

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

10 Attorneys for Plaintiff
11 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

DEC - 1 2015

CLERK OF THE SUPERIOR COURT
By YOLANDA ESTRADA Deputy

12
13 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF ALAMEDA

15 CENTER FOR ENVIRONMENTAL HEALTH,)

16 Plaintiff,)

17 v.)

18 VAPE REVOLUTION LLC, et al.,)

19 Defendants.)

Case No. RG 15-774917

~~PROPOSED~~ CONSENT
JUDGMENT AS TO THE VAPOR
EMPORIUM, LLC

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 the Vapor Emporium, LLC (“Settling Defendant”)
23 to settle claims asserted by CEH against Settling Defendant as set forth in the operative
24 Complaint in the matter *Center for Environmental Health v. Vape Revolution LLC, et al.*,
25 Alameda County Superior Court Case No. RG 15-774917 (the “Action”). CEH and Settling
26 Defendant are referred to collectively as the “Parties.”
27

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 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 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
10 California or has done 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
7 Judgment.

8 **3. INJUNCTIVE RELIEF**

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

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

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

1 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** In an
2 effort to ensure that consumers receive clear and reasonable warnings in compliance with
3 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
4 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
5 materials by certified mail to each of its California retailers or distributors to whom Settling
6 Defendant reasonably believes sold Covered Products that contained nicotine on or after. Such
7 warning materials shall include a reasonably sufficient number of stickers in order to permit the
8 retailer or distributor to affix the warning on each Covered Product such customer has purchased
9 from Settling Defendant. The warning stickers shall contain the warning language set forth in
10 Section 3.1 above. The warning materials shall also include a letter of instruction for the
11 placement of the stickers, and a Notice and Acknowledgment postcard.

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

17 **3.2.1. Product Safety Requirements.** A Settling Defendant opting to participate
18 in Section 3.2 shall make the following change to the Covered Products to increase the safety of
19 such Products: Within ninety (90) days following the Effective Date, all Covered Products
20 manufactured for sale in California shall be manufactured with child proof caps.

21 **3.2.2. Prohibition on Sales to Minors.** A Settling Defendant opting to
22 participate in Section 3.2 shall not sell Covered Products to persons younger than eighteen (18)
23 years of age and shall take reasonable steps to prevent the sale of Covered Products to such
24 persons, including, but not limited to the following measure: implementing one or more systems
25 for checking the age of persons who purchase Covered Products on the Internet or in person. The
26 system shall include age verification by requiring and checking an official government
27 identification card or verifying through a reputable credit agency the age of anyone who

1 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who
2 purchases in person. The system shall be put into place within ninety (90) days of the Effective
3 Date.

4 **3.2.2.1. Prohibition on Selling Flavored Cartridges.** A Settling
5 Defendant opting to participate in Section 3.2 shall not sell flavored cartridges or any substance to
6 use with Covered Products or other e-cigarettes that are targeted to appeal to minors including,
7 but not limited to, cereal, fruit and candy flavors.

8 **3.2.2.2. Prohibition on Advertising to Minors.** A Settling
9 Defendant opting to participate in Section 3.2 shall not use advertisements that target minors.
10 Specifically, Settling Defendant will not use models or images of people that appear to be
11 younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended and
12 designed to appeal to people under the legal smoking age in advertisements or promotional
13 materials that appear in California, including on the Internet. Additionally, Settling Defendant
14 will not: (a) advertise in any media that has more than 25% under 18 readership; (b) utilize any
15 form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using
16 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are
17 designated as prohibiting patrons under the age of 18.

18 **3.2.3. Prohibition on Health and Safety Claims.** A Settling Defendant opting
19 to participate in Section 3.2 shall not make health and or safety claims unless such claims have
20 been reviewed and approved by the Federal Food and Drug Administration. Examples of
21 prohibited claims include the following:

22 **3.2.3.1.** Settling Defendant shall not advertise Covered Products as
23 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
24 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

25 **3.2.3.2.** Settling Defendant shall not make any claim that the
26 Covered Products do not contain carcinogens or are better or safer than tobacco.

1 **3.2.3.3.** Settling Defendant shall not make any claim that the
2 Covered Products produce no second hand smoke.

3 **4. PAYMENTS**

4 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$20,000, which shall
5 be allocated as follows:

6 **4.1.1.** \$1,025 as a civil penalty pursuant to California Health & Safety Code §
7 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
8 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
9 Environmental Health Hazard Assessment).

