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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 ELECTRONIC**
16 TOTALLY WICKED-E LIQUID (USA)) **CIGARETTE INTERNATIONAL**
17 INCORPORATED, et al.,) **GROUP, LTD.**
18 Defendants.)
19)

20 **1. INTRODUCTION**

21 **1.1.** This Consent Judgment is entered into by Plaintiff Center for Environmental
22 Health, a non-profit corporation (“CEH”) and Electronic Cigarette International Group, Ltd.
23 (“Settling Defendant”) to settle claims asserted by CEH against Settling Defendant as set forth in
24 the operative Complaint in the matter *Center for Environmental Health v. Totally Wicked-E*
25 *Liquid (USA) Incorporated, et al.*, Alameda County Superior Court Case No. RG 15-794036 (the
26 “Action”). CEH and Settling Defendant are referred to collectively as the “Parties.”
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1 Settling Defendant denies the material, factual, and legal allegations in the Notices and Complaint
2 and expressly denies any wrongdoing whatsoever. Except as specifically provided herein,
3 nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument,
4 or defense any of the Parties may have in this or any other pending or future legal proceedings.
5 This Consent Judgment is the product of negotiation and compromise and is accepted by the
6 Parties solely for purposes of settling, compromising, and resolving issues disputed in this Action.

7 **2. DEFINITIONS**

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

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

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

17 **2.4.** “Effective Date” means the date on which the Court enters this Consent Judgment.

18 **3. INJUNCTIVE RELIEF**

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

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

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

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

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

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

26 **WARNING:** Use of this product will expose you to formaldehyde and
27 acetaldehyde, chemicals 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 Device Product with such
4 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
5 read and understood by an ordinary individual prior to sale. To the extent that other warning
6 statements are included on the outer packaging of a Covered Device Product, the warning
7 required herein shall be separated from the other warnings by a line that is at least the same height
8 as a line of text on the label. For internet, catalog, or any other sale where the consumer is not
9 physically present and cannot see a warning displayed on the Covered Device Product prior to
10 purchase or payment, the warning statement shall be displayed in such a manner that it is likely to
11 be read and understood as being applicable to the Covered Device Product being purchased prior
12 to the authorization of or actual payment. Placement of the warning statement at the bottom of an
13 internet webpage that offers multiple products for sale does not satisfy the requirements of this
14 Section.

15 **3.2.1. Warnings for Covered Device 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 3.2,
18 within thirty (30) 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 Device 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 Device Product such customer has
23 purchased from Settling Defendant. The warning stickers shall contain the warning language set
24 forth in Section 3.2 above. The warning materials shall also include a letter of instruction for the
25 placement of the stickers, and a Notice and Acknowledgment postcard.

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

1 forth in Section 4.1.5 below, Settling Defendant shall undertake one or more of the additional
2 actions below. If Settling Defendant opts to be bound by this Section, Settling Defendant must
3 provide CEH with a written election stating which optional provision(s) it is agreeing to
4 implement.

5 **3.3.1. Product Reformulation.** Within ninety (90) days following the Effective
6 Date, all Covered Products manufactured for sale in California shall be manufactured such that
7 use of the Covered Products will not produce detectable levels of formaldehyde and acetaldehyde.

8 **3.3.2. Product Safety Requirements.** A Settling Defendant opting to participate
9 in Section 3.3 shall make the following changes to the Covered Products to increase the safety of
10 such products:

11 **3.3.2.1.** Within ninety (90) days following the Effective Date, all
12 Covered Liquid Products manufactured for sale in California shall be manufactured with child
13 proof caps in accordance with the standards set forth in 16 C.F.R. § 1700.15(b) and flow
14 restrictions in accordance with the standard set forth in 16 C.F.R. § 1700.15(d).

15 **3.3.2.2.** Within ninety (90) days following the Effective Date, all
16 Covered Products manufactured for sale in California shall be manufactured without diacetyl in
17 the Covered Products.

18 **3.3.3. Prohibition on Sales and Advertising to Minors.** A Settling Defendant
19 opting to participate in Section 3.3 shall not sell Covered Products to persons younger than
20 eighteen (18) years of age and shall take reasonable steps to prevent the sale of Covered Products
21 to such persons, including, but not limited to the following measures:

22 **3.3.3.1.** Settling Defendant shall implement one or more systems for
23 checking the age of persons who purchase Covered Products on the Internet or in person. The
24 system shall include age verification by requiring and checking an official government
25 identification card or verifying through a reputable credit agency the age of anyone who
26 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who
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1 purchases in person. The system shall be put into place within ninety (90) days of the Effective
2 Date.

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

12 **3.3.4. Prohibition on Health and Safety Claims.** A Settling Defendant opting
13 to participate in Section 3.3 shall not make health and or safety claims unless such claims have
14 been reviewed and approved by the Federal Food and Drug Administration. Examples of
15 prohibited claims include the following:

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

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

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

23 **4. PAYMENTS**

24 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$65,000, which shall
25 be allocated as set forth in this Section and in more detail on Exhibit A:

26 **4.1.1.** \$2,600 as a civil penalty pursuant to California Health & Safety Code §
27 25249.7(b), such money to be apportioned by CEH in accordance with California Health &

1 Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of
2 Environmental Health Hazard Assessment). This civil penalty shall be paid in one (1) check on
3 the date set forth in Exhibit A and shall be made payable to the Center for Environmental Health.

