

1 LEXINGTON LAW GROUP
2 Mark N. Todzo, State Bar No. 168389
3 Abigail Blodgett, State Bar No. 278813
4 503 Divisadero Street
5 San Francisco, CA 94117
6 Telephone: (415) 913-7800
7 Facsimile: (415) 759-4112
8 mtodzo@lexlawgroup.com
9 ablodgett@lexlawgroup.com

6 Attorneys for Plaintiff
7 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

DEC - 1 2015

CLERK OF THE SUPERIOR COURT
By YOLANDA ESTRADA 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-15775917

~~PROPOSED~~ CONSENT
JUDGMENT AS TO KRETEK
INTERNATIONAL, INC.

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 Defendant Kretek International, Inc. (“Kretek”) 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-15775917 (the “Action”). CEH and Settling Defendant are referred
26 to collectively as the “Parties.”
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1 **1.2.** On March 18, 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 Kretek, the California Attorney
4 General, the District Attorneys of every County in the State of California, and the City Attorneys
5 for every City in State of California with a population greater than 750,000. The Notice alleges
6 violations of Proposition 65 with respect to the presence of nicotine in electronic cigarette devices
7 designed for use with nicotine and non-nicotine containing liquid manufactured, distributed,
8 and/or sold by Settling Defendant.

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

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 Kretek's Voodoo Electronic Vaporizer devices which
5 do not contain nicotine but may be used with nicotine-containing liquid and with Stock Keeping
6 Unit ("SKU") numbers 702124, 702125, 702126, 702184, 702185, 702186, 702190, 702352,
7 702353, 702357, 702358, 702359, 702371 and 702372 that are sold into California.

8 **2.2.** "Effective Date" means the date on which the Court enters this Consent Judgment.

9 **2.3.** "Manufacture Date" means the date the Covered Product was manufactured and
10 as may be indicated on a tag attached to the Covered Product.

11 **3. INJUNCTIVE RELIEF**

12 **3.1. Clear and Reasonable Warnings for Covered Products.** As of the Effective
13 Date, no Covered Product may be manufactured for sale, distributed or sold in California unless
14 such Covered Product has a clear and reasonable warning on the outer packaging of the product.

15 For the Covered Products, the warning shall state the following:

16 **WARNING:** Use of this product with nicotine-containing liquid will
17 expose you to nicotine, a chemical known to the State of California to
18 cause birth defects or other reproductive harm; or

19 **WARNING: USING THIS DEVICE CAN EXPOSE THE USER TO**
20 **CHEMICALS KNOWN TO THE STATE OF CALIFORNIA TO CAUSE**
21 **CANCER OR BIRTH DEFECTS OR OTHER REPRODUCTIVE HARM.**

22 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
23 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be
24 prominently displayed on the outer packaging of the Covered Product with such conspicuousness,
25 as compared with other words, statements, or designs as to render it likely to be read and
26 understood by an ordinary individual prior to sale. To the extent that other warning statements
27 are included on the outer packaging of a Covered Product, the warning required herein shall be

1 separated from the other warnings by a line that is at least the same height as a line of text on the
2 label. Kretek does not presently sell the Covered Products directly to consumers. However, in
3 the event Kretek does sell the Covered Product directly to consumers in California in the future,
4 Kretek will – for internet, catalog, or any other sale where the consumer is not physically present
5 and cannot see a warning displayed on the Covered Product prior to purchase or payment – the
6 warning statement shall be displayed in such a manner that it is likely to be read and understood
7 as being applicable to the Covered Product being purchased prior to the authorization of or actual
8 payment. Placing a warning statement at the bottom of an internet webpage that offers multiple
9 products for sale does not alone satisfy the requirements of this Section.

10 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** In an
11 effort to ensure that consumers receive clear and reasonable warnings in compliance with
12 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
13 within thirty (30) days following the Effective Date, Kretek shall send a a certified letter to each
14 of its California retailers or distributors to whom Kretek reasonably believes sold Covered
15 Products on or after January 1, 2014. The letter will inform the retailer or distributor that that
16 Kretek has placed the aforementioned warning on the Covered Products. It will notify the
17 retailers and distributors that if they have Covered Products in their warehouse that does not
18 contain the warning, they are to inform Kretek and Kretek will supply them with warning
19 materials and explain to them where to place the warning. Such letter shall include a reasonably
20 sufficient number of stickers in order to permit the retailer or distributor to affix the warning on
21 each Covered Product such customer has purchased from Settling Defendant. The warning
22 stickers shall contain the warning language set forth in Section 3.1 above. The warning materials
23 shall also include a letter of instruction for the placement of the stickers.

24 **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
25 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in
26 Section 4.1.5 below, Settling Defendant shall undertake the additional actions below. If Settling
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1 Defendant opts to be bound by this Section, Settling Defendant must provide CEH with a written
2 election.

