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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

10
11 RICHARD BOEKEN,)
12 Plaintiff,)
13 vs.)
14 INTERNATIONAL HOUSE OF PANCAKES,)
et al.,)
15 Defendants.)

Case No. BC 226593
**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO INTERNATIONAL
HOUSE OF PANCAKES'
DEMURRER**
Date: June 7, 2000
Time: 8:30 a.m.
Dept: 55
Complaint Filed: May 16, 2000
Judge: Honorable Cesar C. Sarmiento
FILED CONCURRENTLY HEREWITH:
[PROPOSED] ORDER DENYING
DEFENDANT INTERNATIONAL
HOUSE OF PANCAKES' DEMURRER;
AND PROOF OF SERVICE

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I. INTRODUCTION

Plaintiff Richard Boeken, a long-time smoker, took his first puff of a cigarette at the tender age of 13. He continued to smoke through high school and beyond. Defendant International House of Pancakes (“IHOP”) illegally sold cigarettes to Plaintiff from vending machines **while he was a minor¹, in violation of Penal Code Section 308.²** In order to increase business and revenues, IHOP placed cigarette vending machines on their premises in locations that were out-of-sight of the managers and employees of IHOP, thereby allowing and, indeed, encouraging minors to purchase cigarettes from its vending machines.

Plaintiff is proceeding against IHOP **only under California's Unfair Competition Law**, Business and Profession Code Sections 17200 et. seq. and 17500 et. seq.³ IHOP demurred to the entirety of Plaintiff's complaint, including the causes of action brought under the Unfair Competition Law, incorrectly arguing that Civil Code Section 1714.45 immunizes it from liability. Plaintiff is only requesting damages available under the Business and Professions Code for IHOP's **past and continuing** violation of Penal Code Section 308, which prohibits the sale of cigarettes to minors.

Plaintiff respectfully requests that this Court promptly deny IHOP's demurrer and order Defendant to answer the complaint within 10 days from the date of the hearing on the motion. In the alternative, Plaintiff requests leave to amend her complaint to further set forth her claims against IHOP.

¹IHOP's “math” is incorrect as to Plaintiff's age when he first started smoking and first purchased cigarettes from IHOP. Plaintiff was 13 (not 5) when he first started smoking in 1957 and was approximately 16 - 17 years old when he purchased cigarettes from IHOP.

²Plaintiff's complaint also alleges that I-HOP violated its legal duty to refrain from contributing to the delinquency of a minor under Penal Code Section 272.

³Plaintiff's complaint inadvertently named Defendant International House of Pancakes in his first cause of action for negligence, second cause of action for strict liability, third and fourth causes of action for fraud/deceit, fifth cause of action for conspiracy and sixth cause of action for breach of express warranty and tenth cause of action for punitive damages. Plaintiff does not oppose IHOP's demurrer as to those causes of action. Plaintiff is proceeding against IHOP **only** on his seventh, eighth and ninth causes of action under **Business and Professions Code** §§17200 et. seq. and §17500, et seq.

1 **II. STATEMENT OF FACTS**

2 The tobacco industry has known for years that their products eventually injure or kill
3 consumers when used exactly as intended. In fact, cigarette smoking causes more than 85%
4 of all lung cancer. Cigarette smoking is also associated with cancers of the lip, mouth, larynx,
5 and esophagus, as well as with chronic obstructive pulmonary disease and heart disease.

6 **E. IHOP Sold Cigarettes To Minors And Targeted Minors In False**
7 **And Misleading Advertising**

8 IHOP, like numerous other retail establishments in California, sells cigarettes to minor
9 children in violation of Penal Code section 308. Indeed, IHOP sold cigarettes to Plaintiff ,
10 while he was a minor, in violation of Penal Code Section 308. Many of these children become
11 addicted to cigarettes, as they would not have had IHOP not illegally sold them cigarettes.
12 IHOP profits from addicting children to cigarettes because many, unable to overcome their
13 addiction, return to buy cigarettes as both children and adults.

