

1 LEXINGTON LAW GROUP
2 Mark N. Todzo, State Bar No. 168389
3 Abigail Blodgett, State Bar No. 278813
4 503 Divisadero Street
5 San Francisco, CA 94117
6 Telephone: (415) 913-7800
7 Facsimile: (415) 759-4112
8 mtodzo@lexlawgroup.com
9 ablodgett@lexlawgroup.com

10 Attorneys for Plaintiff
11 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

MAY 31 2016

CLERK OF THE SUPERIOR COURT
By Christina McLean Deputy

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA

12 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 15-794036
13)
14 Plaintiff,) [PROPOSED] CONSENT
15 v.) JUDGMENT AS TO LEAD BY
16 TOTALLY WICKED-E LIQUID (USA)) SALES, LLC
17 INCORPORATED, et al.,)
18 Defendants.)

19
20 **1. INTRODUCTION**

21 **1.1.** This Consent Judgment is entered into by Plaintiff Center for Environmental
22 Health, a non-profit corporation ("CEH"), and Lead by Sales, LLC ("Settling Defendant") to
23 settle claims asserted by CEH against Settling Defendant as set forth in the operative Complaint
24 in the matter *Center for Environmental Health v. Totally Wicked-E Liquid (USA) Incorporated, et*
25 *al.*, Alameda County Superior Court Case No. RG 15-794036 (the "Action"). CEH and Settling
26 Defendant are referred to collectively as the "Parties."
27

1 **1.2.** On September 2, 2015, CEH served four 60-Day Notices of Violation (the
2 “Notices”) relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986,
3 California Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Settling Defendant, the
4 California Attorney General, the District Attorneys of every County in the State of California, and
5 the City Attorneys for every City in State of California with a population greater than 750,000.
6 The Notices allege violations of Proposition 65 with regard to exposures to formaldehyde and
7 acetaldehyde resulting from use of Settling Defendant’s e-cigarette devices and the e-liquids used
8 in such devices (the “Products”).

9 **1.3.** On November 19, 2015, CEH filed the Action naming Settling Defendant.

10 **1.4.** Settling Defendant is a corporation that employs ten (10) or more persons and that
11 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
12 California or has done so in the past.

13 **1.5.** 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 Notices 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 Notices and Complaint with respect to
19 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

20 **1.6.** 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 and in the Notices. By execution of this Consent
23 Judgment and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of
24 law, or violation of law, nor shall compliance with the Consent Judgment constitute or be
25 construed as an admission by the Parties of any fact, conclusion of law, or violation of law.
26 Settling Defendant denies the material, factual, and legal allegations in the Notices and Complaint
27 and expressly denies any wrongdoing whatsoever. Except as specifically provided herein,

1 nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument,
2 or defense any of the Parties may have in this or any other pending or future legal proceedings.
3 This Consent Judgment is the product of negotiation and compromise and is accepted by the
4 Parties solely for purposes of settling, compromising, and resolving issues disputed in this Action.

5 **2. DEFINITIONS**

6 **2.1.** “Covered Products” means “Covered Liquid Products” and “Covered Device
7 Products.”

8 **2.2.** “Covered Liquid Products” means liquids that are designed for use with electronic
9 cigarette devices, also known as tanks and vape pens, that are manufactured, distributed, and/or
10 sold by Settling Defendant in California.

11 **2.3.** “Covered Device Products” means electronic cigarette devices, also known as
12 tanks and vape pens, which contain nicotine or are designed and intended for use with nicotine-
13 containing liquid, that are manufactured, distributed, and/or sold by Settling Defendant in
14 California.

15 **2.4.** “Effective Date” means the date on which the Court enters this Consent Judgment.

16 **3. INJUNCTIVE RELIEF**

17 **3.1. Clear and Reasonable Warnings for Covered Liquid Products.** As of the
18 Effective Date, no Covered Liquid Product may be manufactured for sale, distributed or sold in
19 California unless such Covered Liquid Product has a clear and reasonable warning on the outer
20 label of the product. The warning shall state the following:

21 **WARNING:** Use of this product can expose you to (a) chemicals, including
22 formaldehyde and acetaldehyde, known to the State of California to cause cancer,
23 and (b) chemicals, including nicotine, known to the State of California to cause
24 birth defects or other reproductive harm.

25 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
26 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be
27 prominently displayed on the Covered Liquid Product with such conspicuousness, as compared

28

1 with other words, statements, or designs as to render it likely to be read and understood by an
2 ordinary individual prior to sale. To the extent that other warning statements are included on the
3 outer label of a Covered Liquid Product, the warning required herein shall be separated from the
4 other warnings by a line that is at least the same height as a line of text on the label. For internet,
5 catalog, or any other sale into California where the consumer is not physically present and cannot
6 see a warning displayed on the Covered Liquid Product prior to purchase or payment, the warning
7 statement shall be displayed in such a manner that it is likely to be read and understood as being
8 applicable to the Covered Liquid Product being purchased prior to the authorization of or actual
9 payment. Placement of the warning statement at the bottom of an internet webpage that offers
10 multiple products for sale does not satisfy the requirements of this Section.

