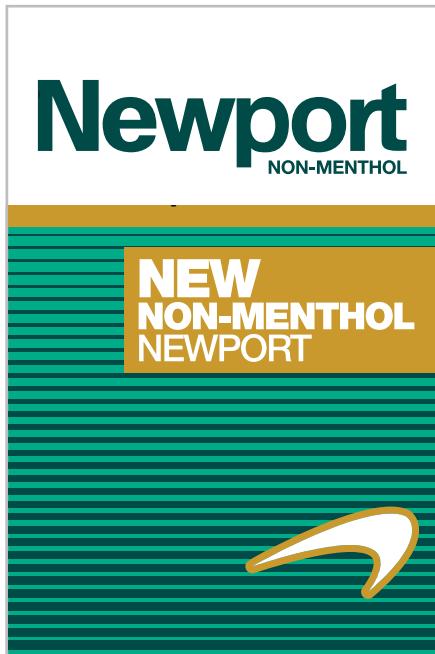
## Newport Non-Menthol



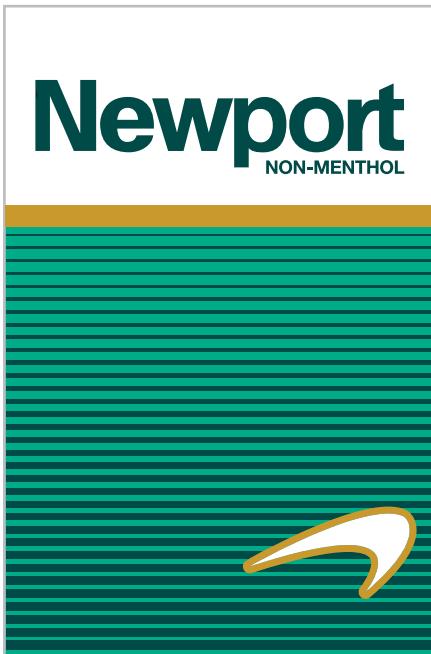
Top



Left



Front



Back



Right



Bottom

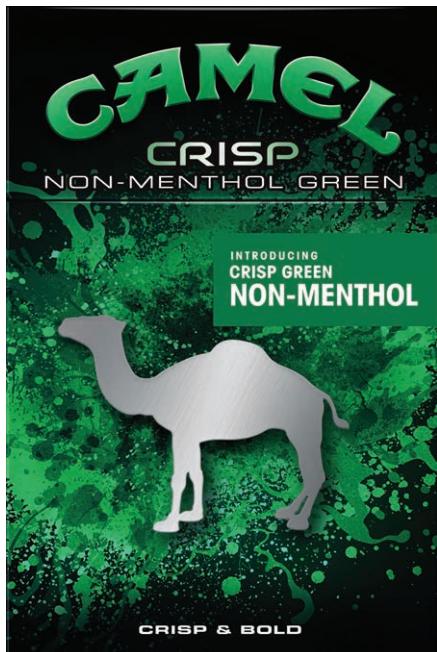
## Camel Crisp "Green"



Top



Left



Front



Back



Right



Bottom

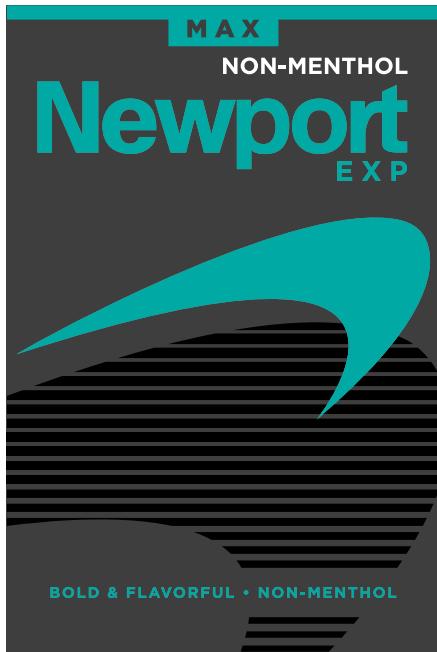
## Newport EXP Max



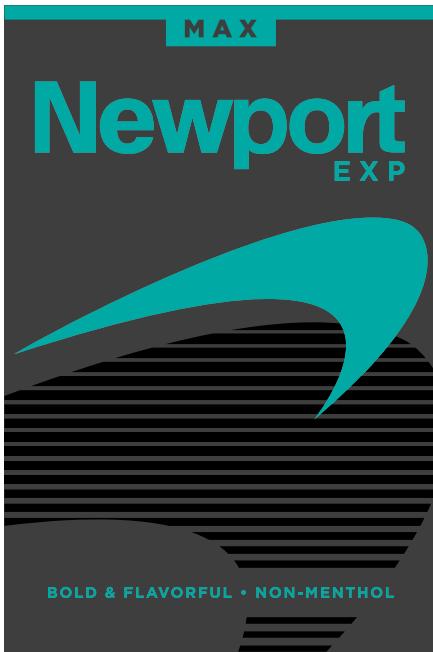
Top



Left



Front



Back



Right



Bottom

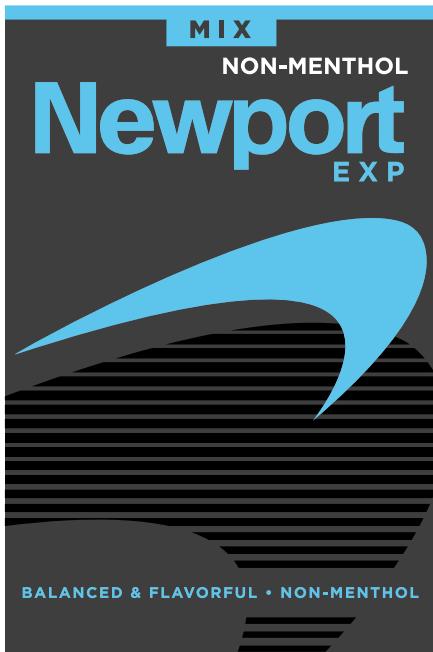
## Newport EXP Mix



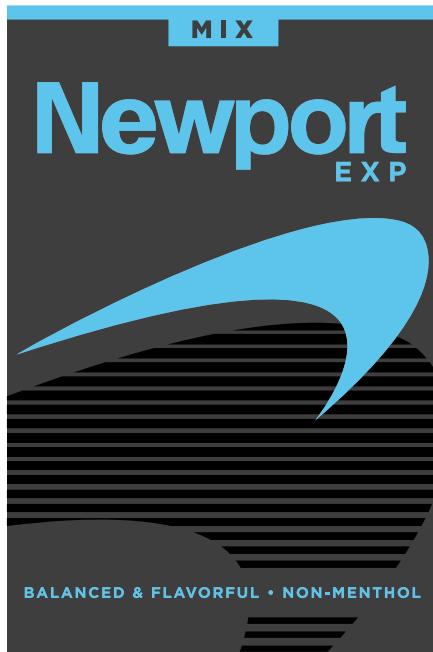
Top



Left



Front



Back



Right



Bottom