

1 EDMUND G. BROWN JR.
Attorney General of California
2 DENNIS ECKHART
Senior Assistant Attorney General
3 JEANNE FINBERG (SBN 88333)
HARRISON POLLAK (SBN 200879)
4 Deputy Attorneys General
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 622-2147
Fax: (510) 622-2121
7 E-mail: Jeanne.Finberg@doj.ca.gov
Attorneys for Attorney General, State of California
8

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA
12

13 **THE PEOPLE OF THE STATE OF CALIFORNIA,**
14 **EX REL EDMUND G. BROWN, JR,**
15
16 **v.**
17 **SOTTERA, INC., D.B.A. NJOY,**
18
19
20

Case No. RG10528622

Plaintiff,

STIPULATED CONSENT JUDGMENT

Defendant.

21 The Plaintiffs, the People of the State of California, *ex rel.* Edmund G. Brown Jr.,
22 California Attorney General (“Attorney General” or “People”), and Defendant Sottera, Inc. d.b.a.
23 NJOY (“Defendant”; collectively, “Parties”), enter into this Stipulated Consent Judgment
24 (“Consent Judgment”) to resolve the allegations set forth in the Complaint filed by the People in
25 the captioned case.
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I. INTRODUCTION

1. The Parties enter into this Consent Judgment without a trial. It does not constitute evidence of an admission by the Defendant regarding any issue of law or fact alleged in the Complaint. This Consent Judgment sets forth the obligations of the Defendant and the People and constitutes the complete, final and exclusive agreement between the Parties and supersedes any prior agreements between the Parties except as specifically provided below.

2. By entering into this Consent Judgment, the Defendant does not admit any violation of law, and the People do not admit that Covered Products (as defined in Section 4) are safe. The People expressly reserve the right to bring an enforcement action based on violations of law not covered in the Claims Covered section (Section 17), and to seek whatever fines, costs, attorneys' fees, penalties, or remedies provided by law, including, but not limited to, an injunction against the sale of Covered Products in the State of California.

3. For purposes of this Consent Judgment, (i) the Alameda County Superior Court ("Court") has jurisdiction over the Parties to and the subject matter of this action; (ii) venue is proper in this Court; (iii) Defendant has employed ten or more persons for some period of time relevant to the allegations of the Complaint; and (iv) the Court has personal jurisdiction over Defendant for the purposes of enforcing the terms of the Consent Judgment.

4. For purposes of the Consent Judgment, "Covered Products" shall mean electronic cigarettes, also known as "e-cigarettes," and cartridges and any other similar product or accessory manufactured, distributed, offered for sale, or sold by Defendant in California for the purpose of creating a vapor that the user inhales through a device designed to look like a cigarette, cigar, pipe, or other smoking device.

5. For purposes of the Consent Judgment, "Effective Date" shall mean the date on which the Court enters the Consent Judgment.

II. INJUNCTIVE RELIEF

6. Quality Control. Defendant shall have and maintain a system for quality control of Covered Products to ensure that they are manufactured to appropriate specifications. The specifications shall provide that the Covered Products do not contain any impurities at levels that

1 reasonably could be anticipated to present a risk of injury to humans (defined, for a carcinogen, to
2 be a level that would cause the exposure of the average user to be at a level that poses greater than
3 a 1 in 100,000 risk of excess cancer as determined pursuant to Health and Safety Code section
4 25249.10, subdivision (c), and its implementing regulations). The system shall include, but not
5 be limited to audits at regular intervals, not to exceed 12 months, of each facility where Covered
6 Products are manufactured and testing to demonstrate to a high level of certainty that the Covered
7 Products comply with specifications. The audits shall be conducted by an independent auditor
8 not having direct responsibility for the matters being audited. Defendant shall provide to the
9 Attorney General a detailed description of the quality control system within 90 days after the
10 Effective Date.

11 7. Sales to Minors. Defendant shall not sell Covered Products to persons younger than
12 18 years of age and shall take reasonable steps to prevent the sale of Covered Products to such
13 persons, including but not limited to the following measures:

14 a. Defendant shall implement one or more systems for checking the age of
15 persons who purchase Covered Products on the Internet or in person. The system shall
16 include age verification by requiring and checking an official government identification
17 card or verifying through a reputable credit agency the age of anyone who purchases
18 Covered Products on the Internet, or of anyone under twenty-six (26) years old who
19 purchases in person. The system shall be put into place as soon as practical after entry
20 of this Consent Judgment, but before the Effective Date.

21 b. Defendant shall not sell flavored cartridges or any substance to use with
22 Covered Products or other e-cigarettes that are targeted to appeal to minors including,
23 but not limited to, strawberry, banana, chocolate, cookies and cream, or mint.

