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7 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

APR 26 2016

CLERK OF THE SUPERIOR COURT
By Christina Momon, Deputy

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF ALAMEDA

12 CENTER FOR ENVIRONMENTAL HEALTH,)

13 Plaintiff,)

14 v.)

15 VAPE REVOLUTION LLC, et al.,)

16 Defendants.)
17)
18)

Case No. RG 15-774917

**[PROPOSED] CONSENT
JUDGMENT AS TO VAPE
REVOLUTION LLC**

19
20 **1. INTRODUCTION**

21 **1.1.** This Consent Judgment is entered into by Plaintiff Center for Environmental
22 Health, a non-profit corporation (“CEH”), and Vape Revolution LLC (“Settling Defendant”) to
23 settle claims asserted by CEH against Settling Defendant as set forth in the operative Complaint
24 in the matter *Center for Environmental Health v. Vape Revolution LLC, et al.*, Alameda County
25 Superior Court Case No. RG 15-774917 (the “Action”). CEH and Settling Defendant are referred
26 to collectively as the “Parties.”
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1 **1.2.** On February 27, 2015, CEH served a 60-Day Notice of Violation (the “Notice”)
2 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986, California
3 Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Settling Defendant, the California
4 Attorney General, the District Attorneys of every County in the State of California, and the City
5 Attorneys for every City in State of California with a population greater than 750,000. The
6 Notice alleges violations of Proposition 65 with respect to the presence of nicotine in liquid for
7 use with electronic cigarette devices manufactured, distributed, and/or sold by Settling Defendant.

8 **1.3.** Settling Defendant is a corporation that employs ten (10) or more persons and that
9 distributes and/or sells Covered Products (as defined herein) in the State of California or has done
10 so in the past.

11 **1.4.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
12 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
13 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)
14 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
15 Consent Judgment as a full and final resolution of all claims which were or could have been
16 raised in the Complaint based on the facts alleged in the Notice and Complaint with respect to
17 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

18 **1.5.** The Parties enter into this Consent Judgment as a full and final settlement of all
19 claims which were or could have been raised in the Complaint arising out of the facts or conduct
20 related to Settling Defendant alleged therein. By execution of this Consent Judgment and
21 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
22 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
23 admission by the Parties of any fact, conclusion of law, or violation of law. Settling Defendant
24 denies the material, factual, and legal allegations in the Notice and Complaint and expressly
25 denies any wrongdoing whatsoever. Except as specifically provided herein, nothing in this
26 Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any
27 of the Parties may have in this or any other pending or future legal proceedings. This Consent

1 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for
2 purposes of settling, compromising, and resolving issues disputed in this Action.

3 **2. DEFINITIONS**

4 **2.1.** "Covered Products" means nicotine-containing liquid for use with electronic
5 cigarette devices manufactured, distributed, and/or sold by Settling Defendant in California.

6 **2.2.** "Effective Date" means the date on which the Court enters this Consent Judgment.

7 **3. INJUNCTIVE RELIEF**

8 **3.1. Clear and Reasonable Warnings for Covered Products.** As of the Effective
9 Date, no Covered Product may be manufactured for sale, distributed or sold in California unless
10 such Covered Product has a clear and reasonable warning on the outer label of the Product. The
11 warning shall state the following:

12 **WARNING:** This product contains nicotine, a chemical known to the State
13 of California to cause birth defects or other reproductive harm.

14 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
15 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be
16 prominently displayed on the Covered Product with such conspicuousness, as compared with
17 other words, statements, or designs as to render it likely to be read and understood by an ordinary
18 individual prior to sale. To the extent that other warning statements are included on the outer
19 label of a Covered Product, the warning required herein shall be separated from the other
20 warnings by a line that is at least the same height as a line of text on the label. For internet,
21 catalog, or any other sale where the consumer is not physically present and cannot see a warning
22 displayed on the Covered Product prior to purchase or payment, the warning statement shall be
23 displayed in such a manner that it is likely to be read and understood as being applicable to the
24 Covered Product being purchased prior to the authorization of or actual payment. Placement of
25 the warning statement at the bottom of an internet webpage that offers multiple products for sale
26 does not satisfy the requirements of this Section.

