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7 CENTER FOR ENVIRONMENTAL HEALTH

FILED
ALAMEDA COUNTY

SEP - 6 2017

CLERK OF THE SUPERIOR COURT
By *[Signature]* Deputy

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

12 CENTER FOR ENVIRONMENTAL HEALTH,)

13 Plaintiff,)

14 v.)

15 TOTALLY WICKED-E LIQUID (USA))
16 INCORPORATED, et al.,)

17 Defendants.)
18)

Case No. RG 15-794036

**[PROPOSED] CONSENT
JUDGMENT AS TO EONSMOKE
LLC**

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 Defendant Eonsmoke LLC (“Settling Defendant”)
23 to settle claims asserted by CEH against Settling Defendant as set forth in the operative
24 Complaint in the matter *Center for Environmental Health v. Totally Wicked-E Liquid (USA)*
25 *Incorporated, et al.*, Alameda County Superior Court Case No. RG 15-794036 (the “Action”).
26 CEH and Settling Defendant are referred to collectively as the “Parties.”
27

1 **1.2.** On November 19, 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. On February 17, 2016, CEH
10 named Settling Defendant as a defendant in the Action via a Doe Amendment.

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

14 **1.5.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
15 Court has jurisdiction over the allegations of violations contained in the Notices and Complaint
16 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)
17 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
18 Consent Judgment as a full and final resolution of all claims which were or could have been
19 raised in the Complaint based on the facts alleged in the Notices and Complaint with respect to
20 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

21 **1.6.** The Parties enter into this Consent Judgment as a full and final settlement of all
22 claims which were or could have been raised in the Complaint arising out of the facts or conduct
23 related to Settling Defendant alleged therein and in the Notices. By execution of this Consent
24 Judgment and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of
25 law, or violation of law, nor shall compliance with the Consent Judgment constitute or be
26 construed as an admission by the Parties of any fact, conclusion of law, or violation of law.
27 Settling Defendant denies the material, factual, and legal allegations in the Notices and Complaint

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

6 **2. DEFINITIONS**

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

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

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

16 **2.4.** “Effective Date” means the date on which the Court enters this Consent Judgment.

17 **3. INJUNCTIVE RELIEF**

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

22 **WARNING:** Use of this product will expose you to formaldehyde and
23 acetaldehyde, chemicals known to the State of California to cause cancer.

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

10 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** In an
11 effort to ensure that consumers receive clear and reasonable warnings in compliance with
12 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
13 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
14 materials by certified mail to each of its California retailers or distributors to whom Settling
15 Defendant reasonably believes sold Covered Products prior to the Effective Date. Such warning
16 materials shall include a reasonably sufficient number of stickers in order to permit the retailer or
17 distributor to affix the warning on each Covered Product such customer has purchased from
18 Settling Defendant. The warning stickers shall contain the warning language set forth in Section
19 3.1 above. The warning materials shall also include a letter of instruction for the placement of the
20 stickers, and a Notice and Acknowledgment postcard.

21 **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
22 eligible for any waiver of the additional civil penalty/additional settlement payments set forth in
23 Section 4.1.5 below, Settling Defendant shall undertake one or more of the additional actions
24 below. If Settling Defendant opts to be bound by this Section, Settling Defendant must provide
25 CEH with a written election stating which optional provision(s) it is agreeing to implement within
26 ninety (90) days following the Effective Date.

1 **3.2.1. Product Reformulation.** Within ninety (90) days following the Effective
2 Date, all Covered Products manufactured for sale in California shall be manufactured such that
3 use of the Covered Products will not produce detectable levels of formaldehyde and acetaldehyde.

4 **3.2.2. Product Safety Requirements.** If Settling Defendant opts to participate in
5 Section 3.2, Settling Defendant shall make the following changes to the Covered Products to
6 increase the safety of such products:

7 **3.2.2.1.** Within ninety (90) days following the Effective Date, all
8 Covered Liquid Products manufactured for sale in California shall be manufactured with child
9 proof caps in accordance with the standards set forth in 16 C.F.R. § 1700.15(b) and flow
10 restrictions in accordance with the standard set forth in 16 C.F.R. § 1700.15(d).

