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11 CENTER FOR ENVIRONMENTAL HEALTH

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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 MADVAPES,**
21) **LLC**
22 VAPE REVOLUTION LLC, et al.,)
23)
24 Defendants.)
25)
26)
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28)

1 INTRODUCTION

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

1 **1.2.** On February 13, 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 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 represents that it has dissolved.

11 **1.4.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
12 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
13 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)
14 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
15 Consent Judgment as a full and final resolution of all claims which were or could have been
16 raised in the Complaint based on the facts alleged in the Notice and Complaint with respect to
17 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

18 **1.5.** The Parties enter into this Consent Judgment as a full and final settlement of all
19 claims which were or could have been raised in the Complaint arising out of the facts or conduct
20 related to Settling Defendant alleged therein. By execution of this Consent Judgment and
21 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
22 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
23 admission by the Parties of any fact, conclusion of law, or violation of law. Settling Defendant
24 denies the material, factual, and legal allegations in the Notice and Complaint and expressly
25 denies any wrongdoing whatsoever. Except as specifically provided herein, nothing in this
26 Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any
27 of the Parties may have in this or any other pending or future legal proceedings. This Consent
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1 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for
2 purposes of settling, compromising, and resolving issues disputed in this Action.

3 **2. DEFINITIONS**

4 **2.1.** “Covered Products” means nicotine-containing liquid for use with vapor products,
5 whereas such liquid was manufactured, distributed, and/or sold by Settling Defendant in
6 California.

7 **2.2.** “Effective Date” means the date on which the Court enters this Consent
8 Judgment.

9 **3. INJUNCTIVE RELIEF**

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

14 **WARNING:** Use of this product will expose you to nicotine, a chemical
15 known to the State of California to cause birth defects or other reproductive
16 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 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
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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.** For any
4 Covered Products that have not been labeled in accordance with Section 3.1, within ninety (90)
5 days following the Effective Date, Settling Defendant shall provide warning materials by certified
6 mail to each of its California retailers or distributors to whom Settling Defendant reasonably
7 believes sold Covered Products prior to the Effective Date. Such warning materials shall include
8 a reasonably sufficient number of stickers in order to permit the retailer or distributor to affix the
9 warning on each Covered Product such customer has purchased from Settling Defendant. The
10 warning stickers shall contain the warning language set forth in Section 3.1 above. The warning
11 materials shall also include a letter of instruction for the placement of the stickers, and a Notice
12 and Acknowledgment postcard.

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

18 **3.2.1. Product Safety Requirements.** A Settling Defendant opting to participate
19 in Section 3.2 shall make the following change to the Covered Products to increase the safety of
20 such Products:

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

25 **3.2.2. Prohibition on Sales and Advertising to Minors.** Within ninety (90)
26 days following the Effective Date, a Settling Defendant opting to participate in Section 3.2 shall
27 not sell Covered Products to persons younger than eighteen (18) years of age and shall take
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1 reasonable steps to prevent the sale of Covered Products to such persons, including, but not
2 limited to the following measures:

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

10 **3.2.2.2.** Settling Defendant shall not sell flavored cartridges or any
11 substance to use with Covered Products or other e-cigarettes that are targeted to appeal to minors
12 unless such sales are in compliance with all applicable federal and state laws and regulations.

13 **3.2.2.3.** Settling Defendant shall not use advertisements that
14 intentionally target minors. Specifically, Settling Defendant shall undertake reasonable efforts to
15 ensure that its advertisements or promotional materials that appear in California regarding
16 Covered Products are not intentionally designed to appeal to people under the legal smoking age,
17 such as by refraining from using models or images of people under twenty-eight (28) years of
18 age. Additionally, Settling Defendant will not: (a) utilize any form of outdoor advertising within
19 1,000 feet of any school or playground; (b) advertise using Instagram; or (c) sponsor any youth
20 athletic, musical or other cultural events unless such events are designated as prohibiting patrons
21 under the age of 18.

22 **3.2.3. Prohibition on Health and Safety Claims.** Within ninety (90) days
23 following the Effective Date, a Settling Defendant opting to participate in Section 3.2 shall not
24 make health and or safety claims unless such claims have been reviewed and approved by the
25 Federal Food and Drug Administration. Examples of prohibited claims include the following:
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1 **3.2.3.1.** Settling Defendant shall not advertise Covered Products as
2 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
3 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

4 **3.2.3.2.** Settling Defendant shall not make any claim that the
5 Covered Products do not contain carcinogens or are better or safer than tobacco.

6 **3.2.3.3.** Settling Defendant shall not make any claim that the
7 Covered Products produce no second hand smoke.

