

ATTORNEY GENERAL OF THE STATE OF NEW YORK

In the Matter of

Henley LLC

Assurance No.: 15-109

**ASSURANCE OF DISCONTINUANCE
UNDER EXECUTIVE LAW
SECTION 63, SUBDIVISION 15**

Pursuant to the provisions of New York Executive Law § 63 and New York General Business Law § 399-gg, Eric T. Schneiderman, Attorney General of the State of New York, caused an inquiry to be made into certain business practices of Henley LLC (“Henley”), relating to its selling of liquid nicotine. Based upon the inquiry, the New York State Office of the Attorney General (“OAG”) has made the following findings, and Henley has agreed to modify and/or discontinue certain practices and assure compliance with the following provisions of this Assurance of Discontinuance (“Assurance”).

I. BACKGROUND

1. Henley LLC is a limited liability company that also does business as Henley, Henley Premium Vapor Products, Henley Vape Store, The Henley Vaporium, Henley Electronic Cigarettes, and/or Henleyvape.com, and is engaged in the business of selling electronic cigarettes (as defined by New York Public Health Law §1399-aa, and referred to herein as “e-cigarettes”), liquid nicotine, and related accessories. Henley’s principal office is located at 23 Cleveland Place, New York, New York 10012, and it has a second retail location at 350 3rd Avenue, New York, New York 10010.

2. The use of e-cigarettes has increased exponentially over recent years. A recent survey by the U.S. Centers for Disease Control and Prevention (“CDC”) reports that e-cigarette use tripled among middle and high school students from 2013 to 2014. According to the CDC, the total number of middle and high school students using e-cigarettes has reached 2,450,000.

3. E-cigarettes typically include a battery that is used to heat liquid nicotine that is contained in the e-cigarette, and converts the liquid nicotine to a vapor that the user inhales. The user may inhale from the device to begin the vaporization process, or touch a switch that activates the vaporizer inside. (As defined by New York Public Health Law § 1399-cc, "liquid nicotine," "electronic liquid" and/or "e-liquid" refer to a liquid composed of nicotine and other chemicals. For purposes of this Assurance, these terms will be collectively referred to as “liquid nicotine.”)

4. According to the CDC, research suggests that nicotine is as addictive as heroin, cocaine, or alcohol. Nicotine withdrawal symptoms include irritability, anxiety, difficulty concentrating, insomnia, restlessness, and increased appetite.

5. Liquid nicotine is comprised of nicotine extracted from tobacco and often mixed with propylene glycol, vegetable glycerine, and other additives including flavors. Depending on the concentration of nicotine in the finished product, liquid nicotine can be highly toxic. Ingestion or even skin exposure to small amounts can lead to rapid heartbeat, elevated blood pressure, nausea, vomiting, diarrhea, dizziness, confusion, seizures and potentially coma and death.

6. According to the American Association of Poison Control Centers, in 2014, 3,783 exposures to liquid nicotine nationwide were reported to poison control centers, a sharp increase

from previous years. Half of those calls related to poisoning of children under the age of five. Also in 2014, an eighteen-month-old toddler in upstate New York died from ingesting liquid nicotine.

7. Manufacturers of liquid nicotine have developed liquid nicotine in an array of flavors, including fruit and candy flavors with strong and sweet aromas, especially enticing to children. Some names of the varieties include “Kaptain Peanut Butter Krunch” and “Gummy Bears.”

8. In light of the concerns about poisoning and the age of purchasers, the New York legislature passed a bill that amended the New York General Business Law to add a new section 399-gg, which states that no person “shall sell or offer for sale” any liquid nicotine unless it is “sold or offered for sale in in a child resistant bottle which is designed to prevent accidental exposure of children to electronic liquids.” Each violation is subject to a one thousand dollar penalty.

9. The bill also amended New York Public Health Law sections 1399-aa and 1399-cc, to require the following:

(i) Any person operating a place of business that sells liquid nicotine and e-cigarettes is prohibited from selling to minors under the age of eighteen.