14 Indeed, approximately 90 percent of cigarette sales in northern California are to
15 children, or to adults who were addicted as children, and who would like, but are unable, to quit
16 smoking. Consequently, IHOP has unjustly enriched itself in an amount equal to 90 percent
17 of its gross profits from the sale of cigarettes. Every dollar IHOP obtains through such
18 cigarette sales results, on average, in more than a dollar spent on health care by the State of
19 California.

20 IHOP assisted and enabled the cigarette manufacturers, including Philip Morris, to
21 engage in false and misleading advertising campaigns, by placing, and allowing them to place
22 and publish, in and around its various retail facilities, false and misleading advertising
23 targeting underage, minor smokers, including Plaintiff. This false and unlawful advertising
24 concealed the true facts concerning the health hazards of smoking, the addictive nature of
25 nicotine, and the cigarette manufacturers' manipulation of the levels of nicotine in cigarettes
26 so as to create and sustain addiction in smokers, including minors.

27 At the time that Plaintiff first started smoking, he saw, believed, and relied on the
28 cigarette manufacturers false and misleading advertising, including those placed in and

1 around the retail facilities of IHOP and, in reliance thereon, he purchased various brands of
2 cigarettes as a minor and continuing thereafter. The advertising campaigns were successful.
3 Plaintiff became addicted to cigarettes as a minor and, despite repeated attempts to quit,
4 remains addicted to this day.

5 **III. LEGAL ARGUMENT**

6 The legal standard on demurrers is well known to the Court. On a demurrer the court
7 must first assume as true all material facts which have been pleaded, Serrano v. Priest (1971)
8 5 Cal.3d 584, 591, making reasonable inferences made from the facts as alleged, McKay v.
9 New York Life Ins. Co (1899) 124 Cal. 270; Remus Films, ltd. v. William Morris Agency, Inc.
10 (1966) 244 Cal.App. 2d 763, no matter how unlikely or improbable. Del E. Webb Corp. v.
11 Structural Materials Co. 91981) 123 Cal.App.3d 593, 604. The ability of plaintiff to prove
12 unlikely allegations, or possible difficulties in making such proof, is of no concern. Committee
13 on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 213-214. The
14 court must look through the form of the pleading to its substance on ruling on the demurrer.
15 Labels that are attached that are erroneous or confusing must be ignored if the complaint
16 pleads facts that would entitle the plaintiff to relief. LiMandri v. Judkins (1997) 52 Cal. App.4th
17 326. Following a ruling on a demurrer, unless otherwise ordered, leave to answer or amend
18 within 10 days shall be deemed granted. Cal. Rules of Court Rule 331(e). Denial of leave to
19 amend constitutes an abuse of discretion, irrespective of whether leave to amend is
20 requested." King v. Mortimer (1948) 83 Cal.App.2d 153, 158.

21 Plaintiff is proceeding against IHOP only on theories of unfair business practices and
22 intentional and negligent advertising under the Business and Professions Code for its violation
23 of Penal Code Section 308, prohibiting the sale of cigarettes to minors and Penal Code
24 Section 272, which prohibits contributing to the delinquency of minors.⁴ Defendants demurred

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26
27 ⁴Plaintiffs' complaint inadvertently named Andronico in the first cause of action for negligence, third and fourth causes of action
28 for false representation, deceit and fraudulent concealment, and sixth cause of action for breach of express warranty. Plaintiff has
dismissed those causes of action against IHOP and intends to proceed against IHOP only under the seventh, eighth and ninth causes
of action for "unfair competition/unfair business practices" under Business and Professions Code Sections 17200 et. seq. and for
negligent and intentional false and misleading advertising under Business and Professions Code Sections 17500 et. seq.

1 generally to each cause of action.

2 IHOP's completely misses the point of Plaintiff's causes of action against it. **Plaintiff**
3 **is not attempting to recover damages for her lung cancer from IHOP.** She is **not**
4 bringing a products liability action against IHOP. Rather, she is bringing an unfair competition
5 action against IHOP under Business and Professions Code Section 17200 et. seq., **on**
6 **behalf of herself and members of the general public**, for its past and **continuing** violation
7 of Penal Code Section 308 in selling cigarettes to minors, and for its violation of Business and
8 Professions Code Section 17500 et. seq., which prohibits false and misleading advertising.
9 Such an action is clearly authorized under the Unfair Competition Law and Civil Code Section
10 1714.45 does not act to bar such claims. See, Stop Youth Addiction v. Lucky Stores, Inc.
11 (1998) 17 Cal.4th 553; Committee on Children's Television, Inc. v. General Foods Corp.
12 (1983) 35 Cal.3d 197. Defendant's demurrer has no merit and should be denied.