24 c. Defendant shall not use advertisements that target minors. Specifically,
25 Defendant will not use models or images of people that appear to be younger than
26 twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended and
27 designed to appeal to people under the legal smoking age in advertisements or
28 promotional materials that appear in California, including on the Internet. This

1 subsection shall not apply to advertisements or promotional materials intended for
2 audiences outside the United States, provided such advertisements or promotional
3 materials conspicuously state that the products are not intended for use by minors, and
4 any sales to a delivery address in California comply with paragraph 7.a, above.

5 d. Defendant shall continue to state on all displays and products that Covered
6 Products may not be sold to minors, and shall ensure that future displays and products
7 state that identification of all persons under 26 years of age will be required before
8 purchase. This message on future displays and products shall be prominently placed
9 with such conspicuousness, as compared with other words, statements, designs, or
10 devices on the display or product, as to render it likely to be read and understood by an
11 ordinary individual under customary conditions of purchase or use.

12 e. Defendant shall not allow self-service displays of Covered Products that are
13 accessible to minors. Covered Products shall be put where assistance from a clerk who
14 can check identification is necessary for access to the product.

15 f. Defendant shall not sell Covered Products in vending machines.

16 8. Defendant shall not send direct advertisements about Covered Products or coupons
17 for Covered Products to any potential new customer who has not solicited the materials unless
18 Defendant has verified as set forth in paragraph 7.a that the customer is of legal smoking age or
19 older. Defendant shall not send samples of Covered Products or Covered Products to any person
20 who has not solicited the materials unless Defendant has verified as set forth in paragraph 7.a that
21 the customer is 18 years old or older.

22 9. Marketing Claims. Defendant shall not make false or misleading claims about
23 Covered Products in its advertising or promotional materials, including on Internet websites. It
24 shall take the following, non-exclusive measures:

25 a. Defendant shall not advertise Covered Products as smoking-cessation devices
26 unless or until they have been approved by the Federal Food and Drug Administration as
27 such under its authority to regulate drugs, devices, or tobacco products. This prohibition
28 includes any claims or testimonials about quitting smoking, using e-cigarettes as a

1 treatment for tobacco dependence or addiction, including for example, making claims
2 such as “cut smoking in half.” This prohibition does not prohibit Defendant from
3 advertising that e-cigarettes are an alternative to smoking traditional cigarettes, provided
4 that any such advertisement states conspicuously that e-cigarettes are sold for purely
5 recreational purposes and not for treating nicotine addiction, and that nicotine causes
6 addiction.

7 b. Defendant shall not sell Covered Products containing vitamins or other
8 substances intended to portray that using Covered Products will improve one’s health,
9 without competent, reliable scientific evidence to support the implied health claim.

10 c. Defendant shall not make claims about Covered Products being safer than
11 cigarettes without competent, reliable scientific evidence to support the claims.
12 Defendant may describe differences between Covered Products and cigarettes that are
13 supported by competent, reliable scientific evidence. Defendant agrees to provide such
14 evidence to the Attorney General upon request without undue delay.

15 d. Defendant shall not make claims about Covered Products having no tar without
16 competent reliable scientific evidence to prove the claims.

17 e. Defendant shall not make claims about Covered Products having no first- or
18 second-hand smoke without competent reliable scientific evidence to prove that the vapor
19 from e-cigarettes contains no chemicals associated with first- or second-hand smoke from
20 traditional cigarettes and known to the State of California to cause cancer or reproductive
21 toxicity.

22 f. Defendant shall not make claims about Covered Products containing no tobacco
23 without competent reliable scientific evidence to prove the claims.

24 g. Defendant shall not make claims about Covered Products containing no
25 carcinogens without competent reliable scientific evidence to prove the claims.

26 10. Warnings. Defendant shall provide clear and reasonable warnings that Covered
27 Products contain nicotine, which is a chemical known by the State of California to cause birth
28 defects or reproductive harm. The warnings will be in the form and locations described in

1 Attachment A. Defendant shall have 90 days after the Effective Date to put warnings on the
2 outside of packaging, provided that during the interim the warning is available to customers prior
3 to use of the product. Defendant shall not sell cartridges directly to the consumer without
4 packaging. Defendant shall instruct customers (other than the consumer) to whom it sells loose
5 cartridges to provide warnings in compliance with this Section of the Consent Judgment.