11 **3.2.2.2.** Within ninety (90) days following the Effective Date, all
12 Covered Products manufactured for sale in California shall be manufactured without diacetyl in
13 the Covered Products.

14 **3.2.3. Prohibition on Sales and Advertising to Minors.** Within ninety (90)
15 days following the Effective Date, if Settling Defendant opts to participate in Section 3.2, Settling
16 Defendant shall not sell Covered Products to persons younger than eighteen (18) years of age and
17 shall take reasonable steps to prevent the sale of Covered Products to such persons, including, but
18 not limited to the following measures:

19 **3.2.3.1.** Settling Defendant shall implement one or more systems for
20 checking the age of persons who purchase Covered Products on the Internet or in person. The
21 system shall include age verification by requiring and checking an official government
22 identification card or verifying through a reputable credit agency the age of anyone who
23 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who
24 purchases in person.

25 **3.2.3.2.** Settling Defendant shall not use advertisements that target
26 minors. Specifically, Settling Defendant will not use models or images of people that appear to
27 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended
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1 and designed to appeal to people under the legal smoking age in advertisements or promotional
2 materials that appear in California, including on the Internet. Additionally, Settling Defendant
3 will not: (a) advertise in any media that has more than 25% under 18 readership; (b) utilize any
4 form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using
5 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are
6 designated as prohibiting patrons under the age of eighteen (18).

7 **3.2.4. Prohibition on Health and Safety Claims.** Within ninety (90) days
8 following the Effective Date, if Settling Defendant opts to participate in Section 3.2, Settling
9 Defendant shall not make health and or safety claims unless such claims have been reviewed and
10 approved by the Federal Food and Drug Administration. Examples of prohibited claims include
11 the following:

12 **3.2.4.1.** Settling Defendant shall not advertise Covered Products as
13 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
14 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

15 **3.2.4.2.** Settling Defendant shall not make any claim that the
16 Covered Products do not expose users carcinogens or are better or safer than tobacco.

17 **3.2.4.3.** Settling Defendant shall not make any claim that the
18 Covered Products produce no second hand smoke.

19 **4. PAYMENTS**

20 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$10,000, which shall
21 be allocated as follows:

22 **4.1.1.** \$1,314 as a civil penalty pursuant to California Health & Safety Code §
23 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
24 Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of
25 Environmental Health Hazard Assessment).

26 **4.1.2.** \$986 as an additional settlement payment (“ASP”) in lieu of civil penalty
27 to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations,

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1 Title 11, § 3204. CEH intends to place these funds in CEH's Toxics and Youth Fund and use
2 them to: (1) support CEH programs and activities that seek to educate the public about nicotine,
3 formaldehyde, and acetaldehyde in electronic cigarettes and other toxic chemicals in consumer
4 products that are marketed to youth; (2) expand its use of social media to communicate with
5 Californians about the risks of exposures to nicotine, formaldehyde, and acetaldehyde and other
6 toxic chemicals in the products they and their children use and about ways to reduce those
7 exposures; and (3) work with industries that market products to youth to reduce exposures to
8 nicotine, formaldehyde, and acetaldehyde and other toxic chemicals, and thereby reduce the
9 public health impacts and risks of exposures to nicotine, formaldehyde, and acetaldehyde and
10 other toxic chemicals in consumer products that are marketed to youth in California. CEH shall
11 obtain and maintain adequate records to document that ASPs are spent on these activities and
12 CEH agrees to provide such documentation to the Attorney General within thirty (30) days of any
13 request from the Attorney General.

14 **4.1.3.** \$7,700 as a reimbursement of a portion of CEH's reasonable attorneys'
15 fees and costs.