13 **A. Civil Code Section 1714.45 Does Not Apply To Plaintiff's Seventh,**
14 **Eight And Ninth Causes Of Action Against IHOP Brought Under**
15 **The Business & Professions Code**

16 IHOP incorrectly argues in its demurrer that Plaintiff's causes of action under
17 California's **Unfair Competition Law** are barred by the immunity given "retailers" in Civil
18 Code Section 1714.45. Such is not the case. **Civil Code Section 1714.45 only applies**
19 **to "product liability action[s]" as that term is defined in the statute.** Plaintiff's seventh,
20 eighth and ninth causes of action under the Unfair Competition Law **do not fit under the**
21 **statute's definition of product liability actions** and, thus, are not barred.

22 Indeed, Civil Code Section 1714.45 **never** applied to anything but "product liability
23 action[s]." The statute defines a product liability action as "any action for injury or death
24 caused by a product, except that the term does not include an action based on a
25 manufacturing defect or breach of an express warranty." See, Civil Code
26 §1714.45(c)(formerly(b)). Similarly, case law and other authorities characterize a product
27 liability action as an action at law in which a defective product and personal injuries or
28 damages to purchasers, users or bystanders are **required elements.** See, Davis v. Shiley,

1 (June 17, 1998) 98 D.A.R. 6605, 6605-6606 (reiterated, citing Khan v. Shiley, Inc., *infra*, that
2 fraud and products liability claims are **two separate causes of action**). Khan v. Shiley, Inc.
3 (1990) 217 Cal. App.3d 848, 855-58; (fraud case not product liability action although potential
4 personal injury was the thing concealed); City and County of San Francisco v. Philip Morris
5 Inc. (N.D. Cal. 1997) 957 F. Supp. 1130, 1140 (fraud and special duty claims not barred by
6 Civil Code section§1714.45); BAJI 9.00.5, 9.19. Plaintiff's causes of action under the
7 Business and Professions Code are not for "injury or death" but are rather for restitution and
8 the disgorgement of profits that IHOP collected by illegally selling cigarettes to minors,
9 including Plaintiff, in violation of Penal Code Section 308. Plaintiff could bring this claim on
10 behalf of herself and the general public **even if she had never contracted lung cancer**
11 **from smoking cigarettes** and independent of any claims of product defect. Stop Youth
12 Addiction v. Lucky Stores, Inc. (1998) 17 Cal.4th 553.

13 **B. Plaintiff Adequately Alleges A Cause Of Action For Unfair**
14 **Business Practices Against IHOP Under Business And**
15 **Professions Code Section 17299 et seq.**

16 California Business and Professions Code Section 17200 et. seq. targets "unfair
17 competition," which is defined as "any unlawful, unfair or fraudulent business act or practice.
18 . . ." and "unfair, deceptive, untrue, or misleading advertising. . . ." including any act prohibited
19 by Business and Professions Code Section 17500 et. seq. The California Supreme Court
20 has held that the Legislature, in enacting the unfair competition law, "intended this sweeping
21 language to include **anything that can properly be called a business practice and that**
22 **at the same time is forbidden by law.**" See, Stop Youth Addiction Inc. v. Lucky Stores, Inc.
23 (1998) 17 Cal.4th 553, 560. (quotations omitted.) Any business practice that is "unlawful" in
24 the sense that it **violates a specific statute** may be enjoined under Business & Professions
25 Code Section 17203, even though it injures consumers as distinguished from competition.
26 See, Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197;
27 Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94. The sale of cigarettes to minors
28 has been a criminal offense in this state since at least 1892, when Section 308 of the Penal

