

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JUDGE FURMAN

-----X  
AMERIVAPE, INC.

Plaintiff,

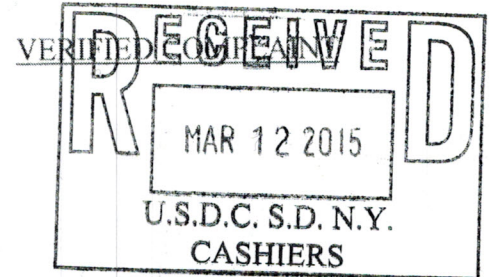
- against -

KYLE KRUGER, ERIK HUTCHINSON, AMERAVAPE  
TECHNOLOGIES INC d/b/a AMERAVAPE, and  
AMERAMATIC VTECH, LLC d/b/a AMERAVAPE,

Defendants.  
-----X

**15 CV 01874**

Index No.



This action arises from Defendants' unauthorized use of a business name that is substantially identical to Plaintiff's well-known name and marks "AMERIVAPE." Years after Plaintiff Amerivape, Inc. ("Amerivape") – the original Amerivape – became well known as a retailer of electronic cigarettes, electronic cigarette liquid and related smoking accessories, Defendants incorporated under a substantially identical name in the State of California, deceptively promoted themselves as if they were Amerivape, and sold and continue to sell similar products to those of Plaintiff, such as electronic cigarettes. Defendants did so by, among other things, registering the domain names ameravape.com, amerivape.net, amerivape.info, and amerivape.org in an effort to deceive potential and existing clients into believing they were dealing with Plaintiff and/or that Defendants had an affiliation with Plaintiff's business. Defendants' efforts to masquerade as Plaintiff have led to serious consequences for Plaintiff. For

example, Plaintiff is aware of several instances in which customers made public complaints about Plaintiff's business and products in the mistaken belief that the customers were actually complaining about Defendants' business and products. Further, Defendants' abuse of Plaintiff's well-known trade name and registered mark is in violation of the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a) and (d); and New York General Business Law §§ 133, 360-k, and 360-l; and constitutes unfair competition under New York common law. As such, Plaintiff, by its attorneys, complains of Defendants as follows:

### **THE PARTIES**

1. Plaintiff Amerivape is a New York corporation organized in New York, with a principal executive office at 336 Hudson Ave., Troy, New York 12182.
2. Defendant Kyle Kruger is co-owner and co-founder of Ameravape Technologies Inc. and served as its President. Defendant Kruger is also one-half owner of Defendant Ameramatic Vtech, LLC.
3. Defendant Eric Hutchinson is co-owner and co-founder of Ameravape Technologies Inc. Defendant Hutchinson is also one-half owner of Defendant Ameramatic Vtech, LLC.
4. Defendant Ameramatic Vtech, LLC is a California limited liability company with an address at 2880 Scott St 106, Vista, California 92081.
5. Defendant Ameravape Technologies Inc. is a California corporation organized under the laws of California with a business address at 2380 Hosp Way #338, Carlsbad, CA 92008.

### **JURISDICTION AND VENUE**

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338 because it arises under the federal Lanham Act and because the state law claims are joined with related and substantial claims under federal trademark and unfair competition laws.

7. This Court has personal jurisdiction over Defendants pursuant to New York CPLR §§ 301 and 302 because they transact business in New York. Additionally, Defendants have committed alleged tortious acts in the State of New York.

8. Venue is proper in this District under 28 U.S.C. § 1391(b) because Defendants have purported to do business in the State of New York and because a substantial portion of the events giving rise to the claims for relief stated in this Complaint occurred in this District.

