

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

6 Attorneys for Plaintiff
7 CENTER FOR ENVIRONMENTAL HEALTH

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9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA
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13 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 15-794036
14 Plaintiff,)
15 v.) **[PROPOSED] CONSENT**
16 TOTALLY WICKED-E LIQUID (USA)) **JUDGMENT AS TO LOGIC**
INCORPORATED, et al.,) **TECHNOLOGY DEVELOPMENT**
17 Defendants.) **LLC**
18)
19)
20)

21 **1. INTRODUCTION**

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

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 may or may not contain nicotine or are designed and intended for use
14 with nicotine-containing liquid, that are manufactured, distributed, and/or sold by Settling
15 Defendant in 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 Liquid Products.** Within 45
19 days of the Effective Date, no Covered Liquid Product may be manufactured for sale, distributed
20 or sold in California unless such Covered Liquid Product has a clear and reasonable warning on
21 the outer label of the product. The warning shall state the following:

22 **WARNING:** Use of this product will expose you to chemicals known to
23 the State of California to cause cancer and birth defects or other
24 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
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1 with other words, statements, or designs as to render it likely to be read and understood by an
2 ordinary individual prior to exposure. To the extent that other warning statements are included on
3 the outer label of a Covered Liquid Product, the warning required herein shall be separated from
4 the other warnings by a spacing that is at least the same height as a line of text on the label. For
5 internet, catalog, or any other sale into California where the consumer is not physically present
6 and cannot see a warning displayed on the Covered Liquid Product prior to purchase or payment,
7 the warning statement shall be displayed in such a manner that it is likely to be read and
8 understood as being applicable to the Covered Liquid Product being purchased prior to the
9 authorization of or actual payment. Placement of the warning statement at the bottom of an
10 internet webpage that offers multiple products for sale does not satisfy the requirements of this
11 Section. The warnings required by this Section and Section 3.1.1 shall not be required if this
12 Court, any California Court of Appeal, the California Supreme Court, or the United States
13 Supreme Court determines that the Food and Drug Administration's regulation of Covered Liquid
14 Products completely preempts all potential Proposition 65 warnings.

15 **3.1.1. Warnings for Covered Liquid Products in the Stream of Commerce.**

16 In an effort to ensure that consumers receive clear and reasonable warnings in compliance with
17 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
18 within forty-five (45) days following the Effective Date, Settling Defendant shall provide warning
19 materials by certified mail to each of its California retailers or distributors to whom Settling
20 Defendant reasonably believes sold Covered Liquid Products prior to the Effective Date. Such
21 warning materials shall include a reasonably sufficient number of stickers in order to permit the
22 retailer or distributor to affix the warning on each Covered Liquid Product such customer has
23 purchased from Settling Defendant. The warning stickers shall contain the warning language set
24 forth in Section 3.1 above. The warning materials shall also include a letter of instruction for the
25 placement of the stickers, and a Notice and Acknowledgment postcard whereby the retailer or
26 distributor may acknowledge receipt of the stickers and letter of instruction. A retailer's or
27 distributor's failure to implement the instructions or to place the stickers shall not constitute a
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1 violation of this Consent Judgment by Settling Defendant, however, such failure by a distributor
2 or retailer shall constitute non-compliance with this Consent Judgment for purposes of Section
3 7.3 as to that distributor or retailer. Settling Defendant's compliance with this Section 3.1.1 shall
4 constitute compliance with Section 3.1 above with respect to Covered Products that have been
5 delivered to retailers or distributors prior to the Effective Date.

6 **3.2. Clear and Reasonable Warnings for Covered Device Products.** Within 45 days
7 of the Effective Date, no Covered Device Product may be manufactured for sale, distributed or
8 sold in California unless such Covered Device Product has a clear and reasonable warning on the
9 outer packaging of the product. For Covered Device Products, the warning shall state the
10 following:

