

1 EDMUND G. BROWN JR.
Attorney General of California
2 DENNIS ECKHART
Senior Assistant Attorney General
3 JEANNE FINBERG (SBN 88333)
HARRISON POLLAK (SBN 200879)
4 Deputy Attorneys General
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 622-2147
Fax: (510) 622-2121
7 E-mail: Jeanne.Finberg@doj.ca.gov
Attorneys for Attorney General, State of California
8

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA
12

13 **THE PEOPLE OF THE STATE OF CALIFORNIA,**
14 **EX REL EDMUND G. BROWN, JR,**

15 Plaintiff,

16 v.

17 **SMOKING EVERYWHERE, ET AL,**

18 Defendants.
19

Case No. RG10493637

STIPULATED CONSENT JUDGMENT

20 The Plaintiffs, the People of the State of California, *ex rel.* Edmund G. Brown Jr.,
21 California Attorney General ("Attorney General" or "People"), and Defendants Smoking
22 Everywhere, Inc. and Eliko Taieb ("Defendants"; collectively, "Parties"), enter into this
23 Stipulated Consent Judgment ("Consent Judgment") to resolve the allegations set forth in the
24 Second Amended Complaint filed by the People in this case.
25

I. INTRODUCTION

1. The Parties enter into this Consent Judgment without a trial. It does not constitute evidence of an admission by the Defendants regarding any issue of law or fact alleged in the Complaint. This Consent Judgment sets forth the obligations of the Defendants and the People and constitutes the complete, final and exclusive agreement between the Parties and supersedes any prior agreements between the Parties except as specifically provided below.

2. By entering into this Consent Judgment, the Defendants do not admit any violation of law, and the People do not admit that Covered Products (as defined in Section 4) are safe. The People expressly reserve the right to bring an enforcement action based on violations of law not covered in the Claims Covered section (Section 16), and to seek whatever fines, costs, attorneys' fees, penalties, or remedies provided by law, including, but not limited to, an injunction against the sale of Covered Products in the State of California.

3. For purposes of this Consent Judgment, (i) the Alameda County Superior Court ("Court") has jurisdiction over the Parties to and the subject matter of this action; (ii) venue is proper in this Court; (iii) Defendant Smoking Everywhere, Inc. has employed ten or more persons for some period of time relevant to the allegations of the Complaint; and (iv) the Court has personal jurisdiction over Defendants for the purposes of enforcing the terms of the Consent Judgment.

4. For purposes of the Consent Judgment, "Covered Products" shall mean electronic cigarettes, also known as "e-cigarettes," and cartridges and any other similar product or accessory manufactured, distributed, offered for sale, or sold by Smoking Everywhere in California for the purpose of creating a vapor that the user inhales through a device designed to look like a cigarette, cigar, pipe, or other smoking device.

5. For purposes of the Consent Judgment, "Effective Date" shall mean the date on which the Court enters the Consent Judgment.

II. INJUNCTIVE RELIEF

6. Quality Control. Defendants shall have and maintain a system for quality control of

1 Covered Products to ensure that they are manufactured to appropriate specifications. The
2 specifications shall provide that the Covered Products do not contain any impurities at levels that
3 reasonably could be anticipated to present a risk of injury to humans (defined, for a carcinogen, to
4 be a level that would cause the exposure of the average user to be at a level that poses greater
5 than a 1 in 100,000 risk of excess cancer as determined pursuant to Health and Safety Code
6 section 25249.10, subdivision (c), and its implementing regulations). The system shall include,
7 but not be limited to audits at regular intervals, not to exceed 12 months, of each facility where
8 Covered Products are manufactured and testing to demonstrate to a high level of certainty that the
9 Covered Products comply with specifications. The audits shall be conducted by an independent
10 auditor not having direct responsibility for the matters being audited. Defendants shall provide to
11 the Attorney General a detailed description of the quality control system within 90 days after the
12 Effective Date.

13 7. Sales to Minors. Defendants shall not sell Covered Products to persons younger than
14 18 years of age and shall take reasonable steps to prevent the sale of Covered Products to such
15 persons, including but not limited to the following measures:

16 a. Defendants shall implement one or more systems for checking the age of
17 persons who purchase Covered Products on the Internet or in person. The system shall
18 include age verification by requiring and checking an official government identification
19 card or verifying through a reputable credit agency the age of anyone who purchases
20 Covered Products on the Internet, or of anyone under twenty-six (26) years old who
21 purchases in person. The system shall be put into place as soon as practical after entry
22 of this Consent Judgment, but before the Effective Date.

