



May 1, 2018

**VIA UPS and Electronic Mail**

Robert Crossley  
Cosmic Fog Vapors LLC  
d/b/a Next Day Vapor Products  
3115 Airway Ave  
Costa Mesa, CA 92626  
[cosmicfogvapors@gmail.com](mailto:cosmicfogvapors@gmail.com)

**WARNING LETTER**

Dear Robert Crossley:

This is to advise you that the Center for Tobacco Products of the U.S. Food and Drug Administration (FDA) and the U.S. Federal Trade Commission recently reviewed the website <http://www.nextdayvaporproducts.com>, from which you take orders for Whip'd Strawberry e-liquid products. FDA has determined that the e-liquid products listed there are manufactured and offered for sale or distribution to customers in the United States. Under section 201(rr) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. § 321(rr)), as amended by the Family Smoking Prevention and Tobacco Control Act, these products are tobacco products because they are made or derived from tobacco and intended for human consumption. Certain tobacco products, including e-liquids, are subject to FDA jurisdiction under section 901(b) of the FD&C Act (21 U.S.C. § 387a(b)). In addition, the FTC has reviewed your marketing for Whip'd Strawberry e-liquid under Section 5 of the FTC Act, 15 U.S.C. § 45(a).

**FD&C Act Misbranding Violation**

FDA has determined that your Whip'd Strawberry e-liquid is misbranded under section 903(a)(1) of the FD&C Act (21 U.S.C. § 387c(a)(1)) and/or section 903(a)(7)(A) of the FD&C Act (21 U.S.C. § 387c(a)(7)(A)) because its labeling and/or advertising is false or misleading.

FDA's investigation of the website <http://www.nextdayvaporproducts.com> revealed that it sells or distributes Whip'd Strawberry e-liquid with labeling and/or advertising that causes it to imitate food products, particularly ones that are marketed toward, and/or appealing to, children (see Exhibit A). Specifically, the labeling and/or advertising of the product looks substantially similar to Reddi Wip whipped cream, a food product that is marketed toward, and/or appealing to, children (see Exhibit B). For example, the labeling and/or advertising for Whip'd Strawberry e-liquid includes an illustration depicting a strawberry dunked in whipped cream, displays a color scheme that is substantially similar to the labeling and/or advertising of Reddi Wip whipped cream, and includes in the product name the terms "Whip'd" and "Strawberry." In addition, the labeling and/or advertising of Whip'd Strawberry e-liquid includes a cylindrical bottle and a swirled bottle cap that are substantially similar to Reddi Wip's bottle and cap, and your website describes the product as "Strawberries and Custard topped off with Whipped Cream." Further, Whip'd Strawberry e-liquid has a strong scent like strawberries and whipped cream. This

labeling and/or advertising causes the product to imitate food products, particularly ones that are marketed toward, and/or appealing to, children and is therefore misleading.



Exhibit A



Exhibit B

Children are at particular risk for ingesting e-liquid products with labeling and/or advertising that causes the product to imitate a food or beverage, particularly a food or beverage that is typically marketed toward, and/or appealing to, children. Moreover, children are at particular risk because exposure to the nicotine in the e-liquid product, even in relatively small amounts, could result in acute toxicity. Child poisonings due to the ingestion of liquid nicotine have recently increased substantially. Severe harms can occur in small children from ingestion of liquid nicotine, including death from cardiac arrest, as well as seizure, coma, and respiratory arrest.

Given that the labeling and/or advertising on Whip'd Strawberry e-liquid describes its nicotine content as 3mg/mL, with a total volume of 60mL, an accidental ingestion of slightly less than a teaspoon would reach the lower end of the fatal dose range for an average two-year-old. Meanwhile, an accidental ingestion of approximately 3% of a teaspoon would reach the lower end of the non-fatal acute toxicity range for an average two-year-old.