11 **WARNING:** Use of this product will expose you to chemicals known to
12 the State of California to cause cancer and birth defects or other
13 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 Device Product with such
17 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
18 read and understood by an ordinary individual prior to exposure. To the extent that other warning
19 statements are included on the outer packaging of a Covered Device Product, the warning
20 required herein shall be separated from the other warnings by spacing that is at least the same
21 height as a line of text on the label. For internet, catalog, or any other sale into California where
22 the consumer is not physically present and cannot see a warning displayed on the Covered Device
23 Product prior to purchase or payment, the warning statement shall be displayed in such a manner
24 that it is likely to be read and understood as being applicable to the Covered Device Product being
25 purchased prior to the authorization of or actual payment. Placement of the warning statement at
26 the bottom of an internet webpage that offers multiple products for sale does not satisfy the
27 requirements of this Section. The warnings required by this Section and Section 3.2.1 shall not be

1 required if this Court, any California Court of Appeal, the California Supreme Court, or the
2 United States Supreme Court determines that the Food and Drug Administration's regulation of
3 Covered Liquid Products completely preempts all potential Proposition 65 warnings.

4 **3.2.1. Warnings for Covered Device Products in the Stream of Commerce.**

5 In an effort to ensure that consumers receive clear and reasonable warnings in compliance with
6 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.2,
7 within forty-five (45) days following the Effective Date, Settling Defendant shall provide warning
8 materials by certified mail to each of its California retailers or distributors to whom Settling
9 Defendant reasonably believes sold Covered Device Products prior to the Effective Date. Such
10 warning materials shall include a reasonably sufficient number of stickers in order to permit the
11 retailer or distributor to affix the warning on each Covered Device Product such customer has
12 purchased from Settling Defendant. The warning stickers shall contain the warning language set
13 forth in Section 3.2 above. The warning materials shall also include a letter of instruction for the
14 placement of the stickers, and a Notice and Acknowledgment postcard whereby the retailer or
15 distributor may acknowledge receipt of the stickers and letter of instruction. A retailer's or
16 distributor's failure to implement the instructions or to place the stickers shall not constitute a
17 violation of this Consent Judgment by Settling Defendant, however, such failure by a distributor
18 or retailer shall constitute non-compliance with this Consent Judgment for purposes of Section
19 7.3 as to that distributor or retailer. Settling Defendant's compliance with this Section 3.2.1 shall
20 constitute compliance with Section 3.2 above with respect to Covered Products that have been
21 delivered to retailers or distributors prior to the Effective Date.

22 **3.3. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
23 eligible for any waiver of the additional civil penalty/payment in lieu of penalty payments set
24 forth in Section 4.1.5 below, Settling Defendant shall undertake one or more of the additional
25 actions below. If Settling Defendant opts to be bound by this Section, Settling Defendant must
26 provide CEH with a written election stating which optional provision(s) it is agreeing to
27 implement within ninety (90) days following the Effective Date.

1 **3.3.3.2.** Settling Defendant shall not use advertisements that target
2 minors. Specifically, Settling Defendant will not use models or images of people that appear to
3 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended
4 and designed to appeal to people under the legal smoking age in advertisements or promotional
5 materials that appear in California, including on the Internet. Additionally, Settling Defendant
6 will not: (a) advertise in any media that has more than 25% under 18 readership; (b) utilize any
7 form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using
8 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are
9 designated as prohibiting patrons under the age of eighteen (18).

10 **3.3.4. Prohibition on Health and Safety Claims.** If Settling Defendant opts to
11 participate in Section 3.3, Settling Defendant shall not make health and or safety claims for
12 products manufactured or distributed for sale in California as of the Effective Date, unless such
13 claims have been reviewed and approved by the Federal Food and Drug Administration.
14 Examples of prohibited claims include the following:

15 **3.3.4.1.** Settling Defendant shall not advertise Covered Products as
16 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
17 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

18 **3.3.4.2.** Settling Defendant shall not make any claim that the
19 Covered Products do not expose users carcinogens or are better or safer than tobacco.

20 **3.3.4.3.** Settling Defendant shall not make any claim that the
21 Covered Products produce no second hand smoke.

22 **4. PAYMENTS**

23 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$55,000, which shall
24 be allocated as follows:

25 **4.1.1.** \$2,250 as a civil penalty pursuant to California Health & Safety Code §
26 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
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1 Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of
2 Environmental Health Hazard Assessment).

3 **4.1.2.** \$3,375 as a payment in lieu of civil penalty pursuant to California Health &
4 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
5 such funds to continue its work educating and protecting people from exposures to toxic
6 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
7 Judgment and to purchase and test Settling Defendant’s Products to confirm compliance. In
8 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
9 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
10 educate and protect the public from exposures to toxic chemicals. The method of selection of
11 such groups can be found at the CEH website at www.ceh.org/justicefund.