27 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** In an

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1 effort to ensure that consumers receive clear and reasonable warnings in compliance with
2 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
3 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
4 materials by certified mail to each of its California retailers or distributors to whom Settling
5 Defendant reasonably believes sold Covered Products that contained nicotine prior to the
6 Effective Date. Such warning materials shall include a reasonably sufficient number of stickers
7 in order to permit the retailer or distributor to affix the warning on each Covered Product such
8 customer has purchased from Settling Defendant. The warning stickers shall contain the warning
9 language set forth in Section 3.1 above. The warning materials shall also include a letter of
10 instruction for the placement of the stickers, and a Notice and Acknowledgment postcard.

11 **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
12 eligible for a waiver of the additional civil penalty and payment in lieu of penalty payments set
13 forth in Section 4.1.5 below, Settling Defendant shall undertake one or more of the additional
14 actions below. A Settling Defendant opting to be bound by this Section must provide CEH with a
15 written election stating which optional provision(s) it is agreeing to implement.

16 **3.2.1. Prohibition on Sales and Advertising to Minors.** If Settling Defendant
17 opts to participate in Section 3.2, Settling Defendant shall not sell Covered Products to persons
18 younger than eighteen (18) years of age and shall take reasonable steps to prevent the sale of
19 Covered Products to such persons, including, but not limited to the following measures:

20 **3.2.1.1.** Settling Defendant shall implement one or more systems for
21 checking the age of persons who purchase Covered Products on the Internet or in person. The
22 system shall include age verification by requiring and checking an official government
23 identification card or verifying through a reputable credit agency the age of anyone who
24 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who
25 purchases in person. The system shall be put into place within ninety (90) days of the Effective
26 Date.

1 **3.2.1.2.** Settling Defendant shall instruct its suppliers and
2 distributors that it will not sell or accept flavored Covered Products that are targeted to appeal to
3 minors including, but not limited to, cereal, fruit and candy flavors. These instructions shall be in
4 writing and made available to CEH upon reasonable request.

5 **3.2.1.3.** Settling Defendant shall not use advertisements that target
6 minors. Specifically, Settling Defendant will not use models or images of people that appear to
7 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended
8 and designed to appeal to people under the legal smoking age in advertisements or promotional
9 materials that appear in California, including on the Internet. Additionally, Settling Defendant
10 will not: (a) advertise in any media that has more than 25 percent under 18 readership; (b) utilize
11 any form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using
12 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are
13 designated as prohibiting patrons under the age of 18.

14 **3.2.2. Prohibition on Health and Safety Claims.** If Settling Defendant opts to
15 participate in Section 3.2, Settling Defendant shall not sell any Covered Products that make health
16 and or safety claims unless such claims have been reviewed and approved by the Federal Food
17 and Drug Administration. Examples of prohibited claims include the following:

18 **3.2.2.1.** Settling Defendant shall not sell Covered Products that are
19 advertised as smoking-cessation devices. This prohibition includes any claims or testimonials
20 about quitting smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

21 **3.2.2.2.** Settling Defendant shall not sell Covered Products that
22 make any claim that the Covered Products do not contain carcinogens or are better or safer than
23 tobacco.

24 **3.2.2.3.** Settling Defendant shall not sell Covered Products that
25 make any claim that the Covered Products produce no second hand smoke.
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1 **4. PAYMENTS**

2 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$40,000, which shall
3 be paid and allocated as set forth in this Section and in more detail on Exhibit A:

4 **4.1.1.** \$2,050 total as a civil penalty pursuant to California Health & Safety Code
5 § 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
6 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
7 Environmental Health Hazard Assessment). This total shall be paid in two (2) separate checks on
8 the dates set forth in Exhibit A and shall be made payable to the Center for Environmental Health.

9 **4.1.2.** \$3,075 total as a payment in lieu of civil penalty pursuant to California
10 Health & Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b).
11 CEH will use such funds to continue its work educating and protecting people from exposures to
12 toxic chemicals. CEH may also use a portion of such funds to monitor compliance with this
13 Consent Judgment and to purchase and test Settling Defendant's Products to confirm compliance.
14 In addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
15 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
16 educate and protect the public from exposures to toxic chemicals. The method of selection of
17 such groups can be found at the CEH website at www.ceh.org/justicefund. This total shall be
18 paid in two (2) separate checks on the dates set forth in Exhibit A and shall be made payable to
19 the Center for Environmental Health.