The FD&C Act provides, in part, that a tobacco product shall be deemed to be misbranded (1) if its labeling is false or misleading in any particular (section 903(a)(1)), or (2) if the tobacco product is distributed or offered for sale in any State and its advertising is false or misleading in any particular (section 903(a)(7)(A)). The labeling and/or advertising for Whip'd Strawberry e-liquid is misleading because it causes the product to imitate food products, particularly ones that are marketed toward, and/or appealing to, children. Therefore, the product is misbranded under section 903(a)(1) and/or 903(a)(7)(A) of the FD&C Act.



The FD&C Act violation discussed in this letter does not necessarily constitute an exhaustive list. You should immediately correct the violation that is referenced above, as well as violations that are the same as or similar to the one stated above, and take any necessary actions to bring your tobacco products into compliance with the FD&C Act.

It is your responsibility to ensure that your tobacco products and all related labeling and/or advertising on this website, on any other websites (including e-commerce, social networking, or search engine websites), in any other media in which you advertise comply with each applicable provision of the FD&C Act and FDA's implementing regulations. Failure to ensure full compliance with the FD&C Act may result in FDA initiating further action without notice, including, but not limited to, civil money penalties, criminal prosecution, seizure, and/or injunction. Please note that any adulterated and misbranded tobacco products offered for import into the United States are subject to detention and refusal of admission.

### **Unfair or Deceptive Marketing**

In addition, the Federal Trade Commission has reviewed the online marketing of Whip'd Strawberry e-liquid. Section 5 of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce. This prohibition includes practices that present unwarranted health or safety risks. Commission Policy Statement on Unfairness, 104 F.T.C. 1070, 1071 (1984) (*appended to Int'l Harvester Co.*, 104 F.T.C. 949 (1984)), *available at* <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>. Preventing practices that present unwarranted health and safety risks, particularly to children, is one of the Commission's highest priorities. FTC Strategic Plan for 2018-2022, at 6; *Philip Morris, Inc.*, 82 F.T.C. 16 (1973).

As noted above, Whip'd Strawberry e-liquid is marketed in packaging that resembles Reddi Wip whipped topping, a brand easily recognized by children. The Reddi Wip website offers suggestions for kid friendly after-school snacks, indicating that children are an intended market for Reddi Wip. Whip'd Strawberry e-liquid has a scent very similar to strawberries and whipped cream and the odor is detectable without opening the packaging. Given the significant number of serious child poisonings due to the ingestion of liquid nicotine, packaging Whip'd Strawberry e-liquid in a manner that is likely to be particularly appealing to young children could present an unwarranted risk to health and safety.

The FTC strongly urges you to review your marketing, including packaging, for Whip'd Strawberry e-liquid and similarly marketed products and to take swift and appropriate steps to protect consumers, especially young children.

### **Conclusion and Requested Actions**

With regard to the FD&C Act violation, please submit a written response to this letter within 15 working days from the date of receipt describing your corrective actions, including the dates on which you discontinued the violative labeling, advertising, sale, and/or distribution of these tobacco products and your plan for maintaining compliance with the FD&C Act. If you do not believe that your products are in violation of the FD&C Act, include your reasoning and any supporting information for our consideration. You can find the FD&C Act through links on FDA's homepage at <http://www.fda.gov>.

Please note your reference number, RW1800858, in your response and direct your response to the following address:

DPAL-WL Response, Office of Compliance and Enforcement  
FDA Center for Tobacco Products  
c/o Document Control Center  
Building 71, Room G335  
10903 New Hampshire Avenue  
Silver Spring, MD 20993-0002

If you have any questions, please contact Ele Ibarra-Pratt at (301) 796-9235 or via email at [CTPCCompliance@fda.hhs.gov](mailto:CTPCCompliance@fda.hhs.gov).

With regard to the FTC-related issues described in this letter, please notify Rosemary Rosso of the FTC via electronic mail at [rosso@ftc.gov](mailto:rosso@ftc.gov) within 15 days of receipt of this letter of the specific actions you have taken to address the FTC's concerns.

Sincerely,



Ann Simoneau, J.D.  
Director  
Office of Compliance and Enforcement  
Center for Tobacco Products



Mary K. Engle  
Associate Director  
Division of Advertising Practices  
Federal Trade Commission

**VIA Electronic Mail**

cc:

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