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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 MR. GOOD**
21) **VAPE LLC**
22)
23 VAPE REVOLUTION LLC, et al.,)
24)
25 Defendants.)
26)
27)
28)

1 INTRODUCTION

1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental Health, a non-profit corporation (“CEH”), and Mr. Good Vape 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 March 18, 2015, CEH served a 60-Day Notice of Violation (the “Notice”)
2 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986, California
3 Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Settling Defendant, the California
4 Attorney General, the District Attorneys of every County in the State of California, and the City
5 Attorneys for every City in the 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 has at various times employed ten (10) or
9 more persons and that manufactures, distributes, and/or sells Covered Products (as defined
10 herein) in the State of California or has done so in the past.

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

18 **1.5.** The Parties enter into this Consent Judgment as a full and final settlement of all
19 claims which were or could have been raised in the Complaint arising out of the facts or conduct
20 related to Settling Defendant alleged therein. By execution of this Consent Judgment and
21 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
22 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
23 admission by the Parties of any fact, conclusion of law, or violation of law. Settling Defendant
24 denies the material, factual, and legal allegations in the Notice and Complaint and expressly
25 denies any wrongdoing whatsoever. Except as specifically provided herein, nothing in this
26 Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any
27 of the Parties may have in this or any other pending or future legal proceedings. 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 electronic
5 cigarette devices manufactured, distributed, and/or sold by Settling Defendant in California.

6 **2.2.** “Effective Date” means the date on which the Court enters this Consent
7 Judgment.

8 **3. INJUNCTIVE RELIEF**

9 **3.1. Clear and Reasonable Warnings for Covered Products.** As of the Effective
10 Date, no Covered Product may be manufactured for sale, distributed or sold in California unless
11 such Covered Product has a clear and reasonable warning on the outer label of the Product. The
12 warning shall state the following:

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

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

1 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** In an
2 effort to ensure that consumers receive clear and reasonable warnings in compliance with
3 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
4 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
5 materials by certified mail to each of its California retailers or distributors to whom Settling
6 Defendant reasonably believes had nicotine-containing Covered Products without the warning set
7 forth in Section 3.1 prior to the Effective Date. Such warning materials shall include a reasonably
8 sufficient number of stickers in order to permit the retailer or distributor to affix the warning on
9 each Covered Product such customer has purchased from Settling Defendant. The warning
10 stickers shall contain the warning language set forth in Section 3.1 above. The warning materials
11 shall also include a letter of instruction for the placement of the stickers, and a Notice and
12 Acknowledgment postcard.

13 **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
14 eligible for a waiver of the additional penalty/payment in lieu of penalty 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 Liquid Products manufactured for sale in California shall be manufactured with child
23 proof caps in accordance with the standards set forth in 16 C.F.R. § 1700.15(b).

24 **3.2.1.2.** Within ninety (90) days following the Effective Date, all
25 Covered Liquid Products manufactured for sale in California shall be manufactured with flow
26 restrictions as described in 16 C.F.R. § 1700.15(d).

1 **3.2.2. Prohibition on Sales and Advertising to Minors.** A Settling Defendant
2 opting to participate in Section 3.2 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 **3.2.2.1.** 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 **3.2.2.2.** Settling Defendant shall not sell flavored cartridges or any
13 substance to use with Covered Products or other e-cigarettes that are targeted to appeal to minors.

14 **3.2.2.3.** Settling Defendant shall not use advertisements that target
15 minors. Specifically, Settling Defendant will not use models or images of people that appear to
16 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended
17 and designed to appeal to people under the legal smoking age in advertisements or promotional
18 materials that appear in California, including on the Internet. Additionally, Settling Defendant
19 will not: (a) advertise in any media that has more than 25% under 18 readership; (b) utilize any
20 form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using
21 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are
22 designated as prohibiting patrons under the age of 18.

23 **3.2.3. Prohibition on Health and Safety Claims.** A Settling Defendant opting
24 to participate in Section 3.2 shall not make health and or safety claims unless such claims have
25 been reviewed and approved by the Federal Food and Drug Administration. Examples of
26 prohibited claims include the following:

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 \$23,000, which shall
10 be paid and allocated as set forth in this Section and in more detail on Exhibit A:

11 **4.1.1.** \$740 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 (25% to CEH and 75% to the State of California’s Office of
14 Environmental Health Hazard Assessment). This amount shall be paid in one (1) separate check
15 on the date set forth in Exhibit A and shall be made payable to the “Center for Environmental
16 Health.”