11 **3.1.1. Warnings for Covered Liquid Products in the Stream of Commerce.**

12 In an effort to ensure that consumers receive clear and reasonable warnings in compliance with
13 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
14 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
15 materials by certified mail to each of its California retailers or distributors, if any, to whom
16 Settling Defendant reasonably believes it sold Covered Liquid Products prior to the Effective
17 Date. Such warning materials shall include a reasonably sufficient number of stickers in order to
18 permit the retailer or distributor, if any, to affix the warning on each Covered Liquid Product such
19 customer has purchased from Settling Defendant. The warning stickers shall contain the warning
20 language set forth in Section 3.1 above. The warning materials shall also include a letter of
21 instruction for the placement of the stickers, and a Notice and Acknowledgment postcard.

22 **3.2. Clear and Reasonable Warnings for Covered Device Products.** As of the
23 Effective Date, no Covered Device Product may be manufactured for sale, distributed or sold in
24 California unless such Covered Device Product has a clear and reasonable warning on the outer
25 packaging of the product. For Covered Device Products, the warning shall state the following:

26 **WARNING:** Use of this product can expose you to (a) chemicals, including
27 formaldehyde and acetaldehyde, chemicals known to the State of California to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

cause cancer, and (b) chemicals, including nicotine, known to the State of California to cause birth defects or other reproductive harm.

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

3.2.1. Warnings for Covered Device Products in the Stream of Commerce.

In an effort to ensure that consumers receive clear and reasonable warnings in compliance with Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.2, within thirty (30) days following the Effective Date, Settling Defendant shall provide warning materials by certified mail to each of its California retailers or distributors, if any, to whom Settling Defendant reasonably believes it sold Covered Device Products prior to the Effective Date. Such warning materials shall include a reasonably sufficient number of stickers in order to permit the retailer or distributor, if any, to affix the warning on each Covered Device Product such customer has purchased from Settling Defendant. The warning stickers shall contain the warning language set forth in Section 3.2 above. The warning materials shall also include a letter of instruction for the placement of the stickers, and a Notice and Acknowledgment postcard.

1 **3.3. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
2 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in
3 Section 4.1.5 below, Settling Defendant shall undertake the additional actions below. If Settling
4 Defendant opts to be bound by this Section, Settling Defendant must provide CEH with a written
5 election stating which optional provision(s) it is agreeing to implement.

6 **3.3.1. Product Safety Requirements.** A Settling Defendant opting to participate
7 in Section 3.3 shall make the following changes to the Covered Products to increase the safety of
8 such products:

9 **3.3.1.1.** Within ninety (90) days following the Effective Date, all
10 Covered Products manufactured for sale in California shall be manufactured such that use of the
11 Covered Products will not produce detectable levels of formaldehyde and acetaldehyde.

12 **3.3.1.2.** Within ninety (90) days following the Effective Date, all
13 Covered Liquid Products manufactured for sale in California shall be manufactured with child
14 proof caps in accordance with the standards set forth in 16 C.F.R. § 1700.15(b) and flow
15 restrictions in accordance with the standard set forth in 16 C.F.R. § 1700.15(d).

16 **3.3.2. Prohibition on Sales and Advertising to Minors.** A Settling Defendant opting to
17 participate in Section 3.3 shall not sell Covered Products to persons younger than eighteen (18)
18 years of age and shall take at least the following steps to prevent the sale of Covered Products to
19 such persons:

20 **3.3.2.1.** Settling Defendant currently has integrated the LexisNexis®
21 Instant Age Verification system ([http://www.lexisnexis.com/risk/products/instant-age-
22 verification.aspx](http://www.lexisnexis.com/risk/products/instant-age-verification.aspx)) into its Internet eCommerce store to prevent purchases by underage persons.
23 Settling Defendant shall (a) continue to implement this system for checking the age of persons
24 who purchase Covered Products, or (b) at Settling Defendant's option, change to another system
25 that is at least as effective.

26 **3.3.2.2.** Settling Defendant shall not use advertisements that target
27
28

1 persons under the age of eighteen (18). Specifically, Settling Defendant will not use cartoons, art,
2 fashion, or music that is intended and designed to appeal to people under the legal smoking age of
3 eighteen (18) in advertisements or promotional materials that appear in California, including on
4 the Internet. Additionally, Settling Defendant will not: (a) advertise in any media that has more
5 than 25% under 18 readership; (b) utilize any form of outdoor advertising within 1,000 feet of any
6 school or playground; (c) buy paid advertising services from Instagram (although Settling
7 Defendant may maintain an Instagram account and post on it); and (d) sponsor any athletic,
8 musical or other cultural events unless such events are designated as prohibiting patrons under the
9 age of eighteen (18).

