

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

6 Attorneys for Plaintiff  
7 CENTER FOR ENVIRONMENTAL HEALTH

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 PAX LABS, INC.**  
16 )  
17 TOTALLY WICKED-E LIQUID (USA) )  
18 INCORPORATED, et al., )  
19 Defendants. )

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 Pax Labs, Inc. (“Settling Defendant”) to settle  
23 claims asserted by CEH against Settling Defendant as set forth in the operative Complaint in the  
24 matter *Center for Environmental Health v. Totally Wicked-E Liquid (USA) Incorporated, et al.*,  
25 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 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 regard to exposures to formaldehyde resulting  
7 from use of Settling Defendant’s e-cigarette devices (the “Products”). The Products are sold  
8 with, and/or for use with nicotine-containing liquid. Although potential exposures to nicotine are  
9 neither covered by the Notice nor complaint, use of the Products expose users to nicotine, which  
10 is a chemical known to the state to cause birth defects or other reproductive harm.

11           **1.3.**    On November 19, 2015, CEH filed the Action, naming Settling Defendant as a  
12 defendant in the Action.

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

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

23           **1.6.**    The Parties enter into this Consent Judgment as a full and final settlement of all  
24 claims which were or could have been raised in the Complaint arising out of the facts or conduct  
25 related to Settling Defendant alleged therein and in the Notice. By execution of this Consent  
26 Judgment and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of  
27 law, or violation of law, nor shall compliance with the Consent Judgment constitute or be  
28

1 construed as an admission by the Parties of any fact, conclusion of law, or violation of law.  
2 Settling Defendant denies the material, factual, and legal allegations in the Notice and Complaint  
3 and expressly denies any wrongdoing whatsoever. Except as specifically provided herein,  
4 nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument,  
5 or defense any of the Parties may have in this or any other pending or future legal proceedings.  
6 This Consent Judgment is the product of negotiation and compromise and is accepted by the  
7 Parties solely for purposes of settling, compromising, and resolving issues disputed in this Action.

8 **2. DEFINITIONS**

9 **2.1.** “Covered Products” means electronic cigarette devices, also known as tanks and  
10 vape pens, which contain nicotine or are designed and intended for use with nicotine-containing  
11 liquid, that are manufactured, distributed, and/or sold by Settling Defendant in California.

12 **2.2.** “Effective Date” means the date on which the Court enters this Consent  
13 Judgment.

14 **3. INJUNCTIVE RELIEF**

15 **3.1. Clear and Reasonable Warnings for Covered Products.** Within six months  
16 following the Effective Date, no Covered Product may be manufactured for sale, distributed, or  
17 sold in California unless such Covered Product has a clear and reasonable warning on the outer  
18 packaging of the Product. The warning shall state the following:

19 **WARNING:** This product contains chemicals known to the State of  
20 California to cause cancer and birth defects or other reproductive harm.

21 The warning shall not be preceded by, surrounded by, or include any additional words or phrases  
22 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be  
23 prominently displayed on the outer packaging of the Covered Product with such conspicuousness,  
24 as compared with other words, statements, or designs as to render it likely to be read and  
25 understood by an ordinary individual prior to sale. To the extent that other warning statements  
26 are included on the outer packaging of a Covered Product, the warning required herein shall be  
27 separated from the other warnings by a line that is at least the same height as a line of text on the

1 label. For internet, catalog, or any other sale where the consumer is not physically present and  
2 cannot see a warning displayed on the Covered Product prior to purchase or payment, the warning  
3 statement shall be displayed in such a manner that it is likely to be read and understood as being  
4 applicable to the Covered Product being purchased prior to the authorization of or actual  
5 payment. Placement of the warning statement at the bottom of an internet webpage that offers  
6 multiple products for sale does not satisfy the requirements of this Section.

7 **3.1.1. Interim Label Warning for Covered Products.** As of the Effective Date  
8 up through the date the warning required by Section 3.1 above takes effect, no Covered Product  
9 may be manufactured for sale, distributed, or sold in California unless such Covered Product has  
10 a clear and reasonable warning on the outer packaging of the Product. The warning shall state the  
11 following:

12 **WARNING:** This product contains chemicals known to the State of  
13 California to cause cancer or birth defects or other reproductive harm.