23 b. Defendants shall not sell flavored cartridges or any substance to use with
24 Covered Products or other e-cigarettes that are targeted to appeal to minors including,
25 but not limited to, strawberry, banana, chocolate, cookies and cream, or mint.

262 c. Defendants shall not use advertisements that target minors. Specifically,
7 Defendants will not use models or images of people that appear to be younger than
28

1 twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended and
2 designed to appeal to people under the legal smoking age in advertisements or
3 promotional materials that appear in California, including on the Internet. This
4 subsection shall not apply to advertisements or promotional materials intended for
5 audiences outside the United States, provided such advertisements or promotional
6 materials conspicuously state that the products are not intended for use by minors, and
7 any sales to a delivery address in California comply with paragraph 7.a, above.

8 d. Defendants shall continue to state on all displays and products that Covered
9 Products may not be sold to minors, and shall ensure that future displays and products
10 state that identification of all persons under 26 years of age will be required before
11 purchase. This message on future displays and products shall be prominently placed
12 with such conspicuousness, as compared with other words, statements, designs, or
13 devices on the display or product, as to render it likely to be read and understood by an
14 ordinary individual under customary conditions of purchase or use.

15 e. Defendants shall not allow self-service displays of Covered Products that are
16 accessible to minors. Covered Products shall be put where assistance from a clerk who
17 can check identification is necessary for access to the product.

18 f. Defendants shall not sell Covered Products in vending machines.

19 8. Defendants shall not send direct advertisements about Covered Products or coupons
20 for Covered Products to any potential new customer who has not solicited the materials unless
21 Defendant has verified as set forth in paragraph 7.a that the customer is of legal smoking age or
22 older. Defendants shall not send samples of Covered Products or Covered Products to any person
23 who has not solicited the materials unless Defendants have verified as set forth in paragraph 7.a
24 that the customer is 18 years old or older.

25 9. Marketing Claims. Defendants shall not make false or misleading claims about
262 Covered Products in its advertising or promotional materials, including on Internet websites. It
7 shall take the following, non-exclusive measures:
28

1 a. Defendants shall not advertise Covered Products as smoking-cessation devices
2 unless or until they have been approved by the Federal Food and Drug Administration as
3 such under its authority to regulate drugs, devices, or tobacco products. This prohibition
4 includes any claims or testimonials about quitting smoking, using e-cigarettes as a
5 treatment for tobacco dependence or addiction, including for example, making claims
6 such as "cut smoking in half." This prohibition does not prohibit Defendants from
7 advertising that e-cigarettes are an alternative to smoking traditional cigarettes, provided
8 that any such advertisement states conspicuously that e-cigarettes are sold for purely
9 recreational purposes and not for treating nicotine addiction, and that nicotine causes
10 addiction.

11 b. Defendants shall not sell Covered Products containing vitamins or other
12 substances intended to portray that using Covered Products will improve one's health,
13 without competent, reliable scientific evidence to support the implied health claim.

14 c. Defendants shall not make claims about Covered Products being safer than
15 cigarettes without competent, reliable scientific evidence to support the claims.
16 Defendants may describe differences between Covered Products and cigarettes that are
17 supported by competent, reliable scientific evidence. Defendants agree to provide such
18 evidence to the Attorney General upon request without undue delay.

19 d. Defendants shall not make claims about Covered Products having no tar
20 without competent reliable scientific evidence to prove the claims.

21 e. Defendants shall not make claims about Covered Products having no first- or
22 second-hand smoke without competent reliable scientific evidence to prove that the
23 vapor from e-cigarettes contains no chemicals associated with first- or second-hand
24 smoke from traditional cigarettes and known to the State of California to cause cancer or
25 reproductive toxicity.

26 f. Defendants shall not make claims about Covered Products containing no
27 tobacco without competent reliable scientific evidence to prove the claims.
28

1 g. Defendants shall not make claims about Covered Products containing no
2 carcinogens without competent reliable scientific evidence to prove the claims.