20 **4.1.3.** \$34,875 total as a reimbursement of a portion of CEH's reasonable
21 attorneys' fees and costs. This amount shall be divided into two amounts: (1) \$30,875 to the
22 Lexington Law Group; and (2) \$4,000 to the Center for Environmental Health. These amounts
23 shall be paid in one (1) check made payable to the Center for Environmental Health and three (3)
24 separate checks made payable to the Lexington Law Group on the dates set forth in Exhibit A.

25 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be delivered on or
26 before the dates set forth in Exhibit A. All checks shall be delivered to Mark Todzo at Lexington
27 Law Group at the address set forth in Section 8.1.2.

1 **4.1.5.** In the event that Settling Defendant elects to not certify its compliance with
2 one or more of the optional provisions in Section 3.2 in accordance with that Section, on or before
3 March 1, 2017, Defendant must make an additional payment for each provision not certified, as
4 follows: (i) \$7,500 if Settling Defendant elects to not participate in Section 3.2.1; and (ii) \$7,500
5 if Settling Defendant elects to not participate in Section 3.2.2. Each of these payments shall be
6 paid in two (2) separate checks, each payable to the Center for Environmental Health, to be
7 allocated as set forth on Exhibit A and as follows:

8 **4.1.5.1.** Forty percent (40%) of the total payment specified in Section
9 4.1.5 shall constitute a penalty pursuant to California Health & Safety Code § 25249.7(b), such
10 money to be apportioned by CEH in accordance with California Health & Safety Code §
11 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
12 Hazard Assessment).

13 **4.1.5.2.** Sixty percent (60%) of the total payment specified in Section
14 4.1.5 shall constitute a payment in lieu of civil penalty pursuant to California Health & Safety
15 Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use such
16 funds to continue its work educating and protecting people from exposures to toxic chemicals.
17 CEH may also use a portion of such funds to monitor compliance with this Consent Judgment and
18 to purchase and test Settling Defendant's Products to confirm compliance. In addition, as part of
19 its Community Environmental Action and Justice Fund, CEH will use four percent (4%) of such
20 funds to award grants to grassroots environmental justice groups working to educate and protect
21 the public from exposures to toxic chemicals. The method of selection of such groups can be
22 found at the CEH website at www.ceh.org/justicefund.

23 **5. ENFORCEMENT OF CONSENT JUDGMENT**

24 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
25 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
26 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
27 shall provide Settling Defendant with a Notice of Violation and a copy of any test results which

1 purportedly support CEH's Notice of Violation. The Parties shall then meet and confer regarding
2 the basis for CEH's anticipated motion or application in an attempt to resolve it informally,
3 including providing Settling Defendant a reasonable opportunity of at least thirty (30) days to
4 cure any alleged violation. Should such attempts at informal resolution fail, CEH may file its
5 enforcement motion or application. The prevailing party on any motion to enforce this Consent
6 Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result of such
7 motion or application. This Consent Judgment may only be enforced by the Parties.

8 **6. MODIFICATION OF CONSENT JUDGMENT**

9 6.1. This Consent Judgment may only be modified by written agreement of CEH and
10 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

11 **7. CLAIMS COVERED AND RELEASE**

12 7.1. This Consent Judgment is a full, final, and binding resolution between CEH acting
13 in the public interest and Settling Defendant, and Settling Defendant's parents, officers, directors,
14 shareholders, divisions, subdivisions, subsidiaries, and their respective successors and assigns
15 ("Defendant Releasees"), of all claims alleged in the Complaint in this Action arising from any
16 violation of Proposition 65 that have been or could have been asserted in the public interest
17 against Settling Defendant and Defendant Releasees, regarding the failure to warn about exposure
18 to nicotine in the Covered Products distributed or sold by Settling Defendant prior to the Effective
19 Date.

