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Michael DiPirro

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

UNLIMITED CIVIL JURISDICTION

MICHAEL DIPIRRO,

Plaintiff,

v.

THE WELLNESS EARTH ENERGY
DISPENSARY, LLC, dba WEED; and DOES 1-
150,

Defendants.

Case No. RG15797817

**[PROPOSED] CONSENT
JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Michael DiPirro (“DiPirro”) and THE
4 Wellness Earth Energy Dispensary, LLC, dba WEED (“WEED”), with DiPirro and WEED
5 individually referred to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 DiPirro is an individual residing in California who seeks to promote awareness of exposures
8 to toxic chemicals and to improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 WEED employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
13 section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 DiPirro alleges that WEED sells, or distributes for sale in the state of California, marijuana
16 intended for smoking and paraphernalia for smoking medical marijuana, the consumption and use of
17 which results in the generation of marijuana smoke, without first providing the clear and reasonable
18 exposure warning required by Proposition 65. Marijuana smoke is listed pursuant to Proposition 65
19 as a chemical that is known to the state of California to cause cancer.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are cannabis or marijuana intended for
22 smoking and paraphernalia for smoking marijuana, the consumption and use of which allegedly
23 results in exposures to marijuana smoke, that are sold, or distributed for sale in California by WEED,
24 including, but not limited to, unprocessed marijuana intended to be heated until combustion, then
25 inhaled (specifically, flowers, leaves, and other organic parts of marijuana plants such as kief), and
26 paraphernalia for smoking marijuana, including, but not limited to, water bongs, smoking pipes,
27 rolling papers, blunts and vaporizers that do not have digital heat control/cannot be definitively set at
28

1 a temperature below combustion point (“Products”).

2 **1.6 Notice of Violation**

3 On or about December 26, 2014, DiPirro served WEED and certain requisite public
4 enforcement agencies with a “60-Day Notice of Violation” (“Notice”), a document that informed the
5 recipients of DiPirro’s allegation that WEED violated Proposition 65 by failing to warn its customers
6 and consumers in California that the Products expose users to marijuana smoke. To the best of the
7 Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations
8 set forth in the Notice.

9 **1.7 Complaint**

10 On or about December 23, 2015, DiPirro filed the instant action against Defendant
11 (“Complaint”) for the alleged violations of Health & Safety Code § 25249.6 that are the subject of
12 the Notice.

13 **1.8 No Admission**

14 WEED denies the material, factual, and legal allegations contained in the Notice and
15 contends that it provides medical marijuana to California residents in accordance with applicable
16 state laws and requirements relating to medicinal use of marijuana. Nothing in this Consent
17 Judgment shall be construed as an admission by WEED of any fact, finding, conclusion of law, issue
18 of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be
19 construed as an admission by WEED of any fact, finding, conclusion of law, issue of law, or
20 violation of law, the same being specifically denied by WEED. This section shall not, however,
21 diminish or otherwise affect WEED’s obligations, responsibilities, and duties under this Consent
22 Judgment.

23 **1.9 Consent to Jurisdiction**

24 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
25 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in Alameda
26 County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
27 Judgment.

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean April 20, 2016.

3 **2. INJUNCTIVE RELIEF: WARNINGS**

4 Commencing on or before the Effective Date, WEED shall provide clear and reasonable
5 warnings as set forth below, for all Products sold in California. Each warning shall be prominently
6 placed with such conspicuousness as compared with other words, statements, designs, or devices as
7 to render it likely to be read and understood by an ordinary individual under customary conditions
8 before purchase or use. Each warning shall be provided in a manner such that the consumer or user
9 understands to which specific Product the warning applies, so as to minimize the risk of consumer
10 confusion.

11 (a) **Entry Door and Lobby Warning.** On or adjacent to all entry doors into any room in
12 which a customer can purchase any Product from WEED, and in the Lobby/waiting area, WEED
13 shall post a sign bearing one of the specified warnings shown below, with the text in [brackets] being
14 optional at the discretion of WEED. The warning sign shall be at least 8 1/2 inches by 11 inches,
15 and posted at a height that will make it conspicuous and easy to read for the average person. The
16 text of the warning shall be printed in black ink, in a font that is easy to read and legible, but in no
17 case less than a size 36 font.

