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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,) Case No. 15-774917
13)
14 Plaintiff,) ~~PROPOSED~~ CONSENT
15 v.) JUDGMENT AS TO MISTER-E-
16 VAPE REVOLUTION LLC, et al.,) LIQUID LLC
17 Defendants.)
18)

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 Mister-E-Liquid 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.”

1 of the Parties may have in this or any other pending or future legal proceedings. This Consent
2 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for
3 purposes of settling, compromising, and resolving issues disputed in this Action.

4 **2. DEFINITIONS**

5 **2.1.** “Covered Products” means “Covered Liquid Products” and “Covered Device
6 Products.”

7 **2.2.** “Covered Liquid Products” means nicotine-containing liquid for use with
8 electronic cigarette devices manufactured, distributed, and/or sold by Settling Defendant in
9 California.

10 **2.3.** “Covered Device Products” means electronic cigarette devices, which may also be
11 known as tanks and vape pens, which contain nicotine or are designed and intended for use with
12 nicotine-containing liquid, manufactured, distributed, and/or sold by Settling Defendant in
13 California. Excluded from Covered Device Products are replacement parts for electronic
14 cigarette devices, including replacement tanks that are sold without delivery devices.

15 **2.4.** “Effective Date” means the date on which Settling Defendant is served with notice
16 that the Court has entered this Consent Judgment.

17 **3. INJUNCTIVE RELIEF**

18 **3.1. Clear and Reasonable Warnings for Covered Liquid Products.** As of the
19 Effective Date, no Covered Liquid Product may be manufactured for sale, distributed or sold in
20 California unless such Covered Liquid Product has a clear and reasonable warning on the outer
21 label of the product. The warning shall state either of the following:

22 **WARNING:** This product contains nicotine, a [chemical or substance]
23 known to the State of California to cause birth defects or other reproductive
24 harm; *or*

25 **WARNING:** Using this liquid will expose the user to chemicals, including
26 nicotine, known to the State of California to cause birth defects or other
27 reproductive harm and chemicals known to cause cancer.

1 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
2 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be
3 prominently displayed on the Covered Liquid Product with such conspicuousness, as compared
4 with other words, statements, or designs as to render it likely to be read and understood by an
5 ordinary individual prior to sale. To the extent that other warning statements are included on the
6 outer label of a Covered Liquid Product, the warning required herein shall be separated from the
7 other warnings by a line that is at least the same height as a line of text on the label. For internet,
8 catalog, or any other sale where the consumer is not physically present and cannot see a warning
9 displayed on the Covered Liquid Product prior to purchase or payment, the warning statement
10 shall be displayed in such a manner that it is likely to be read and understood as being applicable
11 to the Covered Liquid Product being purchased prior to the authorization of or actual payment.
12 Placement of the warning statement at the bottom of an internet webpage that offers multiple
13 products for sale does not satisfy the requirements of this Section.

14 **3.1.1. Warnings for Covered Liquid Products in the Stream of Commerce.**

15 In an effort to ensure that consumers receive clear and reasonable warnings in compliance with
16 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
17 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
18 materials by certified mail to each of its California retailers or distributors that Settling Defendant
19 reasonably believes are selling or offering Covered Products for sale without a clear and
20 reasonable warning as of the Effective Date. Such warning materials shall include a reasonably
21 sufficient number of stickers in order to permit the retailer or distributor to affix the warning on
22 each Covered Liquid Product such customer has purchased from Settling Defendant. The
23 warning materials shall contain the warning language set forth in Section 3.1 above. The warning
24 materials shall also include a letter of instruction for the placement of the materials, and a notice
25 and acknowledgment postcard.

26 **3.2. Clear and Reasonable Warnings for Covered Device Products.** As of the
27 Effective Date, no Covered Device Product may be manufactured for sale, distributed or sold in

1 California unless such Covered Device Product has a clear and reasonable warning on the outer
2 packaging of the product. For Covered Device Products that contain nicotine, the warning shall
3 state either of the following:

4 **WARNING:** Use of this product will expose you to nicotine, a [chemical
5 or substance] known to the State of California to cause birth defects or
6 other reproductive harm; *or*

7 **WARNING:** Using this device will expose the user to chemicals,
8 including nicotine, known to the State of California to birth defects or other
9 reproductive harm and chemicals known to cause cancer.

10 For Covered Device Products that do not contain nicotine, but are designed for use with nicotine-
11 containing products, the warning shall state either of the following:

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

15 **WARNING:** Use of this product with nicotine-containing liquid will
16 expose you to chemicals, including nicotine, known to the State of
17 California to cause birth defects or other reproductive harm and chemicals
18 known to cause cancer.

