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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 ZOOM E-CIGS**
16) **LLC**
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 Zoom E-Cigs LLC (“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 December 10, 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 Notice
6 alleges violations of Proposition 65 with regard to exposures to formaldehyde resulting from use
7 of Settling Defendant’s e-cigarette devices (the “Products”).

8 **1.3.** On November 19, 2015, CEH filed the Complaint in the Action. On March 29,
9 2016, CEH named Settling Defendant as a defendant in the Action via a Doe Amendment.

10 **1.4.** For purposes of this Consent Judgment only, Settling Defendant is a corporation
11 that employs ten (10) or more persons and that manufactures, distributes, and/or sells Covered
12 Products (as defined herein) in the State of 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 Notice 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 Notice 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 Notice. 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 Notice 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 electronic cigarette devices, also known as tanks and
7 vape pens that are manufactured, distributed, and/or sold by Settling Defendant in California.

8 **2.2.** “Effective Date” means the date on which the Court enters this Consent
9 Judgment.

10 **3. INJUNCTIVE RELIEF**

11 **3.1. Recall of Covered Products.** As of the Effective Date, Settling Defendant shall
12 have provided written notice to those direct wholesale customers of Settling Defendant’s Covered
13 Products selling to retailers in California, and to California retail customers known to the Settling
14 Defendant as having purchased Settling Defendant’s Covered Products, informing them that the
15 Covered Products are no longer to be sold within the State of California, and providing
16 instructions for the return or disposition of the Covered Products. Settling Defendant shall also
17 provide this written notice and the instructions for return or disposition of the Covered Products
18 to Settling Defendant’s direct customers that are known to Settling Defendant to sell or offer for
19 sale the Covered Products to California consumers on the internet (*in toto*, the “Recall”).

20 **3.2. Clear and Reasonable Warnings for Covered Products.** As of the Effective
21 Date, in the event that the Covered Products are sold or made available for sale in California by
22 Settling Defendant, no Covered Product may be manufactured for sale, distributed or sold in
23 California by Settling Defendant unless such Covered Product has a clear and reasonable warning
24 on the outer packaging of the Product. The warning shall state the following:

25 **WARNING:** Use of this product will expose you to formaldehyde, a
26 chemical known to the State of California to cause cancer.

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

14 **3.2.1. Warnings for Covered Products in the Stream of Commerce.** In an
15 effort to ensure that consumers receive clear and reasonable warnings in compliance with
16 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.2,
17 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
18 materials by certified mail to each of its California retailers or distributors to whom Settling
19 Defendant reasonably believes sold Covered Products prior to the Effective Date. Such warning
20 materials shall include a reasonably sufficient number of stickers in order to permit the retailer or
21 distributor to affix the warning on each Covered Product such customer has purchased from
22 Settling Defendant. The warning stickers shall contain the warning language set forth in Section
23 3.1 above. The warning materials shall also include a letter of instruction for the placement of the
24 stickers, and a Notice and Acknowledgment postcard. This Section 3.2.1 does not apply if
25 Settling Defendant performs the Recall as described in Section 3.1.

26 **3.3. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
27 eligible for any waiver of the additional civil penalty/payment in lieu of penalty payments set
28

1 forth in Section 4.1.5 below, in the event that the Covered Products are sold or offered for sale in
2 California by the Settling Defendant after the Effective Date, Settling Defendant shall undertake
3 one or more of the additional actions below. If Settling Defendant opts to be bound by this
4 Section, Settling Defendant must provide CEH with a written election stating which optional
5 provision(s) it is agreeing to implement. If Settling Defendant performs the Recall as described
6 in Section 3.1, Settling Defendant will be eligible for a complete waiver of additional civil
7 penalties and payments in lieu of penalties associated with these Optional Additional Injunctive
8 Provisions.

9 **3.3.1. Product Reformulation.** Within ninety (90) days following the Effective
10 Date, all Covered Products manufactured for sale in California shall be manufactured such that
11 use of the Covered Products will not produce detectable levels of formaldehyde and acetaldehyde.

12 **3.3.2. Product Safety Requirements.** A Settling Defendant opting to participate
13 in Section 3.2 shall make the following change to the Covered Products to increase the safety of
14 such products: Within ninety (90) days following the Effective Date, all Covered Products
15 manufactured for sale in California shall be manufactured without diacetyl in the Covered
16 Products.

17 **3.3.3. Prohibition on Sales and Advertising to Minors.** A Settling Defendant
18 opting to participate in Section 3.2 shall not sell Covered Products to persons younger than
19 eighteen (18) years of age and shall take reasonable steps to prevent the sale of Covered Products
20 to such persons, including, but not limited to the following measures:

21 **3.3.3.1.** Settling Defendant shall implement one or more systems for
22 checking the age of persons who purchase Covered Products on the Internet or in person. The
23 system shall include age verification by requiring and checking an official government
24 identification card or verifying through a reputable credit agency the age of anyone who
25 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who
26 purchases in person. The system shall be put into place within ninety (90) days of the Effective
27 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.** 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 **3.3.4.1.** 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 **3.3.4.2.** Settling Defendant shall not make any claim that the
18 Covered Products do not expose users to carcinogens or are better or safer than tobacco.