17 **4.1.2.** \$1,110 as a payment in lieu of civil penalty pursuant to California Health &
18 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
19 such funds to continue its work educating and protecting people from exposures to toxic
20 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
21 Judgment and to purchase and test Settling Defendant’s Products to confirm compliance. In
22 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
23 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
24 educate and protect the public from exposures to toxic chemicals. The method of selection of
25 such groups can be found at the CEH website at www.ceh.org/justicefund. This amount shall be
26 paid in one (1) separate check on the date set forth in Exhibit A and shall be made payable to the
27 “Center for Environmental Health.”

1 **4.1.3.** \$21,150 as a reimbursement of a portion of CEH’s reasonable attorneys’
2 fees and costs. This amount shall be divided into two amounts: (1) \$18,850 to the Lexington Law
3 Group; and (2) \$2,300 to the Center for Environmental Health. These amounts shall be paid in
4 one (1) check made payable to the “Center for Environmental Health” and two (2) separate
5 checks made payable to the “Lexington Law Group” on the dates set forth in Exhibit A.

6 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be delivered on or
7 before the dates set forth in Exhibit A. All checks shall be delivered to Mark Todzo at Lexington
8 Law Group at the address set forth in Section 8.1.2.

9 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
10 one or more of the optional provisions in Section 3.2 in accordance with that Section, within
11 ninety (90) days following the Effective Date, Settling Defendant must make an additional
12 payment for each provision not certified, as follows: (i) \$4,000 if Settling Defendant elects to not
13 participate in Section 3.2.1; (ii) \$4,000 if Settling Defendant elects to not participate in Section
14 3.2.2; and (iii) \$4,000 if Settling Defendant elects to not participate in Section 3.2.3. Each of
15 these payments shall be paid in two separate checks, each payable to the “Center for
16 Environmental Health,” to be allocated as follows:

17 **4.1.5.1.** Forty percent (40%) of the total payment specified in Section
18 4.1.5 shall constitute a penalty pursuant to California Health & Safety Code § 25249.7(b), such
19 money to be apportioned by CEH in accordance with California Health & Safety Code §
20 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental Health
21 Hazard Assessment).

22 **4.1.5.2.** Sixty percent (60%) of the total payment specified in Section
23 4.1.5 shall constitute a payment in lieu of civil penalty pursuant to California Health & Safety
24 Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use such
25 funds to continue its work educating and protecting people from exposures to toxic chemicals.
26 CEH may also use a portion of such funds to monitor compliance with this Consent Judgment and
27 to purchase and test Settling Defendant’s Products to confirm compliance. In addition, as part of
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1 its Community Environmental Action and Justice Fund, CEH will use four percent (4%) of such
2 funds to award grants to grassroots environmental justice groups working to educate and protect
3 the public from exposures to toxic chemicals. The method of selection of such groups can be
4 found at the CEH website at www.ceh.org/justicefund.

5 **5. ENFORCEMENT OF CONSENT JUDGMENT**

6 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
7 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
8 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
9 shall provide Settling Defendant with a Notice of Violation and a copy of test results which
10 purportedly support CEH’s Notice of Violation. The Parties shall then meet and confer regarding
11 the basis for CEH’s anticipated motion or application in an attempt to resolve it informally,
12 including providing Settling Defendant with a reasonable opportunity of at least thirty (30) days
13 to cure any alleged violation. Should such attempts at informal resolution fail, CEH may file its
14 enforcement motion or application. The prevailing party on any motion to enforce this Consent
15 Judgment shall be entitled to its reasonable attorney’s fees and costs incurred as a result of such
16 motion or application. This Consent Judgment may only be enforced by the Parties.