1 Code first took effect. Stats. 1891, ch. 70, §1, p.64.

2 Section 17200 authorizes a court to hear an action for relief "upon the complaint of any
3 board, officer, person, corporation or association or **by any person acting for the interests**
4 **of itself**, its members or **the general public**." Cal. Bus. & Prof. Code §17203. "Person" is
5 defined to mean "**natural persons**, corporations, firms, partnerships, joint stock companies,
6 associations, and other organizations of persons." Cal. Bus. & Prof. Code §17201. Thus,
7 Plaintiff clearly has standing to sue under the Unfair Competition Law on behalf of himself and
8 others.⁵

9 Defendant IHOP demurrer to Plaintiff's Seventh Cause of Action under Business and
10 Professions Code Sections 17200 et. seq. conveniently ignores the California Supreme
11 Court's ruling in Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, **a case**
12 **directly on point**.

13 In the Stop Youth Addiction case, the trial court sustained, without leave to amend, a
14 general demurrer by a supermarket to a complaint against it by a private, for-profit corporation
15 for unfair competition under the Unfair Competition Law (Bus. & Prof. Code, §§17200-17209).
16 The complaint there alleged that defendant Lucky Stores, Inc. **in the course of its retailing**
17 **activities**, violated Penal Code Section 308, prohibiting the sale of cigarettes to minors. The
18 Court of Appeal **reversed** the sustaining of the demurrer. The California Supreme Court
19 **affirmed** the Court of Appeals judgment and stated:

20 "Defendant Lucky Stores, Inc. (Lucky) **and numerous other retailers in**
21 **Northern California** sell cigarettes to minor children in violation of Penal Code
22 section 308. Many of these children become addicted to cigarettes, as they
23 would not have, had Lucky not illegally sold them cigarettes. Lucky profits from
24 addicting such children to cigarettes because many, unable to overcome their
25 addiction, return to buy cigarettes, both children and adults.

26 "Approximately 90 percent of cigarette sales in northern California are to
27 children or to adults who were addicted as children and who would like, but are
28 unable, to quit smoking. Consequently, Lucky has unjustly enriched itself in an
amount equal to 90 percent of its gross profits from the sale of cigarettes.
Every dollar Lucky obtains through such cigarette sales results, on average, in

⁵Indeed, even "a private plaintiff who has himself suffered no injury at all may sue to obtain relief for others." See, e.g. Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197; Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App.3d 65.

1 more than a dollar spent on health care by the State of California.

2 "As a threshold matter, **it is plain that SYA, in alleging Lucky violates Penal**
3 **Code section 308 in its retailing activities, adequately alleges unfair**
4 **competition.** The UCL defines 'unfair competition' as ' . . . any unlawful, unfair
5 or fraudulent business act or practice and unfair, deceptive, untrue or
6 misleading advertising. . . .' (§17200.) As we recently explained in reviewing
7 the scope and purpose of the unfair competition law and its remedial
8 provisions, '[t]he Legislature intended this 'sweeping language' to include
9 'anything that can properly be called a business practice and that at the same
10 time is forbidden by law.' . . ." Stop Youth Addiction, Inc. v. Lucky Stores, Inc.
11 (1998) 17 Cal.4th 553, 558-560. (Emphasis added.)

12 Here, as in Stop Youth Addiction, supra, IHOP sold and continues to sell cigarettes to
13 minor children in violation of Penal Code section 308. Many of these children, including
14 plaintiff, have become addicted to cigarettes, as they would not have had IHOP not illegally
15 sold them cigarettes. IHOP profits from addicting children to cigarettes because many, unable
16 to overcome their addiction, return to buy cigarettes as both children and adults.
17 Consequently, IHOP has unjustly enriched itself by its sale of cigarettes to minors. Thus, it is
18 clear that Plaintiff, in alleging that IHOP violates Penal Code section 308 in its retailing
19 activities, adequately alleges unfair competition. See, Stop Youth Addiction, Inc. v. Lucky
20 Stores, Inc. (1998) 17 Cal.4th 553, 558-560. IHOP demurrer to Plaintiff's seventh cause of
21 action for unfair competition should be overruled.