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

22 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
23 one or more of the optional provisions in Section 3.2 in accordance with that Section, within
24 ninety (90) days following the Effective Date, Settling Defendant must make an additional
25 payment for each provision not certified, as follows: (i) \$4,500 if Settling Defendant elects to not
26 participate in Section 3.2.1; (ii) \$4,500 if Settling Defendant elects to not participate in Section
27 3.2.2; (iii) \$4,500 if Settling Defendant elects to not participate in Section 3.2.3; and (iv) \$4,500 if
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1 Settling Defendant elects to not participate in Section 3.2.4. Each of these payments shall be paid
2 in two separate checks, each payable to the Center for Environmental Health, to be allocated as
3 follows:

4 **4.1.5.1.** Forty percent (40%) shall constitute a civil penalty pursuant to
5 California Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in
6 accordance with California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State
7 of California's Office of Environmental Health Hazard Assessment).

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

23 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

8 **6. MODIFICATION OF CONSENT JUDGMENT**

9 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
10 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

11 **7. CLAIMS COVERED AND RELEASE**

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

23 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged
24 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from
25 any violation of Proposition 65 that have been or could have been asserted regarding the failure to
26 warn about exposure to formaldehyde and/or acetaldehyde in connection with Covered Products
27 manufactured, distributed, or sold by Settling Defendant prior to the Effective Date.

1 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and
2 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
3 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn
4 about formaldehyde and/or acetaldehyde exposures from the Covered Products manufactured,
5 distributed, or sold by Settling Defendant after the Effective Date.

6 **8. PROVISION OF NOTICE**

7 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
8 notice shall be sent by first class and electronic mail as follows:

9 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
10 receive notices pursuant to this Consent Judgment shall be:

11 Andrea Ruth Bird
12 Bird Law Group, PC
13 2151 Michelson Drive, Suite 164
14 Irvine, CA 92612
15 abird@birdlg.com

16 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
17 this Consent Judgment shall be:

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

23 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
24 sending the other Parties notice by first class and electronic mail.

25 **9. COURT APPROVAL**

26 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
27 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
28 Settling Defendant shall support approval of such Motion.

1 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
2 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
3 purpose.

4 **10. GOVERNING LAW AND CONSTRUCTION**

5 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
6 and enforced in accordance with the laws of the State of California.

7 **11. ENTIRE AGREEMENT**

8 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
9 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
10 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
11 merged herein and therein.

12 **11.2.** There are no warranties, representations, or other agreements between CEH and
13 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
14 express or implied, other than those specifically referred to in this Consent Judgment have been
15 made by any Party hereto.

16 **11.3.** No other agreements not specifically contained or referenced herein, oral or
17 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
18 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
19 any of the Parties hereto only to the extent that they are expressly incorporated herein.

20 **11.4.** No supplementation, modification, waiver, or termination of this Consent
21 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

22 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
23 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
24 such waiver constitute a continuing waiver.

25 **12. RETENTION OF JURISDICTION**

26 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.

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

2 **13.1.** 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 **14. NO EFFECT ON OTHER SETTLEMENTS**

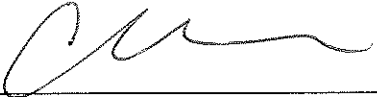
6 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
7 against another entity on terms that are different from those contained in this Consent Judgment.

8 **15. EXECUTION IN COUNTERPARTS**

9 **15.1.** 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**

13
14 
15 _____

16 Charlie Pizarro
17 Associate Director

18 **EONSMOKE LLC**

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21 _____
22 Signature

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24 _____
25 Printed Name

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27 Title

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13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT

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

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

IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

EONSMOKE LLC

Signature 05/09/17

Michael Tolmach

Printed Name

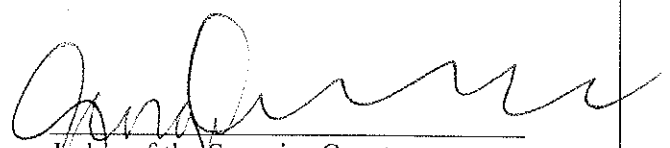
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IT IS SO ORDERED:

Dated: 9/6, 2017



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