20 7.2. CEH, for itself, releases, waives, and forever discharges any and all claims alleged
21 in the Complaint against Settling Defendant and Defendant Releasees arising from any violation
22 of Proposition 65 that have been or could have been asserted regarding the failure to warn about
23 exposure to nicotine in connection with Covered Products distributed or sold by Settling
24 Defendant prior to the Effective Date.

25 7.3. Compliance with the terms of this Consent Judgment by Settling Defendant and
26 the Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant
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1 and Defendant Releasees with respect to any alleged failure to warn about nicotine in Covered
2 Products distributed or sold by Settling Defendant after the Effective Date.

3 **8. PROVISION OF NOTICE**

4 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
5 notice shall be sent by first class and electronic mail as follows:

6 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
7 receive notices pursuant to this Consent Judgment shall be:

8 Elizabeth V. McNulty
9 Archer Norris
10 4695 MacArthur Court, Suite 350
11 Newport Beach, CA 92660
emcnulty@archernorris.com

12 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
13 this Consent Judgment shall be:

14 Mark Todzo
15 Lexington Law Group
16 503 Divisadero Street
San Francisco, CA 94117
mtodzo@lexlawgroup.com

17 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
18 sending the other Parties notice by first class and electronic mail.

19 **9. COURT APPROVAL**

20 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
21 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
22 Settling Defendant shall support approval of such Motion.

23 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
24 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
25 purpose.

1 **10. GOVERNING LAW AND CONSTRUCTION**

2 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
3 and enforced in accordance with the laws of the State of California.

4 **11. ENTIRE AGREEMENT**

5 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
6 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
7 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
8 merged herein and therein.

9 **11.2.** There are no warranties, representations, or other agreements between CEH and
10 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
11 express or implied, other than those specifically referred to in this Consent Judgment have been
12 made by any Party hereto.

13 **11.3.** No other agreements not specifically contained or referenced herein, oral or
14 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
15 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
16 any of the Parties hereto only to the extent that they are expressly incorporated herein.

17 **11.4.** No supplementation, modification, waiver, or termination of this Consent
18 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

19 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
20 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
21 such waiver constitute a continuing waiver.

22 **12. RETENTION OF JURISDICTION**

23 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

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1 **13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

2 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
3 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
4 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

5 **14. NO EFFECT ON OTHER SETTLEMENTS**

6 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
7 against another entity on terms that are different from those contained in this Consent Judgment.

8 **15. EXECUTION IN COUNTERPARTS**

9 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
10 means of facsimile, which taken together shall be deemed to constitute one document.

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12 **IT IS SO STIPULATED:**

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14 **CENTER FOR ENVIRONMENTAL HEALTH**

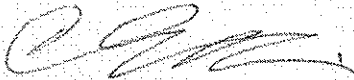
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20 Associate Director

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VAPE REVOLUTION LLC



Signature

CHARN PREM^YODAIN

Printed Name

12/18/15

Title

IT IS SO ORDERED:

Dated: APR 26 2016, ~~2015~~

GEORGE C. HERNANDEZ, JR.
Judge of the Superior Court

EXHIBIT A
Settlement Payments and Allocations

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Total Settlement Payment: \$55,000

Payment 1: Total \$13,500 - Due March 1, 2016

Payment 1 Allocations:

Civil Penalty:	\$2,050
Payment in Lieu of Civil Penalty:	\$3,075
Attorneys' Fees and Costs to CEH:	\$4,000
Attorneys' Fees and Costs to LLG:	\$4,375

Payment 2: Total \$13,500 - Due September 1, 2016

Payment 2 Allocations:

Attorneys' Fees and Costs to LLG:	\$13,500
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Payment 3: Total \$28,000 (or between \$13,000 to \$20,500 if additional payments are waived pursuant to Section 4.1.5) - Due March 1, 2017

Payment 3 Allocations:

Attorneys' Fees and Costs to LLG:	\$13,000
<i>Waivable</i> Civil Penalty:	\$6,000 total or, \$3,000 if election is made under either 3.2.1 or 3.2.2 but not the other
<i>Waivable</i> Payment in Lieu of Civil Penalty:	\$9,000 total or, \$4,500 if election is made under either 3.2.1 or 3.2.2 but not the other