8 **4. PAYMENTS**

9 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$15,000, which shall
10 be allocated as follows:

11 **4.1.1.** \$1,971 as a civil penalty pursuant to California Health & Safety Code §
12 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
13 Safety Code § 25249.12 (\$491.75 to CEH and \$1,479.25 to the State of California’s Office of
14 Environmental Health Hazard Assessment).

15 **4.1.2.** \$1,479 as an additional settlement payment (“ASP”) in lieu of civil penalty
16 to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations,
17 Title 11, § 3204. CEH intends to place these funds in CEH’s Toxics and Youth Fund and use
18 them to: (1) support CEH programs and activities that seek to educate the public about nicotine,
19 formaldehyde, and acetaldehyde in electronic cigarettes and other toxic chemicals in consumer
20 products that are marketed to youth; (2) expand its use of social media to communicate with
21 Californians about the risks of exposures to nicotine, formaldehyde, and acetaldehyde and other
22 toxic chemicals in the products they and their children use and about ways to reduce those
23 exposures; and (3) work with industries that market products to youth to reduce exposures to
24 nicotine, formaldehyde, acetaldehyde and other toxic chemicals, and thereby reduce the public
25 health impacts and risks of exposures to nicotine, formaldehyde, acetaldehyde and other toxic
26 chemicals in consumer products that are marketed to youth in California. CEH shall obtain and
27 maintain adequate records to document that ASPs are spent on these activities and CEH agrees to
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1 provide such documentation to the Attorney General within thirty (30) days of any request from
2 the Attorney General.

3 **4.1.3.** \$11,550 as a reimbursement of a portion of CEH's reasonable attorneys'
4 fees and costs.

5 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in three
6 (3) separate checks, all to be delivered within twenty (20) days following the Effective Date. The
7 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
8 for Environmental Health. The payment required pursuant to Section 4.1.3 shall be made payable
9 to the Lexington Law Group. All checks shall be delivered to Mark Todzo at Lexington Law
10 Group at the address set forth in Section 8.1.2.

11 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
12 one or more of the optional provisions in Section 3.2 in accordance with that Section, within
13 ninety (90) days following the Effective Date, Settling Defendant must make an additional
14 payment for each provision not certified, as follows: (i) \$5,000 if Settling Defendant elects to not
15 participate in Section 3.2.1; (ii) \$5,000 if Settling Defendant elects to not participate in Section
16 3.2.2; and (iii) \$5,000 if Settling Defendant elects to not participate in Section 3.2.3. Each of
17 these payments shall be paid in two (2) separate checks, each payable to the Center for
18 Environmental Health, to be allocated as follows:

19 **4.1.5.1.** Forty (40) percent of the total payment specified in Section
20 4.1.5 shall constitute a penalty pursuant to California Health & Safety Code § 25249.7(b), such
21 money to be apportioned by CEH in accordance with California Health & Safety Code §
22 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
23 Hazard Assessment).

24 **4.1.5.2.** Sixty percent (60%) shall constitute an ASP in lieu of civil
25 penalty to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of
26 Regulations, Title 11, § 3204. CEH intends to place these funds in CEH's Toxics and Youth
27 Fund and use them to: (1) support CEH programs and activities that seek to educate the public
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1 about nicotine, formaldehyde, and acetaldehyde in electronic cigarettes and other toxic chemicals
2 in consumer products that are marketed to youth; (2) expand its use of social media to
3 communicate with Californians about the risks of exposures to nicotine, formaldehyde, and
4 acetaldehyde and other toxic chemicals in the products they and their children use and about ways
5 to reduce those exposures; and (3) work with industries that market products to youth to reduce
6 exposures to nicotine, formaldehyde, and acetaldehyde and other toxic chemicals, and thereby
7 reduce the public health impacts and risks of exposures to nicotine, formaldehyde, and
8 acetaldehyde and other toxic chemicals in consumer products that are marketed to youth in
9 California. CEH shall obtain and maintain adequate records to document that ASPs are spent on
10 these activities and CEH agrees to provide such documentation to the Attorney General within
11 thirty (30) days of any request from the Attorney General.

12 **5. ENFORCEMENT OF CONSENT JUDGMENT**

13 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
14 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
15 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
16 shall provide Settling Defendant with a Notice of Violation and a copy of any test results which
17 purportedly support CEH's Notice of Violation. The Parties shall then meet and confer regarding
18 the basis for CEH's anticipated motion or application in an attempt to resolve it informally,
19 including providing Settling Defendant with a reasonable opportunity of at least thirty (30) days
20 to cure any alleged violation. The prevailing party on any motion to enforce this Consent
21 Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result of such
22 motion or application. This Consent Judgment may only be enforced by the Parties.