9. Upon information and belief, Defendants have transacted business under the name “Ameravape” in this county on multiple occasions. In or about August 2014 through October 2014, Defendants conducted business trips to New York City and County and sold and/or gave out at least \$4,000.00 and/or 4,000 units in promotional products to customers, and sponsored and arranged “cloud competitions” and “vape competitions” to promote their infringing products. In addition, Defendants’ deceptive websites [ameravape.com](http://ameravape.com), [amerivape.info](http://amerivape.info), [amerivape.net](http://amerivape.net), and [amerivape.org](http://amerivape.org) are accessible within New York by New York customers.

### **GENERAL ALLEGATIONS**

10. Plaintiff Amerivape is a retailer of electronic cigarettes, electronic cigarette liquid and related smoking accessories headquartered in Troy, New York. It has been offering its products and services under the name Amerivape since at least 2011. Plaintiff does business at



brick and mortar stores in the State of New York and online across the county at www.amerivape.com. True and correct copies of Amerivape's registered trademarks, U.S. Serial Nos. 86001422 and 861424, are attached as **Exhibit A**.

11. Defendants sell and market products such as electronic cigarettes and similar products under the confusingly similar name "Ameravape."

12. Defendants have infringed Plaintiff's marks for their own economic gain. Specifically, Defendants used Plaintiff's marks by fraudulently registering a corporation and multiple domain names that are the same as or confusingly similar to the marks, then using these domain names to deceive consumers. Said domain names include: ameravape.com, amerivape.info, amerivape.net, and amerivape.org.

13. Upon information and belief, Defendants created said websites in an effort to trade on the goodwill associated with the AMERIVAPE Mark and take advantage of actual and potential customers of Plaintiff. Defendants' websites advertised and sold the same types of products offered by Plaintiff Amerivape as if they were provided by Plaintiff Amerivape.

14. On numerous occasions, Defendants have been mistaken for Plaintiff and/or as an agent of Plaintiff for purposes of service and goods sold, demonstrating the confusing and deceptive nature of Defendants' business and domain name registrations.

15. Plaintiff is aware of several instances in which customers made public complaints about Plaintiff's products and business in a mistaken belief and without realizing that the customer was actually complaining about Defendants' business.

16. Plaintiff is also aware of at least one instance where a news/media outlet confused Defendants' business with Plaintiff's.

17. At all times, Defendants knew that the use of Plaintiff's marks was likely to cause consumer confusion. Moreover, Defendants' use of Plaintiff's marks was intended to deceive consumers. Indeed, after Plaintiff contacted Defendants to advise them to cease and desist, Defendants continued to operate under both the same name and the confusingly similar name "Ameravape." Shortly thereafter, Defendants registered domain names amerivape.org and amerivape.net.

18. Through expenditure of time and capital, the AMERIVAPE Marks have become highly distinctive.

19. The distinctive wording of the AMERIVAPE Mark is used by Plaintiff, including in connection with advertisements for the products offered by Amerivape.

20. By virtue of these activities, Amerivape has customers around the country, including New York.

21. There is no affiliation between Plaintiff's well known nationwide business and Defendants' fraudulent practices.

22. Plaintiff has suffered injury as a result of Defendants' deceptive actions, which are likely to create confusion, such that people will believe, when they encounter Defendants and their infringing companies, that they are dealing with Plaintiff or that Defendants are somehow associated with Plaintiff. Defendants' continued passing-off of themselves as Plaintiff will dilute and devalue the AMERIVAPE Marks, and therefore should be enjoined.

**COUNT ONE USE OF A TRADE NAME WITH INTENT TO DECEIVE IN  
VIOLATION OF NEW YORK GENERAL BUSINESS LAW § 133**

23. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

24. Defendants' Ameravape Technologies Inc. name is confusingly similar to Plaintiff Amerivape's corporate and trade name and the federally registered AMERIVAPE Marks owned by Plaintiff.

25. New York General Business Law § 133 protects trade names from unlawful infringement by prohibiting the use of someone else's name, style or symbol as part of one's own name with an intent to deceive the public.