19 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
20 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be
21 prominently displayed on the outer packaging of the Covered Device Product with such
22 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
23 read and understood by an ordinary individual prior to sale. To the extent that other warning
24 statements are included on the outer packaging of a Covered Device Product, the warning
25 required herein shall be separated from the other warnings by a line that is at least the same height
26 as a line of text on the label. For internet, catalog, or any other sale where the consumer is not
27 physically present and cannot see a warning displayed on the Covered Device Product prior to

1 purchase or payment, the warning statement shall be displayed in such a manner that it is likely to
2 be read and understood as being applicable to the Covered Liquid Product being purchased prior
3 to the authorization of or actual payment. Placement of the warning statement at the bottom of an
4 internet webpage that offers multiple products for sale does not satisfy the requirements of this
5 Section.

6 **3.2.1. Warnings for Covered Products in the Stream of Commerce.** In an
7 effort to ensure that consumers receive clear and reasonable warnings in compliance with
8 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.2,
9 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
10 materials by certified mail to each of its California retailers or distributors that Settling Defendant
11 reasonably believes are selling or offering Covered Products for sale without a clear and
12 reasonable warning as of to the Effective Date. Such warning materials shall include a
13 reasonably sufficient number of stickers in order to permit the retailer or distributor to affix the
14 warning on each Covered Product such customer has purchased from Settling Defendant. The
15 warning materials shall contain the warning language set forth in Section 3.2 above. The warning
16 materials shall also include a letter of instruction for the placement of the materials, and a notice
17 and acknowledgment postcard.

18 **3.3. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
19 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in
20 Section 4.1.5 below, Settling Defendant shall undertake one or more of the additional actions
21 below. A Settling Defendant opting to be bound by this Section must provide CEH with a written
22 election stating which optional provision(s) it is agreeing to implement.

23 **3.3.1. Product Safety Requirements.** A Settling Defendant opting to participate
24 in Section 3.3.1 shall make the following changes to the Covered Products to increase the safety
25 of such products:
26
27

1 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are
2 designated as prohibiting patrons under the age of 18.

3 **3.3.3. Prohibition on Health and Safety Claims.** A Settling Defendant opting
4 to participate in Section 3.3.3 shall not make health and or safety claims unless such claims have
5 been reviewed and approved by the Federal Food and Drug Administration. Examples of
6 prohibited claims include the following:

7 **3.3.3.1.** 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 **3.3.3.2.** Settling Defendant shall not make any claim that the
11 Covered Products do not contain carcinogens or are better or safer than tobacco.

12 **3.3.3.3.** Settling Defendant shall not make any claim that the
13 Covered Products produce no second hand smoke.

14 **3.3.4. Prohibition on High Nicotine Levels.** A Settling Defendant opting to
15 participate in Section 3.3.4 shall not manufacture for sale, distribute or sell in California after the
16 Effective Date Covered Liquid Products that contain more than 24 mg per ml of nicotine.

17 **4. PAYMENTS**

18 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$51,000, which shall
19 be allocated as follows:

20 **4.1.1.** \$1,460 as a civil penalty pursuant to California Health & Safety Code §
21 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
22 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
23 Environmental Health Hazard Assessment).

24 **4.1.2.** \$2,190 as a payment in lieu of civil penalty pursuant to California Health &
25 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
26 such funds to continue its work educating and protecting people from exposures to toxic
27 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent

1 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
2 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
3 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
4 educate and protect the public from exposures to toxic chemicals. The method of selection of
5 such groups can be found at the CEH website at www.ceh.org/justicefund.

6 **4.1.3.** \$47,350 as a reimbursement of a portion of CEH's reasonable attorneys'
7 fees and costs. This amount shall be divided into two checks: (1) a check for \$42,250 shall be
8 made payable to the Lexington Law Group; and (2) a check for \$5,100 shall be made payable to
9 the Center for Environmental Health.

10 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
11 separate checks, all to be delivered within ten (10) days following the Effective Date. The
12 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
13 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group
14 at the address set forth in Section 8.1.2.