12 **4.1.3.** \$49,375 as a reimbursement of a portion of CEH’s reasonable attorneys’
13 fees and costs. This amount shall be divided into two checks: (1) a check for \$43,875 shall be
14 made payable to Lexington Law Group; and (2) a check for \$5,500 shall be made payable to the
15 Center for Environmental Health. Except as expressly provided for in this Consent Judgment,
16 CEH shall not be entitled to any other fees and costs as a prevailing party.

17 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
18 separate checks, all to be delivered within ten (10) days following the Effective Date. The
19 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
20 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group
21 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 3.3 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) \$6,250 if Settling Defendant elects to not
26 participate in Section 3.3.1; (ii) \$6,250 if Settling Defendant elects to not participate in Section
27 3.3.2; (iii) \$6,250 if Settling Defendant elects to not participate in Section 3.3.3; and (iv) \$6,250 if
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1 Settling Defendant elects to not participate in Section 3.3.4. 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 a payment in lieu of civil
9 penalty pursuant to California Health & Safety Code § 25249.7(b) and California Code of
10 Regulations, Title 11, § 3203(b). CEH will use such funds to continue its work educating and
11 protecting people from exposures to toxic chemicals. CEH may also use a portion of such funds
12 to monitor compliance with this Consent Judgment and to purchase and test Settling Defendant's
13 Products to confirm compliance. In addition, as part of its Community Environmental Action and
14 Justice Fund, CEH will use four percent (4%) of such funds to award grants to grassroots
15 environmental justice groups working to educate and protect the public from exposures to toxic
16 chemicals. The method of selection of such groups can be found at the CEH website at
17 www.ceh.org/justicefund.

18 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

3 **6. MODIFICATION OF CONSENT JUDGMENT**

4 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
5 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

6 **7. CLAIMS COVERED AND RELEASE**

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

18 **7.2.** CEH, for itself, and acting in the public interest pursuant to Health and Safety
19 Code § 25249.7(d), releases, waives, and forever discharges any and all claims alleged in the
20 Complaint against the Defendant Releasees and Downstream Defendant Releasees arising from
21 any claims that have been or could have been asserted regarding the failure to warn about
22 exposure to formaldehyde and/or acetaldehyde in connection with Covered Products
23 manufactured, distributed, or sold by Settling Defendant prior to the Effective Date.

24 **7.3.** Compliance with the terms of this Consent Judgment by the Defendant Releasees
25 and the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by the
26 Defendant Releasees and Downstream Defendant Releasees with respect to any alleged failure to
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1 warn about formaldehyde and/or acetaldehyde in Covered Products manufactured, distributed, or
2 sold by Settling Defendant after the Effective Date.

3 **8. PROVISION OF NOTICE**

4 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
5 notice shall be sent by first class and electronic mail as follows:

6 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
7 receive notices pursuant to this Consent Judgment shall be:

8 Bryan M. Haynes
9 Troutman Sanders LLP
10 1001 Haxall Point
11 Richmond, VA 23219
12 bryan.haynes@troutmansanders.com

13 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
14 this Consent Judgment shall be:

15 Mark Todzo
16 Lexington Law Group
17 503 Divisadero Street
18 San Francisco, CA 94117
19 mtodzo@lexlawgroup.com

20 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
21 sending the other Parties notice by first class and electronic mail.

22 **9. COURT APPROVAL**

23 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
24 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
25 Settling Defendant shall support approval of such Motion.

26 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
27 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
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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.

14. NO EFFECT ON OTHER SETTLEMENTS

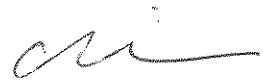
14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim against another entity on terms that are different from those contained in this Consent Judgment.

15. EXECUTION IN COUNTERPARTS

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

LOGIC TECHNOLOGY DEVELOPMENT LLC

Signature

Printed Name

Title

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IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

LOGIC TECHNOLOGY DEVELOPMENT LLC



Signature

MIGUEL MARTIN

Printed Name

PRESIDENT

Title

IT IS SO ORDERED:

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IT IS SO ORDERED:

Dated: _____, 2016

Judge of the Superior Court