26. Defendants, through ameravape.com, amerivape.info, amerivape.net, and amerivape.org and any corresponding deceptive websites, and while conducting business in New York County, have used the AMERIVAPE Marks and/or used the similarity of such marks with the intent to deceive the public.

27. Defendants are doing business under the name "Ameravape" to deceive the public.

28. As such, Defendants have used Plaintiff's trade name with intent to deceive the public.

29. Defendants' activities have caused, and will continue to cause, Plaintiff to suffer irreparable injury.

**COUNT TWO**  
**MISAPPROPRIATION UNDER NEW COMMON LAW**  
**UNFAIR COMPETITION**

30. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

31. Plaintiff, operating under the AMERIVAPE Marks, is known across the country, including in the State of New York and this judicial district, for providing quality products and services. In New York, through such renown, a business possesses goodwill constituting property or a commercial advantage.

32. Consumers purchase Plaintiff's products because of its renown and reputation for providing high-quality services and products. Upon information and belief, it was this consumer demand that spurred Defendants to replicate the AMERIVAPE Marks and register internet domains.

33. As such, Defendants misappropriated Plaintiff's goodwill for Defendants' own economic advancement.

34. Defendants' activities have caused, and will continue to cause, Plaintiff to suffer irreparable injury.

**COUNT THREE**  
**CYBERSQUATTING IN VIOLATION OF 15 U.S.C. § 1125(d)**

35. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

36. The domain names ameravape.com, amerivape.info, amerivape.net, and amerivape.org are identical or substantially similar to the distinctive and federally registered AMERIVAPE Marks.



37. Defendants, with the bad faith intent to profit by using the AMERIVAPE Marks, registered and used ameravape.com, amerivape.info, amerivape.net, and amerivape.org.

38. Defendants' actions constitute bad faith in that said domains were registered with the intent to divert customers from Plaintiff, harming the goodwill represented by the AMERIVAPE Marks, and with the intent to gain commercially through defrauding Plaintiff's actual prospective clients.

39. The foregoing acts of Defendants constitute "cybersquatting" as that term is commonly used, in violation of 15 U.S.C. § 1125(d).

40. Defendants' activities have caused, and will continue to cause, Plaintiff to suffer irreparable injury.

**COUNT FOUR**  
**INFRINGEMENT OF A FEDERALLY REGISTERED TRADEMARK**  
**IN VIOLATION OF 15 U.S.C. § 1114**

41. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

42. Defendants created a misleading corporation and then registered ameravape.com, amerivape.info, amerivape.net, and amerivape.org which were unauthorized and deceptive uses of the AMERIVAPE Marks.

43. Through both the domain names and corresponding deceptive websites, as well as through their other business activities, including conducting business in New York County, Defendants have reproduced, counterfeited, copied, and created a colorable imitation of the AMERIVAPE Mark, all without Plaintiff's authorization.



44. Defendants' use of the AMERIVAPE Mark is likely to have caused confusion, mistake, and deceived consumers.

45. Through the conduct described above, Defendants have infringed Plaintiff's federally registered trademark in violation of 15 U.S.C. § 1114.

46. Defendants' activities have caused, and will continue to cause, Plaintiff to suffer irreparable injury.

**COUNT FIVE**  
**FALSE DESIGNATION OF ORIGIN, FALSE DESCRIPTIONS**  
**IN VIOLATION OF 15 U.S.C. § 1125 (a)**

47. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

48. Defendants created a corporation which substantially used the AMERIVAPE Mark, registered ameravape.com, amerivape.info, amerivape.net, and amerivape.org, created deceptive websites, and do business in New York County.

49. In so doing, Defendants falsely described their services and products as those provided by Plaintiff, and falsely implied their services and products came from Plaintiff.

50. Defendants' use of their corporation, domains, and deceptive websites has and will continue to cause confusion, mistake, or to deceive as to the affiliation, connection, or association of the deceptive business, domains and websites with Plaintiff's services.