3 **3.2.1. Prohibition on Sales and Advertising to Minors.** Kretek does not sell
4 the Covered Product directly to consumers. Instead, Kretek sells to brokers, licensed retailers and
5 other establishment who can legally sell the Covered Products. Accordingly, Kretek shall not sell
6 to any broker, licensed retailer and/or other establishment (“Customer”) unless Kretek is
7 reasonably assured that such Customer has not sold and will not sell the Covered Products to
8 persons younger than eighteen (18) years of age. Kretek shall take additional reasonable steps to
9 prevent the sale of Covered Products to minors, including, but not limited to the following
10 measures:

11 **3.2.1.1.** In the event Kretek sells the Covered Product direct to
12 consumer, Kretek will implement one or more systems for checking the age of persons who
13 purchase Covered Products on the Internet or in person. The system shall include age verification
14 by requiring and checking an official government identification card or verifying through a
15 reputable credit agency the age of anyone who purchases Covered Products on the Internet or
16 some other reasonable means to verify that the purchaser of the Covered Product is over eighteen,
17 or will check the identification of anyone under twenty-six (26) years old who purchases in
18 person.

19 **3.2.1.2.** Settling Defendant shall not intentionally and knowingly
20 use advertisements that target minors when advertising the Covered Products. Specifically,
21 Settling Defendant will not use models or images, cartoons, art, fashion, or music that is intended
22 and designed to appeal to people under the legal smoking age in advertisements or promotional
23 materials that appear in California, including on the Internet, when advertising the Covered
24 Products. Additionally, Kretek will not: (a) advertise the Covered Products in any media that has
25 more than 25% under 18 readership; (b) advertise the Covered Products in any form of outdoor
26 advertising (*i.e.*, billboard) within 1,000 feet of any school or playground in connection with the
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1 Covered Products and (c) sponsor any athletic, musical or other cultural events for the covered
2 products unless such events are designated as prohibiting patrons under the age of eighteen (18).

3 **3.2.2. Prohibition on Health and Safety Claims.** A Settling Defendant opting
4 to participate in Section 3.2 shall not make health and or safety claims for the Covered Products
5 unless such claims have been reviewed and approved by the Federal Food and Drug
6 Administration. Examples of prohibited claims include the following:

7 **3.2.2.1.** Settling Defendant shall not advertise Covered Products as
8 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
9 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

10 **3.2.2.2.** Settling Defendant shall not make any claim that the
11 Covered Products do not expose users to carcinogens or are better or safer than tobacco.

12 **3.2.2.3.** Settling Defendant shall not make any claim that the
13 Covered Products produce no second hand smoke.

14 **4. PAYMENTS**

15 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$30,000, which shall
16 be allocated as follows:

17 **4.1.1.** \$1,700 as a civil penalty pursuant to California Health & Safety Code §
18 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
19 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
20 Environmental Health Hazard Assessment).

21 **4.1.2.** \$2,550 as a payment in lieu of civil penalty pursuant to California Health &
22 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
23 such funds to continue its work educating and protecting people from exposures to toxic
24 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
25 Judgment and to purchase and test Settling Defendant's Products to confirm compliance. In
26 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
27 percent (4%) of such funds to award grants to grassroots environmental justice groups working to

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1 educate and protect the public from exposures to toxic chemicals. The method of selection of
2 such groups can be found at the CEH website at www.keh.org/justicefund.

3 **4.1.3.** \$25,750 as a reimbursement of a portion of CEH's reasonable attorneys'
4 fees and costs.

5 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in three
6 (3) separate checks, all to be delivered within ten (10) days following the Effective Date. The
7 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
8 for Environmental Health. The payment required pursuant to Section 4.1.3 shall be made payable
9 to Lexington Law Group. All checks shall be delivered to Mark Todzo at Lexington Law Group
10 at the address set forth in Section 8.1.2.

11 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
12 Section 3.2 in accordance with that Section, within ninety (90) days following the Effective Date,
13 Settling Defendant must make an additional payment of \$10,000, which shall be paid in two
14 separate checks, each payable to the Center for Environmental Health, to be allocated as follows:

15 **4.1.5.1.** \$4,000 shall constitute a penalty pursuant to California Health
16 & Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with
17 California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California's
18 Office of Environmental Health Hazard Assessment).

19 **4.1.5.2.** \$6,000 shall constitute a payment in lieu of civil penalty
20 pursuant to California Health & Safety Code § 25249.7(b) and California Code of Regulations,
21 Title 11, § 3203(b). CEH will use such funds to continue its work educating and protecting
22 people from exposures to toxic chemicals. CEH may also use a portion of such funds to monitor
23 compliance with this Consent Judgment and to purchase and test Settling Defendant's Products to
24 confirm compliance. In addition, as part of its Community Environmental Action and Justice
25 Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental
26 justice groups working to educate and protect the public from exposures to toxic chemicals. The
27 method of selection of such groups can be found at the CEH website at www.keh.org/justicefund.