(ii) The seller must post a conspicuous sign on a white card in red letters at least one-half inch in height, stating that sale of liquid nicotine, electronic cigarettes and other products to persons under eighteen years of age is prohibited.

(iii) Sales of liquid nicotine and e-cigarettes shall be made only to a purchaser who can prove that they are at least eighteen years old through a valid driver's license or other official identification card, or a valid passport.

(iv) Liquid nicotine and e-cigarettes must be stored for sale behind a counter that is only accessible to employees, or in a locked container.

10. Finally, the bill amended §17-706 of New York City Administrative Code to enforce similar requirements in New York City, except that in New York City, sellers may not sell liquid nicotine and e-cigarettes to individuals under the age of twenty one.

11. The bill went into effect immediately upon being signed into law on December 29, 2014.

II. THE OAG'S INVESTIGATION AND FINDINGS

12. After the New York liquid nicotine and e-cigarette legal protections became effective, the OAG, concerned with consumer safety, commenced an investigation to determine compliance with the new law, and in particular, whether liquid nicotine was being sold in New York without appropriate child-resistant packaging. The OAG made purchases of liquid nicotine from retail establishments physically located in New York, as well as manufacturers and web-based retailers that sell liquid nicotine in New York.

13. When the liquid nicotine containers appeared to lack child-resistant packaging, the OAG followed the purchases with the issuance of subpoenas requesting, *inter alia*, proof of child-resistant packaging for containers of liquid nicotine sold in New York.

14. The investigation revealed that Henley was selling liquid nicotine without child-resistant packaging, including liquid nicotine with the names Cosmic Charlie's Chalk Dust and

The Bearded Lady by Freakshow Curious Elixirs (manufactured by D & V Vapes, Inc.). The caps can be removed easily and lack any child-resistant mechanism.

15. In response to the OAG's subpoena, Henley failed to provide documentary evidence to support an assertion that all the liquid nicotine products it sold were packaged in child-resistant containers.

III. RELEVANT LAWS

16. New York Executive Law § 63(12) prohibits repeated fraudulent or illegal acts in the transaction of business.

17. New York General Business law § 399-gg forbids the sale or offer for sale (by both retailers as well as manufacturers) of liquid nicotine that is not contained in a child-resistant bottle designed to prevent accidental exposure of children to liquid nicotine.

18. The OAG finds that the practices described above constitute repeated violations of Executive Law § 63 (12).

NOW, WHEREAS, Henley admits the OAG's findings in section II above and the OAG is willing to accept the terms of this Assurance under Executive Law § 63(15) and to discontinue this investigation; the parties each believe that the obligations imposed by this Assurance are prudent and appropriate; and the OAG has determined that this Assurance is in the public interest.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the parties that:

I. PROSPECTIVE RELIEF

1. Henley shall immediately stop selling or offering for sale any container of liquid nicotine that is not in child-resistant packaging designed to prevent accidental exposure of

children to electronic liquids. In order to be considered child-resistant, the packaging shall meet the protocol of the Consumer Product Safety Commission and the poison prevention packaging standards pursuant to Title 16 C.F.R. part 1700.

2. Henley shall post on the home page of all of its websites, including but not limited to Henleyvape.com, a notice that offers New York purchasers of liquid nicotine from Henley the right to return the container of liquid nicotine (filled or empty) if the container does not have child-resistant packaging, and in exchange the purchaser shall receive, at the purchaser's option, a free child resistant container of liquid nicotine, in the same size and nicotine concentration as the returned container, or a full refund. The notice shall be approved by the OAG and shall be posted prominently on a banner on the top of the home page, in the same manner and location that Henley typically posts notices of sales and other information it deems important. The notice shall run for a period no shorter than six months from the Effective Date.

3. Within sixty (60) days of the Effective Date, Henley shall provide to the OAG the complete testing report for each type of container of liquid nicotine that it sells or offers for sale in New York, which confirms that the container meets the poison prevention packaging standards under Title 16 C.F.R. part 1700.