18 **WARNING: Smoke from cannabis contains chemicals**
19 **known to the State of California to cause**
20 **cancer [and birth defects or other**
 reproductive harm]. [Do not use near
 pregnant women, children or pets.]

21 **OR**

22 **WARNING: Use of products sold here will expose you [and**
23 **those in your immediate vicinity] to**
24 **marijuana smoke, a chemical known to the**
25 **State of California to cause cancer [and birth**
 defects or other reproductive harm]. [Do not
 consume products that produce marijuana
 smoke near pregnant women, children or
 pets.]

26 (b) **Membership Agreement.** WEED shall provide a warning in its Membership
27 Agreement, as shown below, with the text in [brackets] being optional at the discretion of WEED.
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1 The warnings provided shall be printed in black ink, in a font that is easy to read and legible, in at
2 least a size 12 font, and separated from its surrounding text. The warning shall be provided on
3 either the first or last page of the Membership Agreement; OR if the warning is on a page other than
4 the first or last page, then each member shall initial the text of the warning to show he or she read
5 and understood the warning. If WEED accepts Membership Agreements through a website, then
6 each website-registered member must separately “click-through” to review and approve the warning
7 transmitted in or with the Membership Agreement.

8
9 **WARNING: Marijuana smoke contains chemicals known**
10 **to the State of California to cause cancer [and**
11 **birth defects or other reproductive harm].**
[Do not use near pregnant women, children or
pets.]

12 (c) **Internet Website Warning.** For all Products that are purchased via orders placed on
13 a website, to be delivered directly to WEED members, the website from which the order is placed
14 shall either, at their option: a) provide a warning as shown below on the receipt; b) include in the
15 delivery bag a warning as shown below, on an insert that is at least three inches by five inches; OR
16 c) provide a warning as shown below, on the webpage/receipt displayed to a purchaser during the
17 checkout process. WEED shall not accept orders over the telephone unless a warning is provided in
18 compliance with this section. In either case, the warning shall be provided as shown below, with the
19 text in [brackets] being optional at the discretion of WEED, with the warning text printed in black
20 ink, in a font that is easy to read and legible, in a font size of at least 12, and set off from all other
21 text.

22 **WARNING: Marijuana smoke contains chemicals known**
23 **to the State of California to cause cancer [and**
24 **birth defects or other reproductive harm].**

25 **OR**

26 **WARNING: Use of this product will expose you [and those**
27 **in your immediate vicinity] to marijuana**
28 **smoke, a chemical known to the State of**
California to cause cancer [and birth defects
or other reproductive harm]. [Do not
consume products that produce marijuana

1 **smoke near pregnant women, children or**
2 **pets.]**

3 (d) **Warning Sign at Festivals/Conferences.** For all festivals, conferences, and other
4 public events that take place in California, in which either Defendant operates a booth or other space
5 from which it sells any of the Products, WEED shall post a sign with warning language as shown
6 below, with the text in [brackets] being optional at the discretion of WEED. The warning sign shall
7 be at least 8 1/2 inches by 11 inches, and posted at a height and location that will make it
8 conspicuous and easy to read for the average person. The text of the warning shall be printed in
9 black ink, in a font that is easy to read and legible, but in no case less than a size 36 font.

10 **WARNING: Marijuana smoke contains chemicals known**
11 **to the State of California to cause cancer [and**
birth defects or other reproductive harm].

12 (e) **Additional Warnings.** In order to waive the second civil penalty under Section 3.2,
13 WEED shall provide at least one of the following two types of additional warnings as follows:

14 (i) **Product Labeling.** WEED shall affix a warning to the packaging, labeling,
15 or directly on each Product sold in retail outlets in California by WEED or any person selling the
16 Products as shown below, with the text in [brackets] being optional at the discretion of WEED. The
17 warning text shall be printed in black ink, in a font that is easy to read and legible, in the same type
18 size or larger than the Product's description text. Employees may not write over the text of the
19 warning for any reason.