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1 **5. ENFORCEMENT OF CONSENT JUDGMENT**

2 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
3 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
4 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
5 shall provide Settling Defendant with a Notice of Violation and a copy of any test results which
6 purportedly support CEH's Notice of Violation. The Parties shall then meet and confer regarding
7 the basis for CEH's anticipated motion or application in an attempt to resolve it informally,
8 including providing Settling Defendant a reasonable opportunity of at least thirty (30) days to
9 cure any alleged violation. Should such attempts at informal resolution fail, CEH may file its
10 enforcement motion or application. The prevailing party on any motion to enforce this Consent
11 Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result of such
12 motion or application. This Consent Judgment may only be enforced by the Parties.

13 **6. MODIFICATION OF CONSENT JUDGMENT**

14 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
15 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

16 **7. CLAIMS COVERED AND RELEASE**

17 **7.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting
18 in the public interest and Settling Defendant and Settling Defendant's parents, officers, directors,
19 shareholders, divisions, subdivisions, subsidiaries, and their respective successors and assigns
20 ("Defendant Releasees") and all entities to whom they distribute or sell or have distributed or sold
21 Covered Products including, but not limited to, distributors, wholesalers, customers, retailers,
22 franchisees, cooperative members, and licensees ("Downstream Defendant Releasees"), of all
23 claims alleged in the Complaint in this Action arising from any violation of Proposition 65 that
24 have been or could have been asserted in the public interest against Settling Defendant and
25 Downstream Defendant Releasees, regarding the failure to warn about exposure to nicotine in the
26 Covered Products manufactured, distributed, or sold by Settling Defendant prior to the Effective
27 Date.

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1 7.2. CEH, for itself, releases, waives, and forever discharges any and all claims alleged
2 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from
3 any violation of Proposition 65 that have been or could have been asserted regarding the failure to
4 warn about exposure to nicotine in connection with Covered Products manufactured, distributed,
5 or sold by Settling Defendant prior to the Effective Date.

6 7.3. Compliance with the terms of this Consent Judgment by Settling Defendant and
7 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
8 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn
9 about nicotine in Covered Products manufactured, distributed, or sold by Settling Defendant after
10 the Effective Date.

11 **8. PROVISION OF NOTICE**

12 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the
13 notice shall be sent by first class and electronic mail as follows:

14 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
15 receive notices pursuant to this Consent Judgment shall be:

16 Noah Steinsapir
17 Kretek International, Inc.
18 5449 Endeavour Court
19 Moorpark, CA 93021
 noahsteinsapir@kretek.com

20 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
21 this Consent Judgment shall be:

22 Mark Todzo
23 Lexington Law Group
24 503 Divisadero Street
25 San Francisco, CA 94117
 mtodzo@lexlawgroup.com

26 8.2. Any Party may modify the person and address to whom the notice is to be sent by
27 sending the other Parties notice by first class and electronic mail.

1 **9. COURT APPROVAL**

2 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
3 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
4 Settling Defendant shall support approval of such Motion.

5 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
6 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
7 purpose.

8 **10. GOVERNING LAW AND CONSTRUCTION**

9 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
10 and enforced in accordance with the laws of the State of California.

11 **11. ENTIRE AGREEMENT**

12 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
13 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
14 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
15 merged herein and therein.

16 **11.2.** There are no warranties, representations, or other agreements between CEH and
17 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
18 express or implied, other than those specifically referred to in this Consent Judgment have been
19 made by any Party hereto.

20 **11.3.** No other agreements not specifically contained or referenced herein, oral or
21 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
22 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
23 any of the Parties hereto only to the extent that they are expressly incorporated herein.

24 **11.4.** No supplementation, modification, waiver, or termination of this Consent
25 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

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1 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
2 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
3 such waiver constitute a continuing waiver.

4 **12. RETENTION OF JURISDICTION**

5 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
6 Consent Judgment.

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

8 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
9 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
10 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

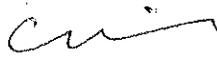
12 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
13 against another entity on terms that are different from those contained in this Consent Judgment.

14 **15. EXECUTION IN COUNTERPARTS**

15 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
16 means of facsimile, which taken together shall be deemed to constitute one document.

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18 **IT IS SO STIPULATED:**

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20 **CENTER FOR ENVIRONMENTAL HEALTH**

21
22 

23 _____
24 Charlie Pizarro
25 Associate Director

1 **KRETEK INTERNATIONAL, INC.**

2 
3 Signature

4 Nath Steinhilber
5 Printed Name

6 General Counsel
7 Title

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11 **IT IS SO ORDERED:**

12 Dated: DEC - 1 2015, 2015

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