|                                      | Case 2:20-cv-00358 Document 1 Filed 01  | /13/20 Page 1 of 5 Page ID #:1  |  |
|--------------------------------------|---|---------------------------------|--|
| 1<br>2<br>3<br>4<br>5<br>6<br>7<br>8 | Eric B. Hull (# 291167)<br>ebh@kflawaz.com<br>KERCSMAR & FELTUS PLLC<br>100 Wilshire Boulevard, 7th Floor<br>Santa Monica, California 90401<br>Telephone: (310) 566-8176<br>Facsimile: (480) 421-1002<br>Attorneys for Kandypens, Inc.<br>IN THE UNITED STATES DISTRICT COURT |                                 |  |
| 9                                    | FOR THE CENTRAL DISTRICT OF CALIFORNIA  |                                 |  |
| 10                                   | Kandypens, Inc., a Delaware corporation,  | Case No.                        |  |
| 11                                   | Plaintiff,  |                                 |  |
| 12<br>13                             | V.  | COMPLAINT                       |  |
| 13<br>14                             | Puff Corp., a Delaware corporation,   | (Declaratory Judgment of Patent |  |
| 15                                   | Defendant.  | Invalidity)                     |  |
| 16                                   |   | Demand for Jury Trial           |  |
| 17                                   |   | J                               |  |
| 18                                   | For its Complaint against Defendant Puff Corp. ("Puffco"), Plaintiff  |                                 |  |
| 19                                   | Kandypens, Inc. ("Kandypens") alleges as follows:   |                                 |  |
| 20                                   | NATURE OF THE CASE  |                                 |  |
| 21                                   | 1. This action seeks a declaration that Puffco's U.S. Patent No.  |                                 |  |
| 22                                   | 10,517,334 is invalid. Puffco's patent is invalid because the claimed invention was   |                                 |  |
| 23                                   | publicly used and otherwise available to the public more than one year before the   |                                 |  |
| 24                                   | effective filing date of the claimed invention. 35 U.S.C. 31 thus acts as a statutory   |                                 |  |
| 25                                   | bar to the patentability of the "portable electronic vaporizing device" described in  |                                 |  |
| 26                                   | Puffco's patent.  |                                 |  |
| 27                                   |   |                                 |  |
| 28                                   | COMPLAINT   |                                 |  |

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|    |  |  |
| 1  | THE PARTIES  |  |
| 2  | 2. Kandypens is a Delaware corporation with its principal place of                 |  |
| 3  | business in Santa Barbara, California.   |  |
| 4  | 3. Puffco is a Delaware corporation with its principal place of business           |  |
| 5  | in Los Angeles, California.  |  |
| 6  | JURISDICTION AND VENUE   |  |
| 7  | 4. This action arises under the Declaratory Judgment Act, 28 U.S.C.                |  |
| 8  | §§ 2201 and 2202 and the patent laws of the United States, 35 U.S.C. § 1 et seq.   |  |
| 9  | 5. This court has original jurisdiction over the subject matter of this            |  |
| 10 | action pursuant to 28 U.S.C. §§ 1331, 1338(a), 2201 and 2202.                      |  |
| 11 | 6. Personal jurisdiction over Puffco is proper in this District because            |  |
| 12 | Puffco's principal place of business is in this District and therefore Puffco is a |  |
| 13 | resident of this District.   |  |
| 14 | 7. Venue is proper in this district under 28 U.S.C. § 1391(b) because              |  |
| 15 | Puffco resides in this judicial district.  |  |
| 16 | <u>FACTS</u>   |  |
| 17 | 8. Kandypens and Puffco are competitors in the emerging electronic                 |  |
| 18 | vaporizer industry. The two parties design and market products for use in the      |  |
| 19 | inhalation of vaporizable substances.  |  |
| 20 | 9. One of Puffco's products is the Puffco Peak, a rig intended to                  |  |
| 21 | facilitate inhaling smoke from vaporized concentrates (known by some as            |  |
| 22 | "dabbing").  |  |
| 23 | 10. On or about January 8, 2018, Puffco's CEO, Roger Volodarsky,                   |  |
| 24 | demonstrated the Puffco Peak for seven individuals, apparently including members   |  |
| 25 | of the media, at the Mirage hotel before the Consumer Electronics Show opened.     |  |
| 26 | 11. Upon information and belief, Puffco conducted additional                       |  |
| 27 | demonstrations and public exhibitions of the Puffco Peak, at the Mirage and on the |  |
| 28 |  |  |
|    | 2<br>COMPLAINT   |  |
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floor of CES, throughout the CES show running January 9, 2018 to January 12, 2018.

