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11 CENTER FOR ENVIRONMENTAL HEALTH

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

15 CENTER FOR ENVIRONMENTAL HEALTH, ) Case No. RG 15-774917  
16 )  
17 Plaintiff, )  
18 )  
19 v. ) **[PROPOSED] CONSENT**  
20 ) **JUDGMENT AS TO BEARD VAPE**  
21 ) **CO., LLC**  
22 )  
23 VAPE REVOLUTION LLC, et al., )  
24 )  
25 Defendants. )  
26 )  
27 )  
28 )

1 **1. INTRODUCTION**

2 **1.1.** This Consent Judgment is entered into by Plaintiff Center for Environmental  
3 Health, a non-profit corporation (“CEH”), and Beard Vape Co., LLC (“Settling Defendant”) to  
4 settle claims asserted by CEH against Settling Defendant as set forth in the operative Complaint  
5 in the matter *Center for Environmental Health v. Vape Revolution LLC, et al.*, Alameda County  
6 Superior Court Case No. RG 15-774917 (the “Action”). CEH and Settling Defendant are referred  
7 to collectively as the “Parties.”

1           **1.2.**    On February 5, 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.**    Plaintiff alleges that Settling Defendant employed ten (10) or more persons and  
9 manufactured, distributed, and/or sold Covered Products (as defined herein) in the State of  
10 California. Settling Defendant disputes all allegations and Plaintiff’s assertion that Settling  
11 Defendant employed 10 or more persons during the applicable time period. Settling Defendant  
12 further contends that it ceased all operations and was dissolved in September 19, 2016.

13           **1.4.**    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 Notice 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 Notice and Complaint with respect to  
19 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

20           **1.5.**    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. By execution of this Consent Judgment and  
23 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or  
24 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an  
25 admission by the Parties of any fact, conclusion of law, or violation of law. Settling Defendant  
26 denies the material, factual, and legal allegations in the Notice and Complaint and expressly  
27 denies any wrongdoing whatsoever. Except as specifically provided herein, nothing in this  
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1 Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any  
2 of the Parties may have in this or any other pending or future legal proceedings. This Consent  
3 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for  
4 purposes of settling, compromising, and resolving issues disputed in this Action.

5 **2. DEFINITIONS**

6 **2.1.** “Covered Products” means nicotine-containing liquid for use with vapor products  
7 where such liquid was manufactured, distributed, and/or sold by Settling Defendant in California.

8 **2.2.** “Effective Date” means the date on which the Court enters this Consent  
9 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 by Settling  
13 Defendant in California unless such Covered Product has a clear and reasonable warning on the  
14 outer label of the product. The warning shall state the following:

15 **WARNING:** Use of this product will expose you to nicotine, a chemical  
16 known to the State of California to cause birth defects or other reproductive  
17 harm.

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

4 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** For any  
5 Covered Products that have not been labeled in accordance with Section 3.1, within ninety (90)  
6 days following the Effective Date, Settling Defendant shall provide warning materials by certified  
7 mail to each of its California retailers or distributors to whom Settling Defendant reasonably  
8 believes sold Covered Products prior to the Effective Date. Such warning materials shall include  
9 a reasonably sufficient number of stickers in order to permit the retailer or distributor to affix the  
10 warning on each Covered Product such customer has purchased from Settling Defendant. The  
11 warning stickers shall contain the warning language set forth in Section 3.1 above. The warning  
12 materials shall also include a letter of instruction for the placement of the stickers, and a Notice  
13 and Acknowledgment postcard.

14 **3.2. Additional Injunctive Provisions.** If Settling Defendant resumes sales of  
15 Covered Products in California, Settling Defendant shall undertake each of the actions below.

16 **3.2.1. Product Safety Requirements.** Settling Defendant shall make the  
17 following change to the Covered Products to increase the safety of such Products:

18 **3.2.1.1.** Within ninety (90) days following the Effective Date, all  
19 Covered Products manufactured for sale in California shall be manufactured with safety features,  
20 such as child proof caps and flow restrictions, in accordance with all applicable federal laws and  
21 regulations.