3 10. Warnings. Defendants shall provide clear and reasonable warnings that Covered
4 Products contain nicotine, which is a chemical known by the State of California to cause birth
5 defects or reproductive harm. The warnings will be in the form and locations described in
6 Attachment A. Defendants shall have 90 days after the Effective Date to put warnings on the
7 outside of packaging, provided that during the interim the warning is available to customers prior
8 to use of the product. Defendants shall not sell cartridges directly to the consumer without
9 packaging. Defendants shall instruct customers (other than the consumer) to whom it sells loose
10 cartridges to provide warnings in compliance with this Section of the Consent Judgment.

11 11. Agents, Distributors and Retail Sellers. Defendants shall use reasonable efforts to
12 ensure that other entities, whether or not affiliated with Defendants, do not take actions that are
13 inconsistent with the terms of this Consent Judgment, or that prevent or interfere with
14 Defendants' compliance with the Consent Judgment. Specifically, Defendants shall take the
15 following, non-exclusive measures:

16 a. Within 30 days after the Effective Date and once every year thereafter,
17 Defendants shall provide the requirements of this Consent Judgment and signs and other
18 materials needed to comply with the Consent Judgment to all of its agents, distributors,
19 and retailers involved in sales of Covered Products. Defendants shall do the same at the
20 time it sells Covered Products to an agent, distributor, or retailer for the first time.
21 Defendants shall require each recipient to confirm at the time of purchase or delivery that
22 they understand and will implement the requirements of the Consent Judgment.
23 Defendants shall stop selling Covered Products to any agent, distributor, or retailer that
24 does not provide such confirmation in a timely manner, but in no event more than 30
25 days after delivery of the product.

26 b. Defendants shall implement a system to monitor compliance by its agents,
27 distributors and retailers authorized by Defendants to sell Covered Products, including its
28

1 employees, representatives, successors, assigns, and all persons acting by, through, under
2 or on behalf of any of them ("Authorized Sellers") comply with the injunctive
3 requirements in Sections 7, 8, 9, and 10 of this Consent Judgment. The monitoring
4 system shall include progressive enforcement of violations, such as notice, probation,
5 and termination of the business relationship, if applicable, with the violators if they do
6 not abide by the terms.

7 c. Defendants shall use reasonable efforts to ensure that entities that offer for sale
8 or sell Covered Products that are not Authorized Sellers comply with the injunctive
9 requirements in Sections 7, 8, 9, and 10 of this Consent Judgment. Defendants shall
10 implement a system to monitor sales practices and marketing claims being made about
11 Covered Products by Unauthorized Sellers. If Defendants discover that an Unauthorized
12 Seller is acting in a manner that is not consistent with the Consent Judgment, then within
13 seven calendar days it shall (i) inform the Unauthorized Seller in writing to stop the
14 practice and verify that it has stopped the practice, or (ii) if that is not effective, within 30
15 days after discovering the practice report it to the Attorney General, along with the
16 identity of the Unauthorized Seller, contact information, and a description of Defendants'
17 communications with the Unauthorized Seller concerning the practice.

18 12. E-Cigarettes and E-Cigarette Cartridges That Are Not Covered Products. Neither
19 Defendant shall have any ownership interest in, a financial interest in, be employed by, or
20 exercise control in any company, person, partnership, or other entity that sells e-cigarettes or e-
21 cigarette cartridges and supplies that are not Covered Products (i.e., that are not manufactured,
22 distributed, offered for sale, or offered for sale by Smoking Everywhere), unless the entity
23 complies with the injunctive provisions in Sections 6 to 11. Within 10 days of signing this
24 Consent Judgment, Defendants shall supply the Attorney General with a list of all companies,
25 persons, partnerships or other entities in which each has an ownership interest, a financial
262 interest, is employed by, or exercises control. Defendants shall update this list as needed, and
7 shall provide the updated list to the Attorney within 10 days after adding any new persons,
28

1 partnerships, or other entities to the list.

2 13. Reporting Requirement. Defendants will file with the Court and submit to the
3 Attorney General a report describing its implementation of the Consent Judgment within 90 days
4 after the Effective Date, as well as quarterly reports for the first year and annual reports
5 thereafter, for a period of three years. The time period for reporting may be extended by
6 agreement of the Parties or by order of the Court for good cause shown.