10 **3.3.3. Prohibition on Health and Safety Claims.** A Settling Defendant opting
11 to participate in Section 3.3 shall not make health and or safety claims unless such claims have
12 been reviewed and approved by the Federal Food and Drug Administration. Examples of
13 prohibited claims include the following:

14 **3.3.3.1.** Settling Defendant shall not advertise Covered Products as
15 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
16 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

17 **3.3.3.2.** Settling Defendant shall not make any claim that the
18 Covered Products do not expose users carcinogens or are better or safer than tobacco.

19 **3.3.3.3.** Settling Defendant shall not make any claim that the
20 Covered Products produce no second hand smoke.

21 **4. PAYMENTS**

22 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$42,500, which shall
23 be allocated as follows:

24 **4.1.1.** \$1,650 as a civil penalty pursuant to California Health & Safety Code §
25 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
26 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
27 Environmental Health Hazard Assessment).

28

1 **4.1.2.** \$2,475 as a payment in lieu of civil penalty pursuant to California Health &
2 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
3 such funds to continue its work educating and protecting people from exposures to toxic
4 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
5 Judgment and to purchase and test Settling Defendant's Products to confirm compliance. In
6 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
7 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
8 educate and protect the public from exposures to toxic chemicals. The method of selection of
9 such groups can be found at the CEH website at www.ceh.org/justicefund.

10 **4.1.3.** \$38,375 as a reimbursement of a portion of CEH's reasonable attorneys'
11 fees and costs. This amount shall be divided into two checks: (1) a check for \$34,125 shall be
12 made payable to Lexington Law Group; and (2) a check for \$4,250 shall be made payable to the
13 Center for Environmental Health.

14 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
15 separate checks, all to be delivered within ten (10) days following the Effective Date. The
16 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
17 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group
18 at the address set forth in Section 8.1.2.

19 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
20 one or more of the optional provisions in Section 3.3 in accordance with that Section, within
21 ninety (90) days following the Effective Date, Settling Defendant must make an additional
22 payment for each provision not certified, as follows: (i) \$8,000 if Settling Defendant elects to not
23 participate in Section 3.3.1; (ii) \$6,000 if Settling Defendant elects to not participate in Section
24 3.3.2; and (iii) \$6,000 if Settling Defendant elects to not participate in Section 3.3.3. Each of
25 these payments shall be paid in two separate checks, each payable to the Center for
26 Environmental Health, to be allocated as follows:

27 **4.1.5.1.** Forty percent (40%) shall constitute a civil penalty pursuant to

1 California Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in
2 accordance with California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State
3 of California's Office of Environmental Health Hazard Assessment).

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

14 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

1 **6. MODIFICATION OF CONSENT JUDGMENT**

2 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
3 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

4 **7. CLAIMS COVERED AND RELEASE**

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

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

21 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant
22 shall constitute compliance with Proposition 65 by Settling Defendant with respect to any alleged
23 failure to warn about Proposition-65-listed chemicals in Covered Products manufactured,
24 distributed, or sold by Settling Defendant after the Effective Date.

25 **8. PROVISION OF NOTICE**

26 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
27 notice shall be sent by first class and electronic mail as follows:

1 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
2 receive notices pursuant to this Consent Judgment shall be:

3 Brian S. Haughton
4 Barg Coffin Lewis & Trapp, LLP
5 350 California Street, 22nd Floor
6 San Francisco, CA 94104-1435
7 bsh@beltlaw.com

8 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
9 this Consent Judgment shall be:

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

15 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
16 sending the other Parties notice by first class and electronic mail.

17 **9. COURT APPROVAL**

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

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

24 **10. GOVERNING LAW AND CONSTRUCTION**

25 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
26 and enforced in accordance with the laws of the State of California.

27 **11. ENTIRE AGREEMENT**

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

1 **11.2.** There are no warranties, representations, or other agreements between CEH and
2 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
3 express or implied, other than those specifically referred to in this Consent Judgment have been
4 made by any Party hereto.

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

9 **11.4.** No supplementation, modification, waiver, or termination of this Consent
10 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

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

14 **12. RETENTION OF JURISDICTION**

15 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
16 Consent Judgment.

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

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

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

22 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
23 against another entity on terms that are different from those contained in this Consent Judgment.

24 **15. EXECUTION IN COUNTERPARTS**

25 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
26 means of facsimile, which taken together shall be deemed to constitute one document.

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

LEAD BY SALES, LLC

Signature

Printed Name

Title

IT IS SO ORDERED:

Dated: _____, 2016

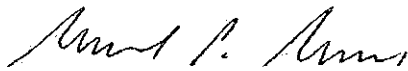
Judge of the Superior Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO STIPULATED:
CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

LEAD BY SALES, LLC



Signature

Michael Murray
Printed Name

Managing Director
Title

IT IS SO ORDERED:

Dated: 5/31, 2016

GEORGE C. HERNANDEZ, JR.
Judge of the Superior Court