22 **3.2.2. Prohibition on Sales and Advertising to Minors.** Within ninety (90)  
23 days following the Effective Date, Settling Defendant shall not sell Covered Products to persons  
24 younger than eighteen (18) years of age and shall take reasonable steps to prevent the sale of  
25 Covered Products to such persons, including, but not limited to the following measures:

26 **3.2.2.1.** Settling Defendant shall implement one or more systems for  
27 checking the age of persons who purchase Covered Products on the Internet or in person in a  
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1 manner consistent with all federal laws and regulations. To the extent applicable, such system  
2 shall include age verification by requiring and checking an official government identification card  
3 or verifying through a reputable third party age verification process such as but not limited to,  
4 VERATAD, PIPL, Westlaw, Lexis or similar age verification software systems. The system  
5 shall be put into place within ninety (90) days of the Effective Date.

6 **3.2.2.2.** Settling Defendant shall not sell flavored cartridges or any  
7 substance to use with Covered Products or other e-cigarettes that are targeted to appeal to minors  
8 unless such sales are in compliance with all applicable federal and state laws and regulations.

9 **3.2.2.3.** Settling Defendant shall not use advertisements that  
10 intentionally target minors. Specifically, Settling Defendant shall undertake reasonable efforts to  
11 ensure that its advertisements or promotional materials that appear in California regarding  
12 Covered Products are not intentionally designed to appeal to people under the legal smoking age,  
13 such as by refraining from using models or images of people under twenty-eight (28) years of  
14 age. Additionally, Settling Defendant will not: (a) utilize any form of outdoor advertising within  
15 1,000 feet of any school or playground; or (b) sponsor any youth athletic, musical or other  
16 cultural events unless such events are designated as prohibiting patrons under the age of 18.

17 **3.2.3. Prohibition on Health and Safety Claims.** Within ninety (90) days  
18 following the Effective Date, Settling Defendant shall not make health and or safety claims unless  
19 such claims have been reviewed and approved by the Federal Food and Drug Administration.  
20 Examples of prohibited claims include the following:

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

24 **3.2.3.2.** Settling Defendant shall not make any claim that the  
25 Covered Products do not contain carcinogens.

1 **4. PAYMENTS**

2 **4.1.** Settling Defendant shall pay to CEH the total sum of \$20,000, which shall be  
3 allocated as follows:

4 **4.1.1.** \$2,629 as a civil penalty pursuant to California Health & Safety Code §  
5 25249.7(b), such money to be apportioned by CEH in accordance with California Health &  
6 Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of  
7 Environmental Health Hazard Assessment).

8 **4.1.2.** \$1,971 as an additional settlement payment (“ASP”) in lieu of civil penalty  
9 to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations,  
10 Title 11, § 3204. CEH intends to place these funds in CEH’s Toxics and Youth Fund and use  
11 them to: (1) support CEH programs and activities that seek to educate the public about nicotine,  
12 formaldehyde, and acetaldehyde in electronic cigarettes and other toxic chemicals in consumer  
13 products that are marketed to youth; (2) expand its use of social media to communicate with  
14 Californians about the risks of exposures to nicotine, formaldehyde, and acetaldehyde and other  
15 toxic chemicals in the products they and their children use and about ways to reduce those  
16 exposures; and (3) work with industries that market products to youth to reduce exposures to  
17 nicotine, formaldehyde, and acetaldehyde and other toxic chemicals, and thereby reduce the  
18 public health impacts and risks of exposures to nicotine, formaldehyde, and acetaldehyde and  
19 other toxic chemicals in consumer products that are marketed to youth in California. CEH shall  
20 obtain and maintain adequate records to document that ASPs are spent on these activities and  
21 CEH agrees to provide such documentation to the Attorney General within thirty (30) days of any  
22 request from the Attorney General.

23 **4.1.3.** \$15,400 as a reimbursement of a portion of CEH’s reasonable attorneys’  
24 fees and costs.