15 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
16 one or more of the optional provisions in Section 3.3 in accordance with that Section, within
17 ninety (90) days following the Effective Date, Settling Defendant must make an additional
18 payment for each provision not certified, as follows: (i) \$7,000 if Settling Defendant elects to not
19 participate in Section 3.3.1; (ii) \$7,000 if Settling Defendant elects to not participate in Section
20 3.3.2; (iii) \$7,000 if Settling Defendant elects to not participate in Section 3.3.3; and (iv) \$7,000 if
21 Settling Defendant elects to not participate in Section 3.3.4. Each of these payments shall be paid
22 in two (2) separate checks, each payable to the Center for Environmental Health, to be allocated
23 as follows:

24 **4.1.5.1.** Forty percent (40%) shall constitute a penalty pursuant to
25 California Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in
26 accordance with California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State
27 of California's Office of Environmental Health Hazard Assessment).

1 **4.1.5.2.** Sixty percent (60%) percent shall constitute a payment in lieu of
2 civil penalty pursuant to California Health & Safety Code § 25249.7(b) and California Code of
3 Regulations, Title 11, § 3203(b). CEH will use such funds to continue its work educating and
4 protecting people from exposures to toxic chemicals. CEH may also use a portion of such funds
5 to monitor compliance with this Consent Judgment and to purchase and test Settling Defendant's
6 products to confirm compliance. In addition, as part of its Community Environmental Action and
7 Justice Fund, CEH will use four percent (4%) of such funds to award grants to grassroots
8 environmental justice groups working to educate and protect the public from exposures to toxic
9 chemicals. The method of selection of such groups can be found at the CEH website at
10 www.ceh.org/justicefund.

11 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

23 **6. MODIFICATION OF CONSENT JUDGMENT**

24 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
25 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.
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Dan Lawitzke, CEO
Mister-E-Liquid LLC
632 Plymouth Ave NE
Grand Rapids, MI 49505
Dan@Mister-e-liquid.com

With a copy to:

Judith M. Praitis
Sidley Austin LLP
555 West 5th Street, Ste 4000
Los Angeles, CA 90013
jpraitis@sidley.com

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

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

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

9. COURT APPROVAL

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

9.2. If this Consent Judgment is not entered by the Court within 180 days of the date on which it is signed by all parties, it shall be of no force or effect and shall not be introduced into evidence or otherwise used in any proceeding for any purpose. However, the 180 day period may be extended by written agreement of the Parties without modification of this Consent Judgment.

10. GOVERNING LAW AND CONSTRUCTION

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

1 **11. ENTIRE AGREEMENT**

2 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
3 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
4 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
5 merged herein and therein.

6 **11.2.** There are no warranties, representations, or other agreements between CEH and
7 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
8 express or implied, other than those specifically referred to in this Consent Judgment have been
9 made by any Party hereto.

10 **11.3.** No other agreements not specifically contained or referenced herein, oral or
11 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
12 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
13 any of the Parties hereto only to the extent that they are expressly incorporated herein.

14 **11.4.** No supplementation, modification, waiver, or termination of this Consent
15 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

16 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
17 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
18 such waiver constitute a continuing waiver.

19 **12. RETENTION OF JURISDICTION**

20 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
21 Consent Judgment.

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

23 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
25 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.
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1 **14. NO EFFECT ON OTHER SETTLEMENTS**

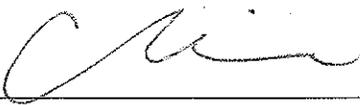
2 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
3 against another entity on terms that are different from those contained in this Consent Judgment.

4 **15. EXECUTION IN COUNTERPARTS**

5 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
6 means of facsimile, which taken together shall be deemed to constitute one document.

7
8 **IT IS SO STIPULATED:**

9 **CENTER FOR ENVIRONMENTAL HEALTH**

10
11 
12 _____
13 Charlie Pizarro
14 Associate Director

15 **MISTER-E-LIQUID LLC**

16
17 _____
18 Signature

19 _____
20 Printed Name

21
22 _____
23 Title

24 **IT IS SO ORDERED:**

25
26 Dated: _____, 2015
27 _____
28 Judge of the Superior Court

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

2 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
3 against another entity on terms that are different from those contained in this Consent Judgment.

4 **15. EXECUTION IN COUNTERPARTS**

5 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
6 means of facsimile, which taken together shall be deemed to constitute one document.

7
8 **IT IS SO STIPULATED:**

9 **CENTER FOR ENVIRONMENTAL HEALTH**

10
11
12 _____
13 Charlie Pizarro
14 Associate Director

15 **MISTER-E-LIQUID LLC**

16
17 
18 _____
19 Signature

20 Daniel T. Lawitzke
21 Printed Name

22 CEO
23 Title

24 **IT IS SO ORDERED:**

25
26 Dated: APR 26 2016 ~~2015~~

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