22 **C. Plaintiff Adequately Alleges Causes Of Action Against IHOP**
23 **Under The False Advertising Law, Business And Professional**
24 **Code Section 17200 et. seq.**

25 Business and Professions Code Sections 17200, 17203 and 17204 authorize an
26 action for unfair competition against a person or business that engages in false or misleading
27 advertising. Business and Professions Code Sections 17500-17582 governs false or
28 misleading advertising.

Business and Professions Code Section 17500 makes it unlawful for any person, firm
corporation, or association, or any employee thereof, to make or disseminate or cause to be
made or disseminated, either to the public in California or from California to the public in any
state, any statement concerning real or personal property or services, professional or

1 otherwise, or concerning any circumstance or matter of fact connected with the proposed
2 performance or disposition of the property or services, if the statement is (1) untrue or
3 misleading, (2) is known, or by the exercise of reasonable care should be known, to be untrue
4 or misleading, and (3) is made or disseminated or caused to be made or disseminated with
5 intent directly or indirectly to dispose of the property, to perform the services, or to induce the
6 public to enter into any obligation relating thereto. The prohibition extends to statements in
7 any newspaper or other publication, or any advertising device, or by public outcry or
8 proclamation, or in any other manner or means whatsoever. Bus. & Prof. Code §17500.

9 It is also unlawful for any person doing business in California and advertising to
10 consumers in California to make any false or misleading advertising claim, including claims
11 that (1) purport to be based on factual, objective, or clinical evidence, (2) compare the
12 product's effectiveness or safety to that of other brands or products, or (3) purport to be based
13 on any fact. Bus. & Prof. Code §17508(a). A statement is untrue or misleading for purposes
14 of Business and Professions Code Section 17500 if members of the public are **likely** to be
15 deceived. Actual deception or confusion is not required. Therefore, a violation of the statute
16 is actionable without individualized proof of deception, reliance, and injury. Committee on
17 Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197.

18 The prohibition in Business and Professions Code Section 17500 against false or
19 misleading advertising extends to negligent, as well as to intentional, dissemination of such
20 advertising. People v. Forest E. Olson, Inc. (1982) 137 Cal. App.3d 137. The statute
21 establishes a duty of reasonable care that is not satisfied by unquestioning reliance on
22 representations made by others. The duty of care is breached by a failure to verify and
23 investigate representations when facts are present that would put a reasonable person on
24 notice that the representations are possibly false. Id.

25 Business and Professions Code Section 17535 provides that an action for an
26 injunction may be brought by any person acting for the interests of itself, its members, or the
27 general public. A "person" for the purposes of the statute includes any individual, partnership,
28 firm, association, or corporation. Bus. & Prof. §17506. Any person, corporation, firm,

1 partnership, joint stock company, or any other association or organization that violates or
2 proposes to violate the false advertising statutes may be enjoined by any court of competent
3 jurisdiction. Bus. & Prof. Code §17535. **All that is needed to state a cause of action for**
4 **injunctive relief is an allegation that members of the public are likely to be deceived.**
5 Allegations of actual deception, reasonable reliance, and damages are **not** necessary.
6 Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197.

7 As a further remedy for violation of the false advertising statutes, a court may make
8 such orders or judgments as may be necessary to (1) prevent the use or employment of any
9 practices that violate Business and Professions Code Section 17500 et. seq., or (2) restore
10 to any person in interest any money or property acquired by unlawful practices. Bus. & Prof.
11 Code §17535. The court is authorized to award restitution without individualized proof of
12 deception, reliance, and injury if it determines that such a remedy is necessary to prevent the
13 use or employment of the unfair advertising practices. Committee on Children's Television,
14 Inc. v. General Foods Corp. (1983) 35 Cal.3d 197.

15 In Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d
16 197 a group of plaintiffs filed a complaint charging a cereal manufacturer, a retailer, and two
17 advertising agencies with fraudulent, misleading and deceptive advertising in the marketing
18 of sugared breakfast cereals. The complaint contained causes of action based on two
19 consumer protection statutes (Bus. & Prof. Code §17200 et seq., unfair competition; and Bus.
20 & Prof. Code §17500 et seq., unfair advertising). Defendant's demurrer was sustained
21 without leave to amend by the trial court.