20 **WARNING: Use of this product will expose you [and those**
21 **in your immediate vicinity] to marijuana**
22 **smoke, a chemical known to the State of**
23 **California to cause cancer. [Do not consume**
products that produce marijuana smoke near
pregnant women, children or pets.]

24 (ii) **Point-of-Sale Warnings.** In order that customers will view the warning
25 before making the decision to purchase the Products at the Dispensary, WEED shall post a warning
26 sign, in the form below, using one of the following point-of-sale warning options: a) at each cash
27 register in the store; b) at each display case in the store and on all receipts; OR c) on a stanchion
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(crowd control post) message sign located at the front of the cash register entry line and on all receipts. The website warning provided pursuant to Section 2 (c), above, also shall be the point of sale warning provided to members who purchase the Products via a website for subsequent delivery. The warning text shall be in the same type size or larger than the Product's description text.

WARNING: Marijuana smoke is a chemical known to the State of California to cause cancer.

OR:

WARNING: Use of products sold here will expose you [and those in your immediate vicinity] to marijuana smoke, a chemical known to the State of California to cause cancer. [Do not consume products that produce marijuana smoke near pregnant women, children or pets.]

3. MONETARY PAYMENTS

3.1 Initial Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b).

WEED shall make an initial civil penalty payment of \$5,000.00, in accordance with this section, within two (2) business days of the Court's approval of this Consent Judgment. The penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHHA") and the remaining 25% of the penalty remitted to DiPirro in accordance with Section 3.3 below. The penalty payment shall be delivered to the address listed in Section 3.3 below.

3.2 Second Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b). On or before August 1, 2016, WEED shall pay a second civil penalty of \$10,000.00. As an incentive to significantly reduce the use of plastic in its dispensary location(s), however, the second civil penalty shall be waived in its entirety if an officer of WEED certifies in writing that as of August 1, 2016, WEED will, for all of its Products sold and offered for sale in all of its California dispensary locations either:

Option 1) use only glass, cardboard or paper packaging (including, but not limited to, regular or reusable glass containers for dried marijuana bud, paper bags for each total purchase, cardboard

packaging for pre-filled cartridges and/or straw coverings for pre-rolled cigarettes and pre-filled cartridges); -or-

Option 2) provide one or both of the Additional Warnings as set forth in Section 2(e) above.

Such certification, along with photographs showing proof of compliance with the Option chosen, must be received by the Law Offices of Bush & Henry on or before August 1, 2016. The second civil penalty payment shall be apportioned in accordance with California Health & Safety Code § 25249.12(c) & (d), with 75% of these funds remitted to OEHHA and the remaining 25% of the penalty remitted to DiPirro in accordance with Section 3.3.

3.3 Payments Held in Trust. Payments shall be delivered to the Law Offices of Bush & Henry, 3270 Mendocino Avenue, Suite 2E, Santa Rosa, CA 95403, and shall be in the form of three checks for the following amounts made payable to:

- (a) “Bush & Henry, Attorneys at Law, PC” in the amount of \$3,750.00 for payment to OEHHA. Law Office of Bush & Henry agrees to forward such funds to OEHHA in a timely manner.
- (b) “Bush & Henry, Attorneys at Law, PC” in the amount of \$1,250.00 as payment to Michael DiPirro. Bush & Henry agree to forward such funds in a timely manner; and
- (c) “Bush & Henry, Attorneys at Law, PC” in the amount of \$45,000, as payment for attorneys’ fees and costs pursuant to Section 4 below.

3.4 Issuance of 1099 Forms. WEED shall provide DiPirro’s counsel with a separate 1099 forms for each of its payments under this Agreement to:

- (a) “Office of Environmental Health Hazard Assessment”, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid;
- (b) “Michael DiPirro,” whose address and tax identification number shall be furnished upon request after this Agreement has been fully executed by the Parties for his portion of the civil penalties paid; and
- (c) “Bush & Henry, Attorneys at Law, PC,” for fees and costs reimbursed

pursuant to Section 4.