51. Defendants' conduct, corporation, domains and websites have and will continue to cause confusion, mistake, or to deceive as to the origin, sponsorship, or approval of their actions.

52. Upon information and belief, Defendants' substantial use of the AMERIVAPE Marks as described herein has resulted in and will continue to result in Plaintiff losing customers, as well as losing goodwill and business reputation.

53. As such, Defendants have infringed the AMERIVAPE Mark in violation of 15 U.S.C. § 1125(a).

54. Defendants' activities have caused, and will continue to cause, Plaintiff to suffer irreparable injury.

**COUNT SIX**  
**TRADEMARK INFRINGEMENT UNDER**  
**NEW YORK GENERAL BUSINESS LAW § 360-K**

55. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

56. Plaintiff owns and uses the AMERIVAPE Marks in connection with electronic cigarettes, electronic cigarette liquid and related smoking accessories sold in New York.

57. Defendants' use of the AMERIVAPE Mark and trade name has and will continue to cause confusion, mistake, and to deceive consumers as to the source or origin of Defendants' fraudulent products and services.

58. As described herein, Defendants reproduced, counterfeited, copied, and colorably imitated the AMERIVAPE Mark in violation of New York General Business Law § 360-k.

59. Defendants' activities have caused, and will continue to cause, Plaintiff to suffer irreparable injury.

**COUNT SEVEN**  
**INJURY TO BUSINESS REPUTATION AND DILUTION**  
**UNDER NEW YORK GENERAL BUSINESS LAW § 360-L**

60. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

61. Plaintiff owns and uses the AMERIVAPE Marks in connection with electronic cigarettes, electronic cigarette liquid and related smoking accessories sold and marketed in New York.

62. The AMERIVAPE Mark is distinctive and recognized as a leader in quality products.

63. Defendants' predatory use of the AMERIVAPE Mark as alleged herein has diluted the AMERIVAPE Marks.

64. As such, Defendants have diluted the AMERIVAPE Marks and injured Plaintiff's business reputation in violation of New York General Business Law § 360-l.

65. Defendants' activities have caused, and will continue to cause, Plaintiff to suffer irreparable injury.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays that the Court enter judgment as follows:

a) Preliminarily and permanently enjoining Defendants, and all persons in active concert or participation with them:

- i. from using the terms "Ameravape," "Amerivape" or any confusingly similar variation of such term in a corporation or trade name or domain name;

- ii. from using names or marks confusingly similar to Plaintiff's marks;
- iii. from false, misleading, or confusing advertising relating to Plaintiff and its services;
- iv. from representing by any means whatsoever, directly or indirectly, that Defendants and/or their products are associated in any way with Plaintiff and its products and/or services, and from otherwise taking any other action to cause confusion, mistake, or deception on the part of consumers;
- v. from doing any other acts calculated or likely to cause confusion or mistake in the mind of the public or lead consumers to believe that Defendants' products or services come from or are the products of Plaintiff, or are somehow sponsored by or associated with Plaintiff;
- vi. from otherwise unfairly diluting the AMERIVAPE Mark and harming Plaintiff's reputation and goodwill; and
- vii. from attempting to defraud the public by using the AMERIVAPE Mark.

b) Awarding Plaintiff compensatory and punitive damages, as well as attorneys' fees and costs.

c) Awarding Plaintiff statutory damages of \$100,000 per domain name pursuant to 15 U.S.C. § 1125(d).

d) Granting such other relief as the Court may determine just and equitable.

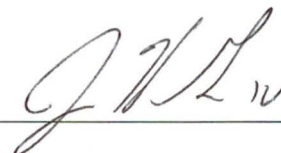


**DEMAND FOR JURY TRIAL**

Plaintiff demands trial by jury for all issues triable by a jury.

Dated: March 9, 2015

By: \_\_\_\_\_

A handwritten signature in cursive script, appearing to read 'J H Glavin IV', written over a horizontal line.