6 11. Agents, Distributors and Retail Sellers. Defendant shall use reasonable efforts to
7 ensure that other entities, whether or not affiliated with Defendant, do not take actions that are
8 inconsistent with the terms of this Consent Judgment, or that prevent or interfere with
9 Defendant's compliance with the Consent Judgment. Specifically, Defendant shall take the
10 following, non-exclusive measures:

11 a. Within 30 days after the Effective Date and once every year thereafter,
12 Defendant shall provide the requirements of this Consent Judgment and signs and other
13 materials needed to comply with the Consent Judgment to all of its agents, distributors,
14 and retailers involved in sales of Covered Products. Defendant shall do the same at the
15 time it sells Covered Products to an agent, distributor, or retailer for the first time.
16 Defendant shall require each recipient to confirm at the time of purchase or delivery that
17 they understand and will implement the requirements of the Consent Judgment.
18 Defendant shall stop selling Covered Products to any agent, distributor, or retailer that
19 does not provide such confirmation in a timely manner, but in no event more than 30
20 days after delivery of the product.

21 b. Defendant shall implement a system to monitor compliance by its agents,
22 distributors and retailers authorized by Defendant to sell Covered Products, including its
23 employees, representatives, successors, assigns, and all persons acting by, through, under
24 or on behalf of any of them ("Authorized Sellers") comply with the injunctive
25 requirements in Sections 7, 8, 9, and 10 of this Consent Judgment. The monitoring
26 system shall include progressive enforcement of violations, such as notice, probation, and
27 termination of the business relationship, if applicable, with the violators if they do not
28 abide by the terms.

1 c. Defendant shall use reasonable efforts to ensure that entities that offer for sale
2 or sell Covered Products that are not Authorized Sellers comply with the injunctive
3 requirements in Sections 7, 8, 9, and 10 of this Consent Judgment. Defendant shall
4 implement a system to monitor sales practices and marketing claims being made about
5 Covered Products by Unauthorized Sellers. If Defendant discovers that an Unauthorized
6 Seller is acting in a manner that is not consistent with the Consent Judgment, then within
7 seven calendar days it shall (i) inform the Unauthorized Seller in writing to stop the
8 practice and verify that it has stopped the practice, or (ii) if that is not effective, within 30
9 days after discovering the practice report it to the Attorney General, along with the
10 identity of the Unauthorized Seller, contact information, and a description of Defendant's
11 communications with the Unauthorized Seller concerning the practice.

12 12. Reporting Requirement. Defendant will file with the Court and submit to the
13 Attorney General a report describing its implementation of the Consent Judgment within 90 days
14 after the Effective Date, as well as quarterly reports for the first year and annual reports
15 thereafter, for a period of three years. The time period for reporting may be extended by
16 agreement of the Parties or by order of the Court for good cause shown.

17 **III. SETTLEMENT PAYMENT**

18 13. Settlement Payment. Within 10 business days after the Effective Date, or by
19 September 15, 2010, whichever is later, Defendant shall pay a total settlement amount of \$85,000.
20 This shall be allocated as follows:

- 21 a. \$75,000 as a civil penalty pursuant to Health and Safety Code section 25249.7,
22 subd. (b).
23 b. \$10,000 as partial reimbursement of the Attorney General's attorneys' fees and
24 costs.

25 14. Payment shall be made by check, payable to "Office of the California Attorney
26 General," and sent to:

27 Robert Thomas
28 Legal Analyst
Office of the Attorney General
1515 Clay St., 20th Floor

1 Post Office Box 70550
2 Oakland, California 94612

3 15. Funds paid to the Attorney General pursuant to Section 13(a) shall be allocated as set
4 forth in Health and Safety Code section 25249.12, subdivisions (c) and (d).

5 16. Of the funds paid to the Attorney General pursuant to Section 13(b),

6 a. The sum of \$5,000 shall be placed in an interest bearing Special Deposit Fund
7 established by the Attorney General. Those funds, including any interest derived therefrom, shall
8 be used by the Attorney General, until all funds are exhausted, for the costs and expenses
9 associated with the enforcement and implementation of Proposition 65, including investigations,
10 enforcement actions, other litigation or activities as determined by the Attorney General to be
11 reasonably necessary to carry out his duties and authority under Proposition 65. Such funding
12 may be used for the costs of the Attorney General's investigation, filing fees and other court
13 costs, payment to expert witnesses and technical consultants, purchase of equipment, travel,
14 purchase of written materials, laboratory testing, sample collection or any other cost associated
15 with the Attorney General's duties or authority under Proposition 65. Funding placed in the
16 Special Deposit Fund pursuant to this Section, and any interest derived therefrom, shall solely and
17 exclusively augment the budget of the Attorney General's Office and in no manner shall supplant
18 or cause any reduction of any portion of the Attorney General's budget.