7 **III. SETTLEMENT PAYMENT**

8 14. Settlement Payment. Defendants shall pay a total settlement amount of \$170,000.
9 The payments terms and allocation of payments are set forth below.

10 a. Defendant Smoking Everywhere. Smoking Everywhere shall pay \$100,000 as
11 a civil penalty pursuant to Health and Safety Code section 25249.7, subd. (b), and
12 \$50,000 as partial reimbursement of the Attorney General's attorneys' fees and costs
13 according to the following schedule:

- 14 1. Within 30 days after the Effective Date, Smoking Everywhere shall pay
15 \$25,000 as a civil penalty.
- 16 2. By February 1, 2011, Smoking Everywhere shall pay \$25,000 as
17 reimbursement of attorneys' fees and costs.
- 18 3. By May 1, 2011, Smoking Everywhere shall pay \$25,000 as a civil
19 penalty.
- 20 4. By August 1, 2011, Smoking Everywhere shall pay \$25,000 as
21 reimbursement of attorneys' fees and costs.
- 22 5. By November 1, 2011, Smoking Everywhere shall pay \$25,000 as a civil
23 penalty.
- 24 6. By February 1, 2011, Smoking Everywhere shall pay \$25,000 as a civil
25 penalty.

26 b. Defendant Elicko Taieb. Elicko Taieb shall pay \$20,000 as partial
27 reimbursement for the Attorney General's attorneys' fees and costs. This amount
28

1 shall be due within 30 days after the Effective Date.

2 c. Early Payment; Default. There shall be no penalty for early payment. In the
3 event of default by either party on any payment, then 10 days after receiving
4 written notice of the default from the People, Defendants shall be jointly and
5 severally liable for any outstanding settlement payments unless the default has
6 been cured.

7 d. Place of payment. Payments shall be made by check, payable to "Office of the
8 California Attorney General" and sent to:

9
10 Robert Thomas
11 Legal Analyst
12 Office of the Attorney General
13 1515 Clay St., 20th Floor
14 Post Office Box 70550
15 Oakland, CA 94612

16 15. Allocation of payment.

17 a. Funds paid to the Attorney General as a civil penalty shall be allocated as set
18 forth in Health and Safety Code section 25249.12, subdivisions (c) and (d).

19 b. Funds paid to the Attorney General as attorneys fees and costs shall be divided
20 equally between the following two funds:

21 i. An interest bearing Special Deposit Fund established by the Attorney
22 General. Those funds, including any interest derived therefrom, shall be
23 used by the Attorney General, until all funds are exhausted, for the costs
24 and expenses associated with for the enforcement and implementation of
25 Proposition 65, including investigations, enforcement actions, other
26 litigation or activities as determined by the Attorney General to be
27 reasonably necessary to carry out his duties and authority under
28 Proposition 65. Such funding may be used for the costs of the Attorney
General's investigation, filing fees and other court costs, payment to expert
witnesses and technical consultants, purchase of equipment, travel,
purchase of written materials, laboratory testing, sample collection or any

1 other cost associated with the Attorney General's duties or authority under
2 Proposition 65. Funding placed in the Special Deposit Fund pursuant to
3 this Section, and any interest derived therefrom, shall solely and
4 exclusively augment the budget of the Attorney General's Office and in no
5 manner shall supplant or cause any reduction of any portion of the
6 Attorney General's budget.

- 7 ii. The Litigation Deposit Fund established by the Attorney General for use
8 by the Attorney General in carrying out the duties and responsibilities
9 entrusted by the Attorney General to the Tobacco Litigation and
10 Enforcement Section of the Public Rights Division, or to its successor, if
11 any. Those funds, including any interest derived therefrom, shall be used
12 by the Attorney General, until all funds are exhausted, for costs and
13 expenses associated with the enforcement and implementation of state
14 laws, including but not limited to Business and Professions Code sections
15 17200 et seq. and 17500 et seq., including investigations, enforcement
16 actions, and other litigation or activities as determined by the Attorney
17 General to be reasonably necessary to carry out his duties and authority.