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

1                   **3.1.2. 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 sold Covered Products prior to the Effective Date. Such warning  
7 materials shall include a reasonably sufficient number of stickers in order to permit the retailer or  
8 distributor to affix the warning on each Covered Product such customer has purchased from  
9 Settling Defendant. The warning stickers shall contain the warning language set forth in Section  
10 3.1 above. The warning materials shall also include a letter of instruction for the placement of the  
11 stickers, and a Notice and Acknowledgment postcard.

12                   **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be  
13 eligible for any waiver of the additional civil penalty/payment in lieu of penalty payments set  
14 forth in Section 4.1.5 below, Settling Defendant shall undertake one or more of the additional  
15 actions below. If Settling Defendant opts to be bound by this Section, Settling Defendant must  
16 provide CEH with a written election stating which optional provision(s) it is agreeing to  
17 implement.

18                   **3.2.1. Product Reformulation.** Within ninety (90) days following the Effective  
19 Date, all Covered Products manufactured for sale in California shall be manufactured such that  
20 use of the Covered Products will not produce detectable levels of formaldehyde.

21                   **3.2.2. Product Safety Requirements.** A Settling Defendant opting to participate  
22 in Section 3.2 shall make the following change to the Covered Products to increase the safety of  
23 such products: Within ninety (90) days following the Effective Date, all Covered Products  
24 manufactured for sale in California shall be manufactured without diacetyl in the Covered  
25 Products.

26                   **3.2.3. Prohibition on Sales and Advertising to Minors.** A Settling Defendant  
27 opting to participate in Section 3.2 shall not sell Covered Products to persons younger than  
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1 eighteen (18) years of age and shall take reasonable steps to prevent the sale of Covered Products  
2 to such persons, including, but not limited to the following measures:

3 **3.2.3.1.** 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. The  
5 system shall include age verification by requiring and checking an official government  
6 identification card or verifying through a reputable credit agency the age of anyone who  
7 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who  
8 purchases in person. The system shall be put into place within ninety (90) days of the Effective  
9 Date.

10 **3.2.3.2.** Settling Defendant shall not use advertisements that target  
11 minors. Specifically, Settling Defendant will not use models or images of people that appear to  
12 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended  
13 and designed to appeal to people under the legal smoking age in advertisements or promotional  
14 materials that appear in California, including on the Internet. Additionally, Settling Defendant  
15 will not: (a) advertise in any media that has more than 25% under 18 readership; (b) utilize any  
16 form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using  
17 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are  
18 designated as prohibiting patrons under the age of eighteen (18).

19 **3.2.4. Prohibition on Health and Safety Claims.** A Settling Defendant opting  
20 to participate in Section 3.2 shall not make health and or safety claims unless such claims have  
21 been reviewed and approved by the Federal Food and Drug Administration. Examples of  
22 prohibited claims include the following:

23 **3.2.4.1.** Settling Defendant shall not advertise Covered Products as  
24 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting  
25 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

26 **3.2.4.2.** Settling Defendant shall not make any claim that the  
27 Covered Products do not expose users to carcinogens or are better or safer than tobacco.

1                                   **3.2.4.3.**           Settling Defendant shall not make any claim that the  
2 Covered Products produce no second hand smoke.

3       **4.       PAYMENTS**

4                   **4.1.**       Settling Defendant shall initially pay to CEH the total sum of \$22,500, which shall  
5 be allocated as follows:

6                           **4.1.1.**   \$950 as a civil penalty pursuant to California Health & Safety Code §  
7 25249.7(b), such money to be apportioned by CEH in accordance with California Health &  
8 Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of  
9 Environmental Health Hazard Assessment).