25 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in three  
26 (3) separate checks, all to be delivered within thirty (30) days following the Effective Date. The  
27 payments required pursuant to Sections 4.1.1 and 4.1.2 shall be made payable to the Center for  
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1 Environmental Health. The payment required pursuant to Section 4.1.3 shall be made payable to  
2 the Lexington Law Group. All checks shall be delivered to Mark Todzo at Lexington Law Group  
3 at the address set forth in Section 8.1.2.

#### 4 **ENFORCEMENT OF CONSENT JUDGMENT**

5 **4.2.** CEH may, by motion or application for an order to show cause before the Superior  
6 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.  
7 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH  
8 shall provide Settling Defendant with a Notice of Violation and a copy of any test results which  
9 purportedly support CEH's Notice of Violation. The Parties shall then meet and confer regarding  
10 the basis for CEH's anticipated motion or application in an attempt to resolve it informally,  
11 including providing Settling Defendant with a reasonable opportunity of at least thirty (30) days  
12 to cure any alleged violation. The prevailing party on any motion to enforce this Consent  
13 Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result of such  
14 motion or application. This Consent Judgment may only be enforced by the Parties.

#### 15 **5. MODIFICATION OF CONSENT JUDGMENT**

16 **5.1.** This Consent Judgment may only be modified by written agreement of CEH and  
17 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

#### 18 **6. CLAIMS COVERED AND RELEASE**

19 **6.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting  
20 in the public interest and Settling Defendant regarding the failure to warn about exposure to  
21 nicotine in the Covered Products manufactured, distributed, or sold by Settling Defendant prior to  
22 the Effective Date as alleged in Plaintiff's Complaint.

23 **6.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged  
24 in the Complaint against Settling Defendant arising from any violation of Proposition 65 that  
25 have been or could have been asserted regarding the failure to warn about exposure to nicotine in  
26 connection with Covered Products manufactured, distributed, or sold by Settling Defendant prior  
27 to the Effective Date.

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1           **6.3.** Compliance with the terms of this Consent Judgment by Settling Defendant, shall  
2 constitute compliance with Proposition 65 by Settling Defendant, with respect to any alleged  
3 failure to warn about nicotine in Covered Products manufactured, distributed, or sold by Settling  
4 Defendant after the Effective Date.

5           **7. PROVISION OF NOTICE**

6           **7.1.** When any Party is entitled to receive any notice under this Consent Judgment, the  
7 notice shall be sent by first class and electronic mail as follows:

8                   **7.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to  
9 receive notices pursuant to this Consent Judgment shall be:

10                                   Phillip Daman  
11                                   Daman and Associates, LLP  
12                                   1455 Pennsylvania Ave, Suite 400  
13                                   Washington, D.C., 20004  
14                                   phillip.daman@damanllp.com

15                   **7.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to  
16 this Consent Judgment shall be:

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

22           **7.2.** 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           **8. COURT APPROVAL**

25           **8.1.** 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.

28           **8.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or  
effect and shall not be introduced into evidence or otherwise used in any proceeding for any  
purpose.



1       **9.       GOVERNING LAW AND CONSTRUCTION**

2               **9.1.**     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       **10.      ENTIRE AGREEMENT**

5               **10.1.**    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               **10.2.**    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              **10.3.**    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              **10.4.**    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              **10.5.**    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       **11.      RETENTION OF JURISDICTION**

23              **11.1.**    This Court shall retain jurisdiction of this matter to implement or modify the  
24 Consent Judgment.

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

2 **12.1.** 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 **13. NO EFFECT ON OTHER SETTLEMENTS**

6 **13.1.** 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 **14. EXECUTION IN COUNTERPARTS**

9 **14.1.** 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 **IT IS SO STIPULATED:**

12 **CENTER FOR ENVIRONMENTAL HEALTH**

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16 \_\_\_\_\_  
17 Charlie Pizarro  
18 Associate Director

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**BEARD VAPE CO., LLC**

DocuSigned by:  
*Colbey Pfund*  
5C50A68ED72A4BA...  
Signature

Colbey Pfund  
Printed Name

co founder  
Title

**IT IS SO ORDERED:**

Dated: \_\_\_\_\_, 2017  
Judge of the Superior Court