18 **IV. ADDITIONAL PROVISIONS**

19
20
21
22
23
24
25
262
7
28

1 16. Claims Covered. The Consent Judgment is a full, final, and binding resolution
2 between the People and Defendants and their successors and assigns ("Defendant Releasees") of
3 the claims that were raised in the Second Amended Complaint or that could have been asserted
4 by the Attorney General on behalf of the People of the State of California against the Defendant
5 Releasees regarding untruthful or misleading claims about Covered Products or the failure to
6 warn about nicotine in Covered Products prior to the Effective Date.

7 17. Enforcement. In an action to enforce this Consent Judgment, the People may seek
8 whatever fines, costs, attorneys' fees, penalties or remedies are provided by law for failure to
9 comply with this Consent Judgment. Where said failure to comply constitutes a violation of
10 Proposition 65 or other laws, independent of this Consent Judgment and/or the allegations in the
11 Complaint, the People are not limited to enforcement of this Consent Judgment, but may seek in
12 another action, subject to satisfaction of any procedural requirements, including notice
13 requirements, whatever fines, costs, attorneys' fees, penalties or remedies are provided by law for
14 any future failure to comply with Proposition 65 or other laws. In any such other action,
15 however, the requirements of this Consent Judgment shall not limit or impair any defense, arising
16 at law or in equity, that the Defendants may assert; except that the Defendants shall not contest its
17 obligation to comply with the terms of this Consent Judgment as set forth herein in any
18 proceeding to enforce this Consent Judgment.

19 18. Modification. This Consent Judgment may be modified from time to time by written
20 stipulation of the Parties and the Court's entry of such stipulation. The Consent Judgment may
21 also be modified upon entry of an order of this Court in accordance with law. Grounds for
22 considering modification shall include any that are permitted by law, including that any part of
23 this Consent Judgment is or has become preempted by federal law or regulation. Before filing an
24 application with the Court for a modification to the Consent Judgment, the Parties shall meet and
25 confer to determine whether they can agree on the proposed modification. If a proposed
262 modification is agreed upon, then the parties will present the modification to the Court by means
7 of a stipulated modification to the Consent Judgment as set forth in the first sentence of this
28

1 paragraph.

2 19. Execution in Counterparts. This Consent Judgment may be executed in counterparts,
3 which taken together shall be deemed to constitute one and the same document.

4 20. This Consent Judgment shall be binding and effective on the Effective Date, and the
5 clerk is ordered to enter this Consent Judgment forthwith.
6
7
8
9
10
11
12

13
14
15
16
17
18 **IT IS SO STIPULATED.**

19
20 Dated: 9/28/10

EDMUND G. BROWN JR.
21
22
23
24
25
262
7
28

1 Attorney General of California
2 DENNIS ECKHART
3 Senior Assistant Attorney General
4 JEANNE FINBERG
5 HARRISON POLLAK
6 Deputy Attorneys General

7
8
9 By: JEANNE FINBERG

10 *Attorneys for Plaintiffs People of the State of California*

11
12 Dated: 9/27/10

13 Eliko Taieb
14 Chief Executive Officer
15 On behalf of Smoking Everywhere, Inc

16 Dated: 9/27/10

17 Eliko Taieb
18 Individually
19 On behalf of himself

20
21 **IT IS SO ORDERED.**

22 Dated: 9/28/10

23
24 JUDGE OF THE SUPERIOR COURT

25 OK2009313606

26 .doc_SE_Consent_Judgment_(for_approval_with_AG_Package)_2.docx

1 Attorney General of California
2 DENNIS ECKHART
3 Senior Assistant Attorney General
4 JEANNE FINBERG
5 HARRISON POLLAK
6 Deputy Attorneys General

7
8 By: JEANNE FINBERG
9 *Attorneys for Plaintiffs People of the State of California*

10 Dated: 9/27/10

11
12 Eliko Taieb
13 Chief Executive Officer
14 On behalf of Smoking Everywhere, Inc

15 Dated: 9/27/10

16 Eliko Taieb
17 Individually
18 On behalf of himself

19
20 **IT IS SO ORDERED.**

21 Dated: _____

22
23 JUDGE OF THE SUPERIOR COURT

24 OK2009313606
25 .doc_SE_Consent_Judgment_(for_approval_with_AG_Package)_2.docx
262