

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

6 Attorneys for Plaintiff
7 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

APR 26 2016

CLERK OF THE SUPERIOR COURT
By Christina Momon, Deputy

8
9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF ALAMEDA

11
12 CENTER FOR ENVIRONMENTAL HEALTH,)

Case No. RG 15-774917

13 Plaintiff,)

~~PROPOSED~~ CONSENT
JUDGMENT AS TO
JRCIGARS.COM, INC.

14 v.)

15 VAPE REVOLUTION LLC, et al.,)

16 Defendants.)
17)
18)

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 JRCigars.com, Inc. (“Settling Defendant”) to settle
23 claims asserted by CEH against Settling Defendant as set forth in the operative Complaint in the
24 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 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, for purposes of this Consent Judgment
9 only, admits that it employs ten (10) or more persons and that distributes and/or sells Covered
10 Products (as defined herein) in the State of 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, including

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1 specifically, any relating to personal jurisdiction or nexus. By execution of this Consent
2 Judgment, Settling Defendant does not admit and in fact denies, that it has contacts with the State
3 of California sufficient to establish personal jurisdiction or nexus. This Consent Judgment is the
4 product of negotiation and compromise and is accepted by the Parties solely for purposes of
5 settling, compromising, and resolving issues disputed in this Action.

6 **2. DEFINITIONS**

7 **2.1.** "Covered Products" means nicotine-containing liquid for use with electronic
8 cigarette devices manufactured, distributed, and/or sold by Settling Defendant in California.

9 **2.2.** "Effective Date" means the date on which the Court enters this Consent Judgment.

10 **3. INJUNCTIVE RELIEF**

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

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

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

1 the warning statement at the bottom of an internet webpage that offers multiple products for sale
2 does not satisfy the requirements of this Section.

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

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

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

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

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1 purchases in person. The system shall be put into place within ninety (90) days of the Effective
2 Date.

3 **3.2.1.2.** Settling Defendant shall not use advertisements that target
4 minors. Specifically, Settling Defendant will not use models or images of people that appear to
5 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended
6 and designed to appeal to people under the legal smoking age in advertisements or promotional
7 materials that appear in California, including on the Internet. Additionally, Settling Defendant
8 will not: (a) advertise in any media that has more than 25 percent under 18 readership; (b) utilize
9 any form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using
10 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are
11 designated as prohibiting patrons under the age of 18.

12 **3.2.2.** Settling Defendant shall instruct its suppliers and distributors that it will
13 not sell or accept flavored Covered Products that are targeted to appeal to minors including, but
14 not limited to, cereal and candy flavors. These instructions shall be in writing and made available
15 to CEH upon reasonable request.

16 **3.2.3. Prohibition on Health and Safety Claims.** If Settling Defendant opts to
17 participate in Section 3.2, Settling Defendant shall not sell any Covered Products that make health
18 and or safety claims unless such claims have been reviewed and approved by the Federal Food
19 and Drug Administration. Examples of prohibited claims include the following:

20 **3.2.3.1.** Settling Defendant shall not sell Covered Products that are
21 advertised as smoking-cessation devices. This prohibition includes any claims or testimonials
22 about quitting smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

23 **3.2.3.2.** Settling Defendant shall not sell Covered Products that
24 make any claim that the Covered Products do not contain carcinogens or are better or safer than
25 tobacco.

26 **3.2.3.3.** Settling Defendant shall not sell Covered Products that
27 make any claim that the Covered Products produce no second hand smoke.

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4. PAYMENTS

4.1. Settling Defendant shall initially pay to CEH the total sum of \$22,000, which shall be allocated as follows:

4.1.1. \$1,224 as a civil penalty pursuant to California Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental Health Hazard Assessment). This check shall be made payable to the Center for Environmental Health.

4.1.2. \$1,838 as a payment in lieu of civil penalty pursuant to California Health & Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use such funds to continue its work educating and protecting people from exposures to toxic chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent Judgment and to purchase and test Settling Defendant’s Products to confirm compliance. In addition, as part of its Community Environmental Action and Justice Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental justice groups working to educate and protect the public from exposures to toxic chemicals. The method of selection of such groups can be found at the CEH website at www.ceh.org/justicefund. This check shall be made payable to the Center for Environmental Health.

4.1.3. \$18,938 as a reimbursement of a portion of CEH’s reasonable attorneys’ fees and costs. This amount shall be divided into two checks: (1) a check for \$16,738 shall be made payable to the Lexington Law Group; and (2) a check for \$2,200 shall be made payable to the Center for Environmental Health.

4.1.4. The payments required under Sections 4.1.1-4.1.3 shall be made in four (4) separate checks, all to be delivered within ten (10) days following the Effective Date. All checks shall be delivered to Mark Todzo at Lexington 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, 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 not to 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%) of the total payment specified in Section
10 4.1.5 shall constitute a penalty pursuant to California Health & Safety Code § 25249.7(b), such
11 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%) of the total payment specified in Section
15 4.1.5 shall constitute a payment in lieu of civil penalty pursuant to California Health & Safety
16 Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use such
17 funds to continue its work educating and protecting people from exposures to toxic chemicals.
18 CEH may also use a portion of such funds to monitor compliance with this Consent Judgment and
19 to purchase and test Settling Defendant's Products to confirm compliance. In addition, as part of
20 its Community Environmental Action and Justice Fund, CEH will use four percent (4%) of such
21 funds to award grants to grassroots environmental justice groups working to educate and protect
22 the public from exposures to toxic chemicals. The method of selection of such groups can be
23 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

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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 a reasonable opportunity of at least thirty (30) days to
5 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"), of all claims alleged in the Complaint in this Action arising from any
17 violation of Proposition 65 that have been or could have been asserted in the public interest
18 against Settling Defendant and Defendant Releasees, regarding the failure to warn about exposure
19 to nicotine in the Covered Products distributed or sold by Settling Defendant prior to the Effective
20 Date.

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

26 7.3. Compliance with the terms of this Consent Judgment by Settling Defendant and
27 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 Jeffrey D. Polsky
9 Fox Rothschild LLP
10 345 California Street, Suite 2200
11 San Francisco, CA 94104-2734
12 jpolsky@foxrothschild.com

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

15 Mark Todzo
16 Lexington Law Group
17 503 Divisadero Street
18 San Francisco, CA 94117
19 mtodzo@lexlawgroup.com

20 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
21 sending the other Parties notice by first class and electronic mail.

22 **9. COURT APPROVAL**

23 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
24 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
25 Settling Defendant shall support approval of such Motion.

26 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
27 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
28 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.** Subject to and without waiver of the provisions of Paragraph 1.5, above, the
24 Parties agree that this Court shall retain jurisdiction of this matter to implement or modify the
25 Consent Judgment.

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13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

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

14. NO EFFECT ON OTHER SETTLEMENTS

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

15. EXECUTION IN COUNTERPARTS

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

IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

JRCIGARS.COM, INC.

Signature

Printed Name

Title

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

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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.

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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:**

13 **CENTER FOR ENVIRONMENTAL HEALTH**

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16 _____
17 Charlie Pizarro
18 Associate Director

19 **JRCIGARS.COM, INC.**

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21 _____
22 Signature

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24 MR R. NORRIS
25 Printed Name

26 CEO.
27 Title

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IT IS SO ORDERED:

Dated: APR 26 2016 ~~2015~~

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