

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

AUG 23 2016

CLERK OF THE SUPERIOR COURT
By Christina Mornon, Deputy

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA

12 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 15-794036
13)
14 Plaintiff,) [PROPOSED] CONSENT
15 v.) JUDGMENT AS TO VMR
16) PRODUCTS LLC
17 TOTALLY WICKED-E LIQUID (USA))
18 INCORPORATED, et al.,)
19 Defendants.)
20 _____)

21 1. INTRODUCTION

22 1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental
23 Health, a non-profit corporation (“CEH”), and VMR Products, LLC (“Settling Defendant”) to
24 settle claims asserted by CEH against Settling Defendant as set forth in the operative Complaint
25 in the matter *Center for Environmental Health v. Totally Wicked-E Liquid (USA) Incorporated, et*
26 *al.*, Alameda County Superior Court Case No. RG 15-794036 (the “Action”). CEH and Settling
27 Defendant are referred to collectively as the “Parties.”

1 **1.2.** On September 2, 2015, CEH served four 60-Day Notices of Violation (the
2 “Notices”) relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986,
3 California Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Settling Defendant, the
4 California Attorney General, the District Attorneys of every County in the State of California, and
5 the City Attorneys for every City in State of California with a population greater than 750,000.
6 The Notices allege violations of Proposition 65 with regard to exposures to formaldehyde and
7 acetaldehyde resulting from use of Settling Defendant’s e-cigarette devices and the e-liquids used
8 in such devices (the “Products”).

9 **1.3.** On November 19, 2015, CEH filed the Action naming Settling Defendant.

10 **1.4.** Settling Defendant is a corporation that employs ten (10) or more persons and that
11 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
12 California or has done so in the past.

13 **1.5.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
14 Court has jurisdiction over the allegations of violations contained in the Notices and Complaint
15 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)
16 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
17 Consent Judgment as a full and final resolution of all claims which were or could have been
18 raised in the Complaint based on the facts alleged in the Notices and Complaint with respect to
19 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

20 **1.6.** The Parties enter into this Consent Judgment as a full and final settlement of all
21 claims which were or could have been raised in the Complaint arising out of the facts or conduct
22 related to Settling Defendant alleged therein and in the Notices. By execution of this Consent
23 Judgment and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of
24 law, or violation of law, nor shall compliance with the Consent Judgment constitute or be
25 construed as an admission by the Parties of any fact, conclusion of law, or violation of law.
26 Settling Defendant denies the material, factual, and legal allegations in the Notices and Complaint
27 and expressly denies any wrongdoing whatsoever. Except as specifically provided herein,

1 nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument,
2 or defense any of the Parties may have in this or any other pending or future legal proceedings.
3 This Consent Judgment is the product of negotiation and compromise and is accepted by the
4 Parties solely for purposes of settling, compromising, and resolving issues disputed in this Action.

5 **2. DEFINITIONS**

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

8 **2.2.** “Covered Liquid Products” means liquids that are designed for use with electronic
9 cigarette devices, also known as tanks and vape pens that are manufactured, distributed, and/or
10 sold by Settling Defendant in California.

11 **2.3.** “Covered Device Products” means electronic cigarette devices, also known as
12 tanks and vape pens, which contain nicotine or are designed and intended for use with nicotine-
13 containing liquid that are manufactured, distributed, and/or sold by Settling Defendant in
14 California.

15 **2.4.** “Effective Date” means the date on which the Court enters this Consent Judgment,
16 or sixty (60) days from the execution of this Agreement, whichever is later.

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 packaging of the product. For Covered Liquid Products that contain nicotine the warning shall
22 state the following:

23 **WARNING:** Use of this product will expose you to nicotine, a chemical
24 known to the State of California to cause birth defects or other reproductive
25 harm and to formaldehyde and acetaldehyde, chemicals known to the State
26 of California to cause cancer.

1 For Covered Liquid Products that do not contain nicotine the warning shall state the
2 following:

3 **WARNING:** Use of this product will expose you to formaldehyde and
4 acetaldehyde, chemicals known to the State of California to cause cancer.