10 **4.1.2.** \$1,538 as a payment in lieu of civil penalty pursuant to California Health &
11 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
12 such funds to continue its work educating and protecting people from exposures to toxic
13 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
14 Judgment and to purchase and test Settling Defendant's Products to confirm compliance. In
15 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
16 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
17 educate and protect the public from exposures to toxic chemicals. The method of selection of
18 such groups can be found at the CEH website at www.ceh.org/justicefund.

19 **4.1.3.** \$17,437 total as a reimbursement of a portion of CEH's reasonable
20 attorneys' fees and costs. This amount shall be divided into two checks: (1) a check for \$15,437
21 shall be made payable to the Lexington Law Group; and (2) a check for \$2,000 shall be made
22 payable to the Center for Environmental Health.

23 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
24 separate checks, all to be delivered within ten (10) days following the Effective Date. The
25 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
26 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group
27 at the address set forth in Section 8.1.2.

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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, within
3 ninety (90) days following the Effective Date, Defendant must make an additional payment for
4 each provision not certified, as follows: (i) \$2,500 if Settling Defendant elects to not participate in
5 Section 3.2.1; (ii) \$2,500 if Settling Defendant elects to not participate in Section 3.2.2; and (iii)
6 \$2,500 if Settling Defendant elects to not participate in Section 3.2.3. Each of these payments
7 shall be paid in two separate checks, each payable to the Center for Environmental Health, to be
8 allocated as follows:

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

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

24 **5. ENFORCEMENT OF CONSENT JUDGMENT**

25 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
26 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
27 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH

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

9 **6. MODIFICATION OF CONSENT JUDGMENT**

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

12 **7. CLAIMS COVERED AND RELEASE**

13 7.1. This Consent Judgment is a full, final, and binding resolution between CEH acting
14 in the public interest and Settling Defendant and Settling Defendant's parents, officers, directors,
15 shareholders, divisions, subdivisions, subsidiaries, and their respective successors and assigns
16 ("Defendant Releasees") and all entities to whom they distribute or sell or have distributed or sold
17 Covered Products including, but not limited to, distributors, wholesalers, customers, retailers,
18 franchisees, cooperative members, and licensees ("Downstream Defendant Releasees"), of all
19 claims alleged in the Complaint in this Action arising from any violation of Proposition 65 that
20 have been or could have been asserted in the public interest against Settling Defendant and
21 Downstream Defendant Releasees, regarding the failure to warn about exposure to nicotine in the
22 Covered Products manufactured, distributed, or sold by Settling Defendant prior to the Effective
23 Date.

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

3 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and
4 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
5 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn
6 about nicotine in Covered Products manufactured, distributed, or sold by Settling Defendant after
7 the Effective Date.

8 **8. PROVISION OF NOTICE**

9 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
10 notice shall be sent by first class and electronic mail as follows:

11 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
12 receive notices pursuant to this Consent Judgment shall be:

13 William D. Whiteman
14 Law Offices of William D. Whiteman
15 300 Montgomery Street, Suite 500
16 San Francisco, CA 94104
 wwhiteman@wdwlawoffices.com

17 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
18 this Consent Judgment shall be:

19 Mark Todzo
20 Lexington Law Group
21 503 Divisadero Street
 San Francisco, CA 94117
 mtodzo@lexlawgroup.com

22 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
23 sending the other Parties notice by first class and electronic mail.

24 **9. COURT APPROVAL**

25 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
26 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
27 Settling Defendant shall support approval of such Motion.

1 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
2 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
3 purpose.

4 **10. GOVERNING LAW AND CONSTRUCTION**

5 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
6 and enforced in accordance with the laws of the State of California.

7 **11. ENTIRE AGREEMENT**

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

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

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

20 **11.4.** No supplementation, modification, waiver, or termination of this Consent
21 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

22 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
23 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
24 such waiver constitute a continuing waiver.

25 **12. RETENTION OF JURISDICTION**

26 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
27 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.

11

12 **IT IS SO STIPULATED:**

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14 **CENTER FOR ENVIRONMENTAL HEALTH**

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17 _____

18 Charlie Pizarro
19 Associate Director

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21 **THE VAPOR EMPORIUM, LLC**

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23 _____
24 Signature

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26 _____
27 Printed Name

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Title

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12 **IT IS SO STIPULATED:**

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14 **CENTER FOR ENVIRONMENTAL HEALTH**

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17 _____
18 Charlie Pizarro
19 Associate Director

20 **THE VAPOR EMPORIUM, LLC**

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22 _____
23 Signature

24 Deana Kirkpatrick
25 Printed Name

26 Owner
27 Title

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IT IS SO ORDERED:

DEC - 1 2015

Dated: GEORGE C. HERNANDEZ, JR., 2015

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