23 **6. MODIFICATION OF CONSENT JUDGMENT**

24 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
25 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.
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1 **7. CLAIMS COVERED AND RELEASE**

2 **7.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting
3 in the public interest and Settling Defendant and Settling Defendant’s parents, officers, directors,
4 shareholders, divisions, subdivisions, subsidiaries, related corporate entities, and their respective
5 successors and assigns (“Defendant Releasees”) and all entities to whom they distribute or sell or
6 have distributed or sold Covered Products including, but not limited to, distributors, wholesalers,
7 customers, retailers, franchisees, cooperative members, and licensees (“Downstream Defendant
8 Releasees”), of all claims alleged in the Complaint in this Action arising from any violation of
9 Proposition 65 that have been or could have been asserted in the public interest against Settling
10 Defendant, Defendant Releasees, and Downstream Defendant Releasees, regarding the failure to
11 warn about exposure to nicotine in the Covered Products manufactured, distributed, or sold by
12 Settling Defendant prior to the Effective Date.

13 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged
14 in the Complaint against Settling Defendant, Defendant Releasees, and Downstream Defendant
15 Releasees arising from any violation of Proposition 65 that have been or could have been asserted
16 regarding the failure to warn about exposure to nicotine in connection with Covered Products
17 manufactured, distributed, or sold by Settling Defendant prior to the Effective Date.

18 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant,
19 Defendant Releasees, and the Downstream Defendant Releasees shall constitute compliance with
20 Proposition 65 by Settling Defendant, Defendant Releasees, and Downstream Defendant
21 Releasees with respect to any alleged failure to warn about nicotine in Covered Products
22 manufactured, distributed, or sold by Settling Defendant after the Effective Date.

23 **8. PROVISION OF NOTICE**

24 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
25 notice shall be sent by first class and electronic mail as follows:

26 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
27 receive notices pursuant to this Consent Judgment shall be:
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1 Phillip Daman
2 Daman and Associates, LLP
3 1455 Pennsylvania Ave, Suite 400
4 Washington, D.C., 20004
5 phillip.daman@damanllp.com

6 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
7 this Consent Judgment shall be:

8 Mark Todzo
9 Lexington Law Group
10 503 Divisadero Street
11 San Francisco, CA 94117
12 mtodzo@lexlawgroup.com

13 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
14 sending the other Parties notice by first class and electronic mail.

15 **9. COURT APPROVAL**

16 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
17 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
18 Settling Defendant shall support approval of such Motion.

19 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
20 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
21 purpose.

22 **10. GOVERNING LAW AND CONSTRUCTION**

23 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
24 and enforced in accordance with the laws of the State of California.

25 **11. ENTIRE AGREEMENT**

26 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
27 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
28 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
merged herein and therein.

11.2. There are no warranties, representations, or other agreements between CEH and
Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,

1 express or implied, other than those specifically referred to in this Consent Judgment have been
2 made by any Party hereto.

3 **11.3.** No other agreements not specifically contained or referenced herein, oral or
4 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
5 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
6 any of the Parties hereto only to the extent that they are expressly incorporated herein.

7 **11.4.** No supplementation, modification, waiver, or termination of this Consent
8 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

9 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
10 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
11 such waiver constitute a continuing waiver.

12 **12. RETENTION OF JURISDICTION**

13 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
14 Consent Judgment.

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

16 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
17 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
18 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

19 **14. NO EFFECT ON OTHER SETTLEMENTS**

20 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
21 against another entity on terms that are different from those contained in this Consent Judgment.

22 **15. EXECUTION IN COUNTERPARTS**

23 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
24 means of facsimile, which taken together shall be deemed to constitute one document.

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1 **IT IS SO STIPULATED:**

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3 **CENTER FOR ENVIRONMENTAL HEALTH**

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Charlie Pizarro
Associate Director

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9 **MADVAPES, LLC**

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Signature

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Printed Name

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Title

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20 **IT IS SO ORDERED:**

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Dated: _____, 2017

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Judge of the Superior Court

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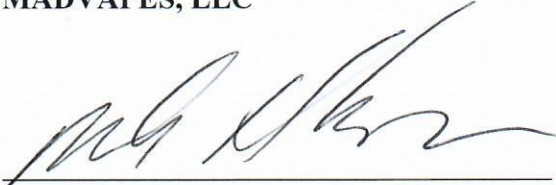
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IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

MADVAPES, LLC



Signature

Mark Hoogendoorn
Printed Name

Organizer / member
Title

IT IS SO ORDERED:

Dated: _____, 2017

Judge of the Superior Court