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

19 **3.1.1. Warnings for Covered Liquid Products in the Stream of Commerce.**

20 In an effort to ensure that consumers receive clear and reasonable warnings in compliance with
21 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
22 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
23 materials by certified mail to each of its California retailers or distributors to whom Settling
24 Defendant reasonably believes sold Covered Liquid Products prior to the Effective Date. Such
25 warning materials shall include a reasonably sufficient number of stickers in order to permit the
26 retailer or distributor to affix the warning on each Covered Liquid Product such customer has
27 purchased from Settling Defendant. The warning stickers shall contain the warning language set

28

1 forth in Section 3.1 above. The warning materials shall also include a letter of instruction for the
2 placement of the stickers, and a Notice and Acknowledgment postcard.

3 **3.2. Clear and Reasonable Warnings for Covered Device Products.** As of the
4 Effective Date, no Covered Device Product may be manufactured for sale, distributed or sold in
5 California unless such Covered Device Product has a clear and reasonable warning on the outer
6 packaging of the product. For Covered Device Products, the warning shall state the following:

7 **WARNING:** Use of this product with nicotine-containing liquid will
8 expose you to nicotine, a chemical known to the State of California to
9 cause birth defects or other reproductive harm and to formaldehyde and
10 acetaldehyde, which are chemicals known to cause cancer. Use of this
11 product with non-nicotine-containing liquid will expose you the chemicals
12 known to cause cancer.

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

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3.2.1. Warnings for Covered Device Products in the Stream of Commerce.

In an effort to ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.2, within thirty (30) days following the Effective Date, Settling Defendant shall provide warning materials by certified mail to each of its California retailers or distributors to whom Settling Defendant reasonably believes sold Covered Device Products prior to the Effective Date. Such warning materials shall include a reasonably sufficient number of stickers in order to permit the retailer or distributor to affix the warning on each Covered Device Product such customer has purchased from Settling Defendant. The warning stickers shall contain the warning language set forth in Section 3.2 above. The warning materials shall also include a letter of instruction for the placement of the stickers, and a Notice and Acknowledgment postcard.

3.3. Optional Additional Injunctive Provisions. In order for Settling Defendant to be

eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in Section 4.1.5 below, Settling Defendant shall undertake the additional actions below. If Settling Defendant opts to be bound by this Section, Settling Defendant must provide CEH with a written election stating which optional provision(s) it is agreeing to implement.

3.3.1. Product Safety Requirements. A Settling Defendant opting to participate in Section 3.3 shall make the following changes to the Covered Products to increase the safety of such products:

3.3.1.1. Within ninety (90) days following the Effective Date, all Covered Products manufactured for sale in California shall be manufactured such that use of the Covered Products will not produce detectable levels of formaldehyde and acetaldehyde.

3.3.1.2. Within ninety (90) days following the Effective Date, all Covered Liquid Products manufactured for sale in California shall be manufactured with child proof caps in accordance with the standards set forth in 16 C.F.R. § 1700.15(b) and flow restrictions in accordance with the standard set forth in 16 C.F.R. § 1700.15(d).

1 **3.3.2. Prohibition on Sales and Advertising to Minors.** A Settling Defendant
2 opting to participate in Section 3.3 shall not sell Covered Products to persons younger than
3 eighteen (18) years of age and shall take reasonable steps to prevent the sale of Covered Products
4 to such persons, including, but not limited to the following measures:

5 **3.3.2.1.** Settling Defendant shall implement one or more systems for
6 checking the age of persons who purchase Covered Products on the Internet or in person. The
7 system shall include age verification by requiring and checking an official government
8 identification card or verifying through a reputable credit agency the age of anyone who
9 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who
10 purchases in person. The system shall be put into place within ninety (90) days of the Effective
11 Date.

12 **3.3.2.2.** Settling Defendant shall not use advertisements that target
13 minors. Specifically, Settling Defendant will not use models or images of people that appear to
14 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended
15 and designed to appeal to people under the legal smoking age in advertisements or promotional
16 materials that appear in California, including on the Internet. Additionally, Settling Defendant
17 will not: (a) advertise in any media that has more than 25% under 18 readership; (b) utilize any
18 form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using
19 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are
20 designated as prohibiting patrons under the age of eighteen (18).