19 **3.3.4.3.** 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 \$37,000, which shall
23 be allocated as follows:

24 **4.1.1.** \$1,581 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).

1 **4.1.2.** \$2,372 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.** \$33,047 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 \$29,347 shall be
12 made payable to Lexington Law Group; and (2) a check for \$3,700 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 does not complete its Recall and elects
20 not to certify its compliance with one or more of the optional provisions in Section 3.3 in
21 accordance with that Section, within ninety (90) days following the Effective Date, Settling
22 Defendant must make an additional payment for each provision not certified, as follows: (i)
23 \$4,075 if Settling Defendant elects to not participate in Section 3.3.1; (ii) \$4,075 if Settling
24 Defendant elects to not participate in Section 3.3.2; (iii) \$4,075 if Settling Defendant elects to not
25 participate in Section 3.3.3; and (iv) \$4,075 if Settling Defendant elects to not participate in
26 Section 3.3.4. Each of these payments shall be paid in two separate checks, each payable to the
27 Center for Environmental Health, to be allocated as follows:

1 **4.1.5.1.** Forty percent (40%) shall constitute a civil penalty pursuant to
2 California Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in
3 accordance with California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State
4 of California’s Office of Environmental Health Hazard Assessment).

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

15 **5. ENFORCEMENT OF CONSENT JUDGMENT**

16 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
17 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
18 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
19 shall provide Settling Defendant with a Notice of Violation and a copy of any test results or other
20 information which purportedly supports CEH’s Notice of Violation. The Parties shall then meet
21 and confer regarding the basis for CEH’s anticipated motion or application in an attempt to
22 resolve it informally, including providing Settling Defendant a reasonable opportunity of at least
23 thirty (30) days to cure any alleged violation. Should such attempts at informal resolution fail,
24 CEH may file its enforcement motion or application. The prevailing party on any motion to
25 enforce this Consent Judgment shall be entitled to its reasonable attorney’s fees and costs
26 incurred as a result of such motion or application. This Consent Judgment may only be enforced
27 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 has been or could have been asserted in the public interest against Settling Defendant and
13 Downstream Defendant Releasees, regarding the failure to warn about exposures to formaldehyde
14 in the Covered Products manufactured, distributed, or sold by Settling Defendant prior to the
15 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 in connection with Covered Products manufactured,
20 distributed, or sold by Settling Defendant, and any and all claims related to the Covered Products
21 and known to CEH, in each case prior to the Effective Date.

22 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and
23 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
24 Defendant and Downstream Defendant Releasees, including with respect to any alleged failure to
25 warn about formaldehyde in Covered Products manufactured, distributed, or sold by Settling
26 Defendant after the Effective Date.

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1 **8. PROVISION OF NOTICE**

2 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
3 notice shall be sent by first class and electronic mail as follows:

4 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
5 receive notices pursuant to this Consent Judgment shall be:

6 Bob Nicksin
7 O'Melveny & Myers LLP
8 400 South Hope Street, 18th Floor
9 Los Angeles, CA 90071
 bnicksin@omm.com

10 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
11 this Consent Judgment shall be:

12 Mark Todzo
13 Lexington Law Group
14 503 Divisadero Street
 San Francisco, CA 94117
 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.

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1 **11. ENTIRE AGREEMENT**

2 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
3 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
4 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
5 merged herein and therein.

6 **11.2.** There are no warranties, representations, or other agreements between CEH and
7 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
8 express or implied, other than those specifically referred to in this Consent Judgment have been
9 made by any Party hereto.

10 **11.3.** No other agreements not specifically contained or referenced herein, oral or
11 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
12 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
13 any of the Parties hereto only to the extent that they are expressly incorporated herein.

14 **11.4.** No supplementation, modification, waiver, or termination of this Consent
15 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

16 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
17 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
18 such waiver constitute a continuing waiver.

19 **12. RETENTION OF JURISDICTION**

20 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
21 Consent Judgment.

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

23 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
25 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.
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1 **14. NO EFFECT ON OTHER SETTLEMENTS**

2 14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
3 against another entity on terms that are different from those contained in this Consent Judgment.

4 **15. EXECUTION IN COUNTERPARTS**

5 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by
6 means of facsimile, which taken together shall be deemed to constitute one document.

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8 **IT IS SO STIPULATED:**


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9 **CENTER FOR ENVIRONMENTAL HEALTH**

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12

Charlie Pizarro
Associate Director

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ZOOM E-CIGS LLC

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Signature

18

19

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Printed Name

21

22

Title

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24

IT IS SO ORDERED:

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Dated: _____, 2016

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Judge of the Superior Court

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

2 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
3 against another entity on terms that are different from those contained in this Consent Judgment.

4 **15. EXECUTION IN COUNTERPARTS**

5 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
6 means of facsimile, which taken together shall be deemed to constitute one document.

7

8 **IT IS SO STIPULATED:**

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9 **CENTER FOR ENVIRONMENTAL HEALTH**

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12 _____
Charlie Pizarro
Associate Director

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15 **ZOOM E-CIGS LLC**

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18 _____
Signature

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19 _____
John R. Long

20 Printed Name

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22 _____
Vice President & General Counsel
23 Title

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24 **IT IS SO ORDERED:**

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27 Dated: _____, 2016

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Judge of the Superior Court