22 The California Supreme Court reversed and remanded for further proceedings, holding
23 that the complaints stated a cause of action for injunctive relief and restitution under the unfair
24 competition law and the false advertising law. The California Supreme Court stated:

25 "Plaintiffs' second cause of action is based on Business and Professions Code
26 Section 17500 and subsequent sections (the false advertising law), which
27 prohibits the dissemination in any advertising media of any 'statement'
28 concerning real or personal property offered for sale, 'which is untrue or
misleading, and which is known, or which by the exercise of reasonable care
should be known, to be untrue or misleading.' Bus. & Prof. Code, §17500.
Section 17535 authorizes injunctive relief and restitution. . . . Any violation of the

1 false advertising law, moreover, necessarily violates the unfair competition law.

2 "To state a cause of action under these statutes for injunctive relief, it is
3 necessary only to show that `members of the public are likely to be deceived.'
4 (citations omitted.) Allegations of actual deception, reasonable reliance, and
5 damage are unnecessary. The court may also order restitution without
6 individualized proof of deception, reliance, and injury if it `determines that such
7 a remedy is necessary `to prevent the use or employment' of the unfair practice.
8 . . . '

9 ". . . Defendants engaged in a nationwide, long-term advertising campaign
10 **designed to persuade children** to influence their parents to buy sugared
11 cereals. Adapted to its audience, the campaign sought to persuade less by
12 direct representation than by imagery and example. While maintaining a
13 constant theme, the particular advertisements changed frequently. Plaintiffs
14 now contend that these advertisements were deceptive and misleading, and
15 while we do not know the actual truth of those charges, we must assume them
16 true for the purpose of this appeal. . . .

17 ". . . The California Legislature . . . has enacted consumer protection statutes
18 and codified common law remedies which in principle apply to all deceptive
19 advertising, regardless of complexity and scale. . . .

20 "We therefore conclude that plaintiffs' complaint states a cause of action for
21 injunctive relief and restitution under the unfair competition law (Bus. & Prof.
22 Code §17200 et seq.) and the false advertising law (Bus. & Prof. Code §17500
23 et seq.). . . ." Committee on Children's Television, Inc. v. General Foods Corp.
24 (1983) 35 Cal.3d 197, 210-23.

25 As in Committee on Children's Television, supra, Plaintiff's complaint properly states
26 causes of action based on Business and Professions Code Section 17500 and subsequent
27 sections (the false advertising law), which prohibits the dissemination in any advertising media
28 of any "statement" concerning real or personal property offered for sale, "which is untrue or
misleading, and which is known, or which by the exercise of reasonable care should be
known, to be untrue or misleading." Bus. & Prof. Code, §17500. Plaintiff's complaint requests
injunctive relief and restitution as authorized by Section 17535.

Plaintiff's complaint alleges that IHOP, in conjunction with the Philip Morris, and the
other cigarette manufacturer's participated in a long-term advertising campaign **designed
to persuade children** to purchase cigarettes and that these advertisements were deceptive
and misleading. Plaintiff's complaint alleges that IHOP assisted and enabled the cigarette
manufacturers, including Philip Morris, to engage in false and misleading advertising
campaigns, by placing, and allowing them to place and publish, in and around its various retail

1 facilities, false and misleading advertising targeting underage, minor smokers, including
2 Plaintiff. This false and unlawful advertising concealed the true facts concerning the health
3 hazards of smoking, the addictive nature of nicotine, and the cigarette manufacturers'
4 manipulation of the levels of nicotine in cigarettes so as to create and sustain addiction in
5 smokers, including minors.

6 The truth of these charges, must be assumed for the purpose of this demurrer.
7 The Unfair Competition Law applies to all deceptive advertising, regardless of complexity and
8 scale. Therefore, Plaintiff's complaint states a cause of action for injunctive relief and
9 restitution under the unfair competition law (Bus. & Prof. Code §17200 et seq.) and the false
10 advertising law (Bus. & Prof. Code §17500 et seq.) and IHOP demurrer should be overruled.