James Henry Glavin IV (JG-2188)  
Glavin and Glavin  
69 Second Street  
Waterford, NY 12188  
Tel. (518) 237-5505  
Fax. (518) 237-1990  
[hglavin@glavinandglavin.com](mailto:hglavin@glavinandglavin.com)

*Attorney for Plaintiff*

VERIFICATION

STATE OF NEW YORK     )  
  ) ss.:  
COUNTY OF SARATOGA    )

LEON W. GUILBEAULT, JR., being duly sworn, deposes and says:

I am the President of Amerivape, Inc., Plaintiff named in the above-entitled proceeding. I have read the foregoing Complaint and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

  
\_\_\_\_\_  
LEON W. GUILBEAULT, JR., President

Sworn to before me this 9<sup>th</sup> day of March, 2015

  
\_\_\_\_\_  
Notary Public

Marina Ivulgina Glavin  
Notary Public, State of New York  
No. 02GL6142734  
Qualified in Richmond County  
March 20, 2015

# EXHIBIT A



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# AMERIVAPE

### Word Mark

**AMERIVAPE**

### Goods and Services

IC 030. US 046. G & S: Electronic cigarette liquid comprised of flavorings in liquid form used to refill electronic cigarette cartridges. FIRST USE: 20110310. FIRST USE IN COMMERCE: 20110401

IC 034. US 002 008 009 017. G & S: Electronic cigarettes; Smoking accessories, namely, electronic smoking pipes, herbs for smoking, smoking pipes, smoking pipe cleaners, smoking pipe racks, smoking tobacco, smoking urns. FIRST USE: 20110310. FIRST USE IN COMMERCE: 20110401

### Standard Characters Claimed

### Mark Drawing Code

(4) STANDARD CHARACTER MARK

### Serial Number

86001422

### Filing Date

July 3, 2013

### Current Basis

1A

### Original Filing Basis

1A

### Published for Opposition

January 14, 2014

### Registration Number

4504565

### Registration Date

April 1, 2014



**Owner** (REGISTRANT) Amerivape Inc CORPORATION NEW YORK 336 Hudson ave Troy NEW YORK 12182

**Attorney of Record** Raj Abhyanker

**Type of Mark** TRADEMARK

**Register** PRINCIPAL

**Live/Dead Indicator** LIVE

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*Amerivape*

<b>Word Mark</b>	<b>AMERIVAPE</b>
<b>Goods and Services</b>	<p>IC 030. US 046. G &amp; S: Electronic cigarette liquid comprised of flavorings in liquid form used to refill electronic cigarette cartridges. FIRST USE: 20110310. FIRST USE IN COMMERCE: 20110401</p> <p>IC 034. US 002 008 009 017. G &amp; S: Electronic cigarettes; Smoking accessories, namely, electronic smoking pipes, herbs for smoking, smoking pipes, smoking pipe cleaners, smoking pipe racks, smoking tobacco, smoking urns. FIRST USE: 20110310. FIRST USE IN COMMERCE: 20110401</p>
<b>Mark Drawing Code</b>	(5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM
<b>Serial Number</b>	86001424
<b>Filing Date</b>	July 3, 2013
<b>Current Basis</b>	1A
<b>Original Filing Basis</b>	1A
<b>Published for Opposition</b>	January 14, 2014
<b>Registration Number</b>	4504566
<b>Registration Date</b>	April 1, 2014
<b>Owner</b>	<p>(REGISTRANT) Amerivape Inc CORPORATION NEW YORK 336 Hudson ave Troy NEW YORK 12182</p> <p>Raj Abhyanker</p>

**Attorney of  
Record**

**Description of Mark** The color(s) red is/are claimed as a feature of the mark. The mark consists of the literal element "AMERIVAPE" written in stylized form in red color.

**Type of Mark** TRADEMARK

**Register** PRINCIPAL

**Live/Dead  
Indicator** LIVE

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