17 **6. MODIFICATION OF CONSENT JUDGMENT**

18 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
19 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

20 **7. CLAIMS COVERED AND RELEASE**

21 **7.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting
22 in the public interest and Settling Defendant and Settling Defendant’s parents, officers, directors,
23 shareholders, members, employees, divisions, subdivisions, subsidiaries, and their respective
24 successors and assigns (“Defendant Releasees”) and all entities to whom they distribute or sell or
25 have distributed or sold Covered Products including, but not limited to, distributors, wholesalers,
26 customers, retailers, franchisees, cooperative members, and licensees (“Downstream Defendant
27 Releasees”), of all claims alleged in the Complaint in this Action arising from any violation of
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1 Proposition 65 that have been or could have been asserted in the public interest against Settling
2 Defendant and Downstream Defendant Releasees, regarding the failure to warn about exposure to
3 nicotine in the Covered Products manufactured, distributed, or sold by Settling Defendant prior to
4 the Effective Date.

5 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged
6 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from
7 or related to any violation of Proposition 65 that have been or could have been asserted regarding
8 the failure to warn about exposure to nicotine in connection with Covered Products manufactured,
9 distributed, or sold by Settling Defendant prior to the Effective Date.

10 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and
11 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
12 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn
13 about nicotine in Covered Products manufactured, distributed, or sold by Settling Defendant after
14 the Effective Date.

15 **8. PROVISION OF NOTICE**

16 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
17 notice shall be sent by first class and electronic mail as follows:

18 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
19 receive notices pursuant to this Consent Judgment shall be:

20 Paul M. Teinert
21 Ross Wersching & Wolcott LLP
22 3151 Airway Avenue, Suite S-1
23 Costa Mesa, CA 92626
24 pmt@rossllp.com

25 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
26 this Consent Judgment shall be:
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1 Mark Todzo
2 Lexington Law Group
3 503 Divisadero Street
4 San Francisco, CA 94117
5 mtodzo@lexlawgroup.com

6 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
7 sending the other Parties notice by first class and electronic mail.

8 **9. COURT APPROVAL**

9 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
10 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
11 Settling Defendant shall support approval of such Motion.

12 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
13 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
14 purpose.

15 **10. GOVERNING LAW AND CONSTRUCTION**

16 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
17 and enforced in accordance with the laws of the State of California.

18 **11. ENTIRE AGREEMENT**

19 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
20 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
21 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
22 merged herein and therein.

23 **11.2.** There are no warranties, representations, or other agreements between CEH and
24 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
25 express or implied, other than those specifically referred to in this Consent Judgment have been
26 made by any Party hereto.

27 **11.3.** No other agreements not specifically contained or referenced herein, oral or
28 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements

1 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
2 any of the Parties hereto only to the extent that they are expressly incorporated herein.

3 **11.4.** No supplementation, modification, waiver, or termination of this Consent
4 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

5 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
6 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
7 such waiver constitute a continuing waiver.

8 **12. RETENTION OF JURISDICTION**

9 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
10 Consent Judgment.

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

12 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
13 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
14 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

16 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
17 against another entity on terms that are different from those contained in this Consent Judgment.

18 **15. EXECUTION IN COUNTERPARTS**

19 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
20 means of facsimile, which taken together shall be deemed to constitute one document.

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22 **IT IS SO STIPULATED:**

23 **CENTER FOR ENVIRONMENTAL HEALTH**

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26 _____
27 Charlie Pizarro
28 Associate Director

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MR. GOOD VAPE LLC

Gary Riddle
Signature

Gary Riddle
Printed Name

President
Title

IT IS SO ORDERED:

Dated: _____, 2016

Judge of the Superior Court

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EXHIBIT A
Settlement Payments and Allocations

Total Settlement Payment: \$35,000

Payment 1: Total \$11,500 - Due 10 Days After the Effective Date

Payment 1 Allocations:

Civil Penalty:	\$740
Payment in Lieu of Civil Penalty:	\$1,110
Attorneys' Fees and Costs to CEH:	\$2,300
Attorneys' Fees and Costs to LLG:	\$7,350

Payment 2: Total \$11,500 - Due 60 Days After the Effective Date

Payment 2 Allocations:

Attorneys' Fees and Costs to LLG:	\$11,500
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Payment 3: Total \$12,000 (may be waived pursuant to Section 4.1.5) - Due 90 Days After the Effective Date

Payment 3 Allocations:

<i>Waivable</i> Civil Penalty:	\$4,800 total, or \$1,600 for each election made under Section 3.2.1, 3.2.2, or 3.2.3
<i>Waivable</i> Payment in Lieu of Civil Penalty:	\$7,200 total, or \$2,400 for each election made under Section 3.2.1, 3.2.2, or 3.2.3