11 **D. Remedies Requested**

12 Plaintiff's complaint requests only remedies available under the Unfair Competition
13 Law from IHOP. The complaint does **not** request damages for Mr. Boeken's lung cancer from
14 IHOP.

15 The statute authorizes equitable remedies, such as injunctive and restitutionary relief
16 and/or disgorgement of profits. The statute expressly entitles a court to take whatever action
17 is necessary to prevent the use by any person of any unfair business practice, and to restore
18 to any person in interest any property acquired by means of the unfair business practice.
19 Restitutionary relief may be necessary to accomplish complete justice and to deter unfair
20 practices by not allowing wrongdoers to keep their illicit profits. See, Bronco Wine Co. v.
21 Frank A. Logoluso Farms (1989) 214 Cal. App.3d 699 (private litigant recovered \$169,139
22 in 'restitutionary' damages pursuant to Bus. & Prof. Code §17203.) Restitution may be
23 recovered even without the issuance of an injunction. ABC Internat. Traders, Inc. v. Matsushita
24 Electric Corp. (1997) 14 Cal.4th 1247.

25 Plaintiff's complaint requests only the following damages against IHOP: (1) redress
26 and restitution for past and continuing acts of unfair competition and illegal conduct; (2) a
27 permanent injunction enjoining IHOP from selling any more cigarettes to minors and youths;
28 (3) disgorgement of all profits unjustly gained from the illegal sale of cigarettes to minors; (4)

1 disgorgement of all profits unjustly gained from the continuing and ongoing sale of cigarettes
2 to those consumers, including plaintiff, whom IHOP addicted to cigarettes as minors, and who,
3 including plaintiff, continued to purchase them because of their addiction; and (5)
4 reimbursement to the State of California and all other public and other entities from which
5 plaintiff received benefits and services for cigarette-related illnesses and conditions; and (6)
6 reasonable attorneys fees. These are remedies available for violation of the Unfair
7 Competition Law, not damages for personal injury or products liability, which would be
8 prohibited by Civil Code Section 1714.45.

9 Clearly, Plaintiff's causes of action against IHOP under the Unfair Competition Law are
10 not barred by Civil Code Section 1714.45, which pertains strictly to "products liability
11 action[s]" and IHOP demurrer should be overruled.

12 **E. Plaintiff's Complaint Against IHOP Is Not Barred By The Statute**
13 **Of Limitations**

14 An action to enforce any cause of action under the Business & Professions Code,
15 Section 17200 et seq. must be commenced within four years **after the cause of action**
16 **accrued**. Bus. & Prof. C. §17208.

17 In Suh v. Yang (N.D.Cal. 1997) 987 F. Supp. 783 the Court held that competitor's
18 wrongful dilution of a martial arts school operator's service name represented multiple,
19 continuous acts that delayed accrual of the four-year limitations period applicable to the
20 operator's unfair competition claim under Business and Professions Code Section 17208.
21 The court also noted that the "doctrine of equitable tolling" suspends the running of the statute
22 of limitations if the plaintiff proves that the defendant fraudulently concealed the existence of
23 the cause of action so that the plaintiff acting as a reasonable person, did not know of its
24 existence.

25 ". . . Plaintiff's claim for unfair competition would not be barred by the four year
26 statute of limitations since the alleged wrongs . . . are multiple, continuous acts,
and some of these acts have occurred within the limitations period. . . .

27 ". . . In this case, each allegedly infringing display of Defendant's service name
28 . . . could create a separate cause of action for unfair competition. . . .

1 "Therefore, Defendant's counter-motion for summary judgment based upon the
2 running of the statute of limitations is DENIED." Suh v. Yang (N.D. Cal. 1997)
3 987 F. Supp. 783, 795-796.

4 Here, as in Suh v. Yang, supra, Plaintiff's claim for unfair competition is not be barred
5 by the four year statute of limitations since the alleged wrongs, selling cigarettes to minors in
6 violation of the Penal Code and assisting and enabling the cigarette manufacturers, including
7 Philip Morris, to engage in false and misleading advertising campaigns, by placing, and
8 allowing them to place and publish, in and around its various retail facilities, false and
9 misleading advertising targeting underage, minor smokers, including Plaintiff, **are multiple,**
10 **continuous acts, and some of these acts have occurred within the limitations period.**

11 Each of these acts creates a separate cause of action for unfair competition. Therefore,
12 IHOP's demurrer must be overruled.