19 b. The sum of \$5,000 shall be deposited in the Litigation Deposit Fund established by
20 the Attorney General for use by the Attorney General in carrying out the duties and
21 responsibilities entrusted by the Attorney General to the Tobacco Litigation and Enforcement
22 Section of the Public Rights Division, or to its successor, if any. Those funds, including any
23 interest derived therefrom, shall be used by the Attorney General, until all funds are exhausted,
24 for costs and expenses associated with the enforcement and implementation of state laws,
25 including but not limited to Business and Professions Code sections 17200 et seq. and 17500 et
26 seq., including investigations, enforcement actions, and other litigation or activities as determined
27 by the Attorney General to be reasonably necessary to carry out his duties and authority.
28

1 **IV. ADDITIONAL PROVISIONS**

2 17. Claims Covered. The Consent Judgment is a full, final, and binding resolution
3 between the People and Defendant and its successors and assigns (“Defendant Releasees”) of the
4 claims that were raised or that could have been asserted by the Attorney General on behalf of the
5 People of the State of California against the Defendant Releasees regarding untruthful or
6 misleading claims about Covered Products or the failure to warn about nicotine in Covered
7 Products prior to the Effective Date.

8 18. Enforcement. In an action to enforce this Consent Judgment, the People may seek
9 whatever fines, costs, attorneys’ fees, penalties or remedies are provided by law for failure to
10 comply with this Consent Judgment. Where said failure to comply constitutes a violation of
11 Proposition 65 or other laws, independent of this Consent Judgment and/or the allegations in the
12 Complaint, the People are not limited to enforcement of this Consent Judgment, but may seek in
13 another action, subject to satisfaction of any procedural requirements, including notice
14 requirements, whatever fines, costs, attorneys’ fees, penalties or remedies are provided by law for
15 any future failure to comply with Proposition 65 or other laws. In any such other action,
16 however, the requirements of this Consent Judgment shall not limit or impair any defense, arising
17 at law or in equity, that the Defendant may assert; except that the Defendant shall not contest its
18 obligation to comply with the terms of this Consent Judgment as set forth herein in any
19 proceeding to enforce this Consent Judgment.

20 19. Modification. This Consent Judgment may be modified from time to time by written
21 stipulation of the Parties and the Court’s entry of such stipulation. The Consent Judgment may
22 also be modified upon entry of an order of this Court in accordance with law. Grounds for
23 considering modification shall include any that are permitted by law, including that any part of
24 this Consent Judgment is or has become preempted by federal law or regulation. Before filing an
25 application with the Court for a modification to the Consent Judgment, the Parties shall meet and
26 confer to determine whether they can agree on the proposed modification. If a proposed
27 modification is agreed upon, then the parties will present the modification to the Court by means
28 of a stipulated modification to the Consent Judgment as set forth in the first sentence of this

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

paragraph.

20. Execution in Counterparts. This Consent Judgment may be executed in counterparts, which taken together shall be deemed to constitute one and the same document.

21. This Consent Judgment shall be binding and effective on the Effective Date, and the clerk is ordered to enter this Consent Judgment forthwith.

IT IS SO STIPULATED.

Dated: July 30, 2010

EDMUND G. BROWN JR.
Attorney General of California
DENNIS ECKHART
Senior Assistant Attorney General
JEANNE FINBERG
HARRISON POLLAK
Deputy Attorneys General

JF
By: JEANNE FINBERG
Attorneys for Plaintiffs People of the State of California

Dated: _____

CRAIG WEISS, President
Sottera, Inc.

IT IS SO ORDERED.

Dated: _____

JUDGE OF THE SUPERIOR COURT

OK2009313606
90154257.doc

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

paragraph.

20. Execution in Counterparts. This Consent Judgment may be executed in counterparts, which taken together shall be deemed to constitute one and the same document.

21. This Consent Judgment shall be binding and effective on the Effective Date, and the clerk is ordered to enter this Consent Judgment forthwith.

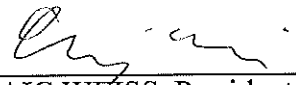
IT IS SO STIPULATED.

Dated: _____

EDMUND G. BROWN JR.
Attorney General of California
DENNIS ECKHART
Senior Assistant Attorney General
JEANNE FINBERG
HARRISON POLLAK
Deputy Attorneys General

By: JEANNE FINBERG
Attorneys for Plaintiffs People of the State of California

Dated: 7/29/2010



CRAIG WEISS, President
Sottera, Inc.

IT IS SO ORDERED.

Dated: _____

JUDGE OF THE SUPERIOR COURT

OK2009313606
90154257.doc