10                           **4.1.2.**   \$1,425 as a payment in lieu of civil penalty pursuant to California Health &  
11 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use  
12 such funds to continue its work educating and protecting people from exposures to toxic  
13 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent  
14 Judgment and to purchase and test Settling Defendant’s Products to confirm compliance. In  
15 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four  
16 percent (4%) of such funds to award grants to grassroots environmental justice groups working to  
17 educate and protect the public from exposures to toxic chemicals. The method of selection of  
18 such groups can be found at the CEH website at [www.ceh.org/justicefund](http://www.ceh.org/justicefund).

19                           **4.1.3.**   \$20,125 as a reimbursement of a portion of CEH’s reasonable attorneys’  
20 fees and costs. This amount shall be divided into two checks: (1) a check for \$17,875 shall be  
21 made payable to Lexington Law Group; and (2) a check for \$2,250 shall be made payable to the  
22 Center for Environmental Health.

23                           **4.1.4.**   The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)  
24 separate checks, all to be delivered within ten (10) days following the Effective Date. The  
25 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center  
26 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group  
27 at the address set forth in Section 8.1.2.

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1                   **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with  
2 one or more of the optional provisions in Section 3.3 in accordance with that Section, within  
3 ninety (90) days following the Effective Date, Settling Defendant must make an additional  
4 payment for each provision not certified, as follows: (i) \$2,500 if Settling Defendant elects to not  
5 participate in Section 3.2.1; (ii) \$2,500 if Settling Defendant elects to not participate in Section  
6 3.2.2; (iii) \$2,500 if Settling Defendant elects to not participate in Section 3.2.3; and (iv) \$2,500 if  
7 Settling Defendant elects to not participate in Section 3.2.4. Each of these payments shall be paid  
8 in two separate checks, each payable to the Center for Environmental Health, to be allocated as  
9 follows:

10                   **4.1.5.1.** Forty percent (40%) shall constitute a civil penalty pursuant to  
11 California Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in  
12 accordance with California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State  
13 of California’s Office of Environmental Health Hazard Assessment).

14                   **4.1.5.2.** Sixty percent (60%) shall constitute a payment in lieu of civil  
15 penalty pursuant to California Health & Safety Code § 25249.7(b) and California Code of  
16 Regulations, Title 11, § 3203(b). CEH will use such funds to continue its work educating and  
17 protecting people from exposures to toxic chemicals. CEH may also use a portion of such funds  
18 to monitor compliance with this Consent Judgment and to purchase and test Settling Defendant’s  
19 Products to confirm compliance. In addition, as part of its Community Environmental Action and  
20 Justice Fund, CEH will use four percent (4%) of such funds to award grants to grassroots  
21 environmental justice groups working to educate and protect the public from exposures to toxic  
22 chemicals. The method of selection of such groups can be found at the CEH website at  
23 [www.ceh.org/justicefund](http://www.ceh.org/justicefund).

24                   **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

9 **6. MODIFICATION OF CONSENT JUDGMENT**

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

12 **7. CLAIMS COVERED AND RELEASE**

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

24 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged  
25 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from  
26 any violation of Proposition 65 that have been or could have been asserted regarding the failure to  
27

1 warn about exposure to formaldehyde in connection with Covered Products manufactured,  
2 distributed, or sold by Settling Defendant prior to the Effective Date.

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

8 **8. PROVISION OF NOTICE**

9 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the  
10 notice shall be sent by first class and electronic mail as follows:

11 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to  
12 receive notices pursuant to this Consent Judgment shall be:

13 Jeffrey D. Polsky  
14 Fox Rothschild LLP  
15 345 California Street, Suite 2200  
16 San Francisco, CA 94104  
17 jpolsky@foxrothschild.com

18 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to  
19 this Consent Judgment shall be:

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

25 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by  
26 sending the other Parties notice by first class and electronic mail.

27 **9. COURT APPROVAL**

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

28

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**

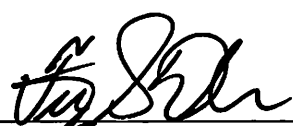
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**PAX LABS INC.**



\_\_\_\_\_  
Signature

*TIMOTHY S DANNER*

\_\_\_\_\_  
Printed Name

*VP FINANCE + COST SECRETARY*

\_\_\_\_\_  
Title

**IT IS SO ORDERED:**

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Judge of the Superior Court