13 Additionally, under the Business & Professions Code even "**a private plaintiff who**
14 **has himself suffered no injury at all may sue to obtain relief for others.**" See, e.g.
15 Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197;
16 Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App.3d 65. Thus, even if this Court finds
17 that Plaintiff's right to recover the damages that he incurred as a result of IHOP's violations of
18 the Business & Profession's Code is barred by the statute of limitations, he still has the right
19 to bring an action on behalf of others who have incurred damages within the limitations period
20 and to request an injunction, barring IHOP from further engaging in its wrongful conduct.

21 Clearly, Plaintiff's causes of action against IHOP under the Business & Professions
22 Code are not barred by the statute of limitations and IHOP's demurrer should be overruled.

23 **IV. CONCLUSION**

24 For the above-described reasons, the demurrer of Defendant International House of
25 Pancakes should be overruled. Plaintiff's complaint alleges causes of action against IHOP
26 only under the unfair competition law (Bus. & Prof. Code §17200 et seq.) and the false
27 advertising law (Bus. & Prof. Code §17200 et seq.) and, as such, Plaintiff's complaint is not
28 barred by Civil Code Section 1714.45. Additionally, for the reasons stated above, Plaintiff's
complaint is not barred by the statute of limitations. In the alternative, Plaintiff requests leave

1 to amend his complaint in order to more fully set forth facts in support of his causes of action
2 against said Defendant.

3
4 Dated: May 26, 2000

THE LAW OFFICES OF MICHAEL J. PUIZE

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7 By: _____
8 MICHAEL J. PUIZE
9 Attorney for Plaintiff

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17 **PROOF OF SERVICE**
18 Boeken v. Philip Morris, Inc., et al.
19 Case No. BC 226593

20 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

21 I am employed in the County of Los Angeles, State of California. I am over the age of
22 18 and not a party to the within action; my business address is 11755 Wilshire Boulevard,
Suite 1170, Los Angeles, California 90025.

23 On May 30, 2000, I served the foregoing document described as **PLAINTIFF'S**
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO INTERNATIONAL
HOUSE OF PANCAKES' DEMURRER on the interested parties in this action by placing:

24 _____ the original to the propounding party and a true copy to all other parties; or

25 XX a true copy thereof enclosed in a sealed envelope addressed as follows:

26 **See Attached Service List**

27 (X) By Envelope - by placing () the original (X) a true copy thereof enclosed in sealed
28 envelopes addressed as above and delivering such envelopes:

1 (X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and
2 processing correspondence for mailing. Under that practice, it would be deposited with United
3 States Postal Service on that same day with postage thereon fully prepaid at Los Angeles,
4 California in the ordinary course of business. I am aware that on motion of party served,
5 service is presumed invalid if postal cancellation date or postage meter date is more than 1
6 day after date of deposit for mailing in affidavit.

7 () By Personal Service: I delivered such envelope by hand to the addressee(s) above.

8 () By Federal Express: I caused such envelope to be delivered by Federal Express
9 delivery service to the offices of the addressee.

10 () By Facsimile Transmission: On _____, I caused the above-named document to be
11 transmitted by facsimile transmission telephonically to the offices of the addressee(s) at the
12 facsimile number(s) so indicated above. The transmission was reported as complete and
13 without error. A copy of the transmission report properly issued by the transmitting facsimile
14 machine is attached hereto.

15 Executed on May 30, 2000, at Los Angeles, California.

16 (X) (State) I declare under penalty of perjury under the laws of the State of California that the
17 foregoing is true and correct.

18 () (Federal) I declare that I am employed by the office of a member of the bar or of this court
19 at whose direction the service was made.

20 _____
21 Ellen Girma

22 **SERVICE LIST**
23 Boeken v. Philip Morris, Inc., et al.
24 Case No. BC 226593

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