12. More than one year later, on January 14, 2019, Mr. Volodarsky and others filed a provisional patent application, No. 62/792,202, and a non-provisional application, PCT/US2019/013501.

13. On April 2, 2019, Mr. Volodarsky and others filed a non-provisional patent application, No. 16/373,170, claiming priority from the earlier applications.

14. At no point in any of these applications did any of the applicants disclose the public use and disclosures of the Puffco Peak more than one year before the first application date.

15. On December 19, 2019, Puffco was issued U.S. Patent No. 10,517,334, "Portable Electronic Vaporizing Device" (the "334 Patent").

16. The '334 Patent's specification, including its drawings, describes the Puffco Peak vaporizer.

17. The '334 Patent's claims read on the Puffco Peak vaporizer, or its use.

16 18. Among other products, Kandypens developed and markets the Oura17 portable concentrate vaporizer.

18 19. On January 3, 2020, counsel for Puffco sent Kandypens a cease-and-19 desist letter alleging that the Oura vaporizer directly infringes the '334 Patent, and 20 that marketing and selling accessories for the Oura vaporizer may constitute 21 indirect infringement. Puffco further demanded that, to avoid "the disruption that a 22 court proceeding would entail," Kandypens must "[c]ease and desist from any 23 further manufacture, use, sales, offers to sell, or importation into the United States 24 of the Oura, and other accessories therefor."

25 20. Puffco sent at least one similar letter to one of Kandypens'
26 distributors, apparently in an effort to persuade the distributor to not carry the Oura
27 vaporizer.

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21. By sending the letters, Puffco has put a cloud of uncertainty over Kandypens' and others' ability to market the Oura vaporizer without incurring liability to Puffco, exposing Kandypens to the risk of economic harm.

22. Based on the foregoing, a justiciable controversy exists between Kandypens and Puffco as to whether the claims of the '334 Patent are valid and enforceable.

23. Absent a declaration of invalidity or unenforceability, Puffco will continue to wrongfully allege that Kandypens' marketing of the Oura vaporizer infringes the '334 Patent, and thereby cause Kandypens irreparable injury and damage

## COUNT ONE

## (Declaratory Judgment of Invalidity and/or Unenforceability)

24. Kandypens incorporates the foregoing paragraphs by reference.

25. As a result of the acts described in the preceding paragraphs, there exists a controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment of invalidity.

26. A judicial declaration is necessary and appropriate so that Kandypens may ascertain its rights regarding the validity of the '334 Patent.

27. Kandypens is entitled to a declaratory judgment that the claims of the '334 Patent are invalid because they are anticipated by prior art, including the public use and disclosure of the Puffco Peak itself more than one year before the effective filing date of the claimed invention.

23 28. Kandypens is entitled to a declaratory judgment that the claims of the
24 '334 Patent are unenforceable because Puffco failed to disclose relevant
25 anticipatory prior art to the Patent Office, including the public use and disclosure of
26 the Puffco Peak itself more than one year before the effective filing date of the
27 claimed invention.

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WHEREFORE, Kandypens demands trial by jury on all issue so triable and requests judgment against Puffco as follows:

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1. Adjudging that each of the claims of the '334 Patent is invalid;

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3. Adjudging that the '334 Patent is unenforceable;

4. A judgment that Puffco and each of its officers, directors, agents, counsel, servants, employees and all of persons in active concert or participation with any of them, be restrained and enjoined from alleging, representing or otherwise stating that Kandypens infringes any claims of the '334 Patent or from instituting or initiating any action or proceeding alleging infringement of any claims of the '334 Patent against Kandypens or any customers, manufacturers, users, importers, or sellers of Kandypens' products;

5. Declaring Kandypens as the prevailing party and this case as exceptional, and awarding Kandypens its reasonable attorneys' fees, pursuant to 35 U.S.C. § 285;

6. That Puffco be ordered to pay all fees, expenses and costs associated with this action; and

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

Dated this 13th day of January, 2020.

KERCSMAR & FELTUS PLLC

By s/ Eric B Hull

Eric B. Hull 100 Wilshire Boulevard Seventh Floor Santa Monica, California 90401 *Attorneys for Kandypens, Inc.* 

> 5 COMPLAINT

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