21 **3.3.3. Prohibition on Health and Safety Claims.** A Settling Defendant opting
22 to participate in Section 3.3 shall not make health and or safety claims unless such claims have
23 been reviewed and approved by the Federal Food and Drug Administration. Examples of
24 prohibited claims include the following:

25 **3.3.3.1.** Settling Defendant shall not advertise Covered Products as
26 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
27 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

1 **3.3.3.2.** Settling Defendant shall not make any claim that the
2 Covered Products do not expose users carcinogens or are better or safer than tobacco.

3 **3.3.3.3.** Settling Defendant shall not make any claim that the
4 Covered Products produce no second hand smoke.

5 **4. PAYMENTS**

6 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$65,000, which shall
7 be allocated as follows:

8 **4.1.1.** \$2,600 as a civil penalty pursuant to California Health & Safety Code §
9 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
10 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
11 Environmental Health Hazard Assessment).

12 **4.1.2.** \$3,900 as a payment in lieu of civil penalty pursuant to California Health &
13 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
14 such funds to continue its work educating and protecting people from exposures to toxic
15 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
16 Judgment and to purchase and test Settling Defendant's Products to confirm compliance. In
17 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
18 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
19 educate and protect the public from exposures to toxic chemicals. The method of selection of
20 such groups can be found at the CEH website at www.ceh.org/justicefund.

21 **4.1.3.** \$58,500 as a reimbursement of a portion of CEH's reasonable attorneys'
22 fees and costs. This amount shall be divided into two checks: (1) a check for \$52,000 shall be
23 made payable to Lexington Law Group; and (2) a check for \$6,500 shall be made payable to the
24 Center for Environmental Health.

25 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
26 separate checks, all to be delivered within ten (10) days following the Effective Date. The
27 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
28

1 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group
2 at the address set forth in Section 8.1.2.

3 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
4 one or more of the optional provisions in Section 3.3 in accordance with that Section, within
5 ninety (90) days following the Effective Date, Settling Defendant must make an additional
6 payment for each provision not certified, as follows: (i) \$10,000 if Settling Defendant elects to
7 not participate in Section 3.3.1; (ii) \$10,000 if Settling Defendant elects to not participate in
8 Section 3.3.2; and (iii) \$10,000 if Settling Defendant elects to not participate in Section 3.3.3.
9 Each of these payments shall be paid in two separate checks, each payable to the Center for
10 Environmental Health, to be allocated as follows:

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

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

25 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

28

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

10 **6. MODIFICATION OF CONSENT JUDGMENT**

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

13 **7. CLAIMS COVERED AND RELEASE**

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

25 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged
26 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from
27 any violation of Proposition 65 that have been or could have been asserted regarding the failure to

1 warn about exposure to formaldehyde and/or acetaldehyde in connection with Covered Products
2 manufactured, distributed, 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 formaldehyde and/or acetaldehyde in Covered Products manufactured, distributed, or sold
7 by Settling Defendant after 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 Seth J. Coblenz
14 General Counsel
15 VMR Products LLC
16 3050 Biscayne Boulevard, 8th Floor
17 Miami, FL 33137
18 seth@v2.com

19 8.1.2. **Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
20 this Consent Judgment shall be:

21 Mark Todzo
22 Lexington Law Group
23 503 Divisadero Street
24 San Francisco, CA 94117
25 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.

28 **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.

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.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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.

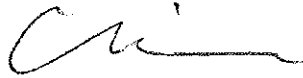
15. EXECUTION IN COUNTERPARTS

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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

VMR PRODUCTS LLC

Signature

Printed Name

Title

IT IS SO ORDERED:

Dated: _____, 2016

Judge of the Superior Court

1 IT IS SO STIPULATED:

2

3 CENTER FOR ENVIRONMENTAL HEALTH

4

5

6 _____
Charlie Pizarro
7 Associate Director

8

9 VMR PRODUCTS LLC

10

11

12 _____
Signature

14 _____
JAN VERLINDEN

15 Printed Name

16

17 _____
CEO
18 Title

19

20

21 IT IS SO ORDERED:

22

23

24 Dated: AUG 23 2016, 2016

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

25

26

27

28