4 **4.1.2.** \$3,900 as a payment in lieu of civil penalty pursuant to California Health &
5 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
6 such funds to continue its work educating and protecting people from exposures to toxic
7 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
8 Judgment and to purchase and test Settling Defendant’s Products to confirm compliance. In
9 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
10 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
11 educate and protect the public from exposures to toxic chemicals. The method of selection of
12 such groups can be found at the CEH website at www.ceh.org/justicefund.

13 **4.1.3.** \$58,500 as a reimbursement of a portion of CEH’s reasonable attorneys’
14 fees and costs. This total shall be divided into two amounts: (1) \$52,000 to the Lexington Law
15 Group; and (2) \$6,500 to the Center for Environmental Health. These amounts shall be paid in
16 one (1) check made payable to the Center for Environmental Health and three (3) separate checks
17 made payable to the Lexington Law Group on the dates set forth in Exhibit A.

18 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be delivered on or
19 before the dates set forth in Exhibit A. All checks shall be delivered to Mark Todzo at Lexington
20 Law Group at the address set forth in Section 8.1.2.

21 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
22 one or more of the optional provisions in Section 3.3 in accordance with that Section, within one
23 hundred and fifty (150) days following the Effective Date, Settling Defendant must make an
24 additional payment for each provision not certified, as follows: (i) \$7,500 if Settling Defendant
25 elects to not participate in Section 3.3.1; (ii) \$7,500 if Settling Defendant elects to not participate
26 in Section 3.3.2; (iii) \$7,500 if Settling Defendant elects to not participate in Section 3.3.3; and
27 (iv) \$7,500 if Settling Defendant elects to not participate in Section 3.3.4. Each of these

1 payments shall be paid in two (2) separate checks, each payable to the Center for Environmental
2 Health, to be allocated as follows:

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

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

17 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

1 motion or application. This Consent Judgment may only be enforced by the Parties.

2 **6. MODIFICATION OF CONSENT JUDGMENT**

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

5 **7. CLAIMS COVERED AND RELEASE**

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

17 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged
18 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from
19 any violation of Proposition 65 that have been or could have been asserted regarding the failure to
20 warn about exposure to formaldehyde and/or acetaldehyde in connection with Covered Products
21 manufactured, distributed, or sold by Settling Defendant 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 with respect to any alleged failure to warn
25 about nicotine in Covered Products manufactured, distributed, or sold by Settling Defendant after
26 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 Robert J. Lanza
7 Lanza, Reich & Daniel, LLP
8 221 W. 37th Street, 4th Floor
9 New York, NY 10018
10 Rlanza@rlelawfirm.com

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

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

18 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
19 sending the other Parties notice by first class and electronic mail.

20 **9. COURT APPROVAL**

21 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
22 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
23 Settling Defendant shall support approval of such Motion.

24 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
25 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
26 purpose.

27 **10. GOVERNING LAW AND CONSTRUCTION**

28 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
and enforced in accordance with the laws of the State of California.

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.

7
8 **IT IS SO STIPULATED:**

9 **CENTER FOR ENVIRONMENTAL HEALTH**

10 
11 _____
12 Charlie Pizarro
13 Associate Director

14 **ELECTRONIC CIGARETTE INTERNATIONAL GROUP, LTD.**

15
16 _____
17 Signature

18 _____
19 Printed Name

20
21 _____
22 Title

23 **IT IS SO ORDERED:**

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25 Dated: _____, 2016
26 _____
27 Judge of the Superior Court

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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

ELECTRONIC CIGARETTE INTERNATIONAL GROUP, LTD.



Signature



Printed Name



Title

IT IS SO ORDERED:

Dated: _____, 2016

Judge of the Superior Court

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EXHIBIT A
Settlement Payments and Allocations

Total Settlement Payment: \$95,000

Payment 1: Total \$25,000 - Due 30 Days After the Effective Date

Payment 1 Allocations:

Civil Penalty:	\$2,600
Payment in Lieu of Civil Penalty:	\$3,900
Attorneys' Fees and Costs to CEH:	\$6,500
Attorneys' Fees and Costs to LLG:	\$12,000

Payment 2: Total \$20,000 - Due 90 Days After the Effective Date

Payment 2 Allocations:

Attorneys' Fees and Costs to LLG:	\$20,000
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Payment 3: Total \$50,000 (or \$20,000 if additional payments are waived pursuant to Section 4.1.5) - Due 150 Days After the Effective Date

Payment 3 Allocations:

Attorneys' Fees and Costs to LLG:	\$20,000
<i>Waivable</i> Civil Penalty:	\$12,000 total, or \$3,000 for each election made under Sections 3.3.1, 3.3.2, 3.3.3, or 3.3.4
<i>Waivable</i> Payment in Lieu of Civil Penalty:	\$18,000 total, or \$4,500 for each election made under Sections 3.3.1, 3.3.2, 3.3.3, or 3.3.4