For any payment that is returned for insufficient funds, payment must be made by a cashier's check within ten (10) calendar days of notification of insufficient funds, plus a 10% service fee

4. REIMBURSEMENT OF FEES AND COSTS

The parties acknowledge that DiPirro and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. WEED then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The parties then attempted to (and did) reach an accord on the compensation due to DiPirro and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. WEED shall pay \$45,000 for fees and costs incurred as a result of investigating, bringing this matter to WEED's attention, and negotiating a settlement in the public interest. WEED shall issue a separate 1099 for fees and costs (EIN: 81-1257634), shall make the check payable to "Bush & Henry, Attorneys at Law, PC" and shall deliver payment within two (2) business days of the Court's approval of this Consent Judgment to the address listed in Section 3.3 above.

5. CLAIMS COVERED AND RELEASED

5.1 Plaintiff's Public Binding Release of Proposition 65 Claims

This Consent Judgment is a full, final, and binding resolution between DiPirro acting on behalf of himself and in the public interest, and WEED of any violation of Proposition 65 that was or could have been asserted by DiPirro, on behalf of himself, or on behalf of his past and current agents, representatives, attorneys, successors, and assignees, against WEED, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom WEED directly or indirectly distributes or sells the Products, including, without limitation, its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Releasees"), for unwarned exposures to marijuana smoke from the Products sold or

distributed for sale in California by WEED prior to the Effective Date. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to marijuana smoke from the Products sold by or through WEED after the Effective Date.

5.2 DiPirro's Individual Release of Claims

DiPirro, in his individual capacity only and *not* in his representative capacity, also provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of DiPirro of any nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to marijuana smoke in the Products grown, cultivated, processed or sold or distributed for sale by Defendant before the Effective Date.

5.3 Defendant's Release of DiPirro

WEED, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims that it may have against DiPirro and his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by DiPirro and his attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

6. COURT APPROVAL

This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within one year after it has been fully executed by all Parties.

7. SEVERABILITY

If, subsequent to the execution of this Consent Judgment, any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

1 **8. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the state of California
3 and apply within the state of California. In the event that Proposition 65 is repealed or is otherwise
4 rendered inapplicable by reason of law generally, or as to the Products, then WEED may provide
5 written notice to DiPirro of any asserted change in the law, and have no further obligations pursuant
6 to this Consent Judgment, with respect to, and to the extent that, the Products are so affected.
7 Nothing in this Consent Judgment shall be interpreted to relieve WEED from any obligation to
8 comply with any pertinent state or federal toxics control laws.

9 **9. NOTICES**

10 Unless specified herein, all correspondence and notices required to be provided pursuant to
11 this Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered
12 or certified mail, return receipt requested; or (iii) a recognized overnight courier on any party by the
13 other party at the following addresses:

14 For WEED:

15 Jeffrey Malinovitz
16 Wellness Earth Energy Dispensary, LLC, dba WEED
17 11557 Ventura Blvd.
18 Studio City, CA 91604

19 For DiPirro:

20 Bush & Henry, Attorneys at Law, PC
21 3270 Mendocino Avenue, Suite 2E
22 Santa Rosa, CA 95403

23 Any party may, from time to time, specify in writing to the other party a change of address to
24 which all notices and other communications shall be sent.

25 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

26 This Consent Judgment may be executed in counterparts, and by facsimile or portable
27 document format (PDF) signature, each of which shall be deemed an original, and all of which,
28 when taken together, shall constitute one and the same document.

11. **POST EXECUTION ACTIVITIES**

DiPirro agrees to comply with the reporting form requirements referenced in Health & Safety

Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance of obtaining such approval, DiPirro and Defendant agree to mutually employ their best efforts, and that of their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain judicial approval of the settlement in a timely manner.

12. MODIFICATION

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or application of any Party and the entry of a modified consent judgment by the Court.

13. AUTHORIZATION

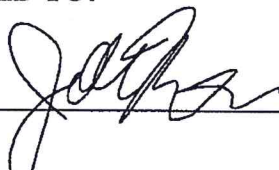
The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

Date: 4/27/16

By: 
MICHAEL DIPIRRO

AGREED TO:

Date: 

By: Jeffrey Malinovitz
Jeffrey Malinovitz, President
WELLNESS EARTH ENERGY
DISPENSARY, LLC, DBA WEED