4. Within thirty (30) days of the Effective Date, Henley shall train its employees and agents in order to fully comply with all relevant laws and regulations, including but not limited to New York General Business Law § 399-gg, New York Public Health § 1399-cc and Administrative Code of the City of New York § 17-706, as well as the requirements of this Assurance. Prior to training, Henley shall submit its training materials to the OAG for review and comment, and will incorporate suggestions made by the OAG.

5. If Henley learns that a bottle of liquid nicotine is being sold or offered for sale in New York without child-resistant packaging, it shall notify the OAG immediately.

II. PENALTIES

6. Within thirty days of the Effective Date, Henley shall pay \$40,000.00 (forty thousand dollars) to the OAG as a civil penalty, in lieu of any other action which could be taken by the OAG in consequence of the foregoing. The penalty payment may be made in installments, with the first payment made within thirty days of the Effective Date, and the last payment made no later than one year after the Effective Date.

III. CORRESPONDENCE AND PAYMENT

7. All payments, notices, reports, requests, and other communications to any party pursuant to this Assurance shall be in writing and shall be directed as follows:

If to the OAG to:

Carol Hunt
Assistant Attorney General
Office of the Attorney General
Health Care Bureau
120 Broadway, 26th Floor
New York, New York 10271

If to Henley to:

Phillip Daman, Esq.
Daman and Associates
15 Court Square, Suite 800
Boston, Massachusetts 02108
Philip.Daman@DamanLLP.com

8. All checks issued pursuant to this Assurance shall be made payable to "State of New York Department of Law."

9. All payments and correspondence related to this Assurance must reference "Assurance 15-109."

IV. MISCELLANEOUS

Henley's Representations

10. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by Henley and its counsel and the OAG's own factual investigation. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

No Deprivation of the Public's Rights

11. Nothing herein shall be construed to deprive any person of any private right under law or equity.

No Blanket Approval by the OAG of Henley's Practices

12. Acceptance of this Assurance by the OAG shall not be deemed or construed as approval by the OAG of any of Henley's acts or practices, and Henley shall make no representation to the OAG the contrary.

Monitoring by the OAG

13. To the extent not already provided under this Assurance, Henley shall, upon request by the OAG, provide all documentation and information necessary for the OAG to verify compliance with this Assurance, at Henley's expense. This Assurance does not in any way limit the OAG's right to obtain, by subpoena or by any other means permitted by law, documents, testimony, or other information.

No Limitation on the OAG's Authority

14. Nothing in this Assurance in any way limits the OAG's ability to investigate or take other action with respect to any non-compliance at any time by Henley with respect to this Assurance, or Henley's noncompliance with any applicable law with respect to any matters.

Nondisparagement of Assurance

15. Henley shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects Henley's (a) testimonial obligations or (b) right to take legal or factual positions in defense of litigation or other legal proceedings to which OAG is not a party.

Governing Law; Effect of Violation of Assurance of Discontinuance

16. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

17. Under Executive Law § 63(15), evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law in any action or proceeding thereafter commenced by the OAG.

18. If a court of competent jurisdiction determines that Henley has breached this Assurance, Henley shall pay to the OAG the cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

19. Any failure by the OAG to enforce this entire Assurance or any provision thereof with respect to any deadline or any other provision herein shall not be construed as a waiver of the OAG's right to enforce other deadlines and provisions of this Assurance.

20. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

Entire Agreement; Amendment

21. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Henley in agreeing to this Assurance.

22. This Assurance contains an entire, complete, and integrated statement of each and every term and provision agreed to by and among the parties, and the Assurance is not subject to any condition not provided for herein. This Assurance supersedes any prior agreements or understandings, whether written or oral, between the OAG and Henley regarding the subject matter of this Assurance.

23. This Assurance may not be amended or modified except in an instrument in writing signed on behalf of all the parties to this Assurance.

24. The division of this Assurance into sections and subsections and the use of captions and headings in connection herewith are solely for convenience and shall have no legal effect in construing the provisions of this Assurance.

Binding Effect

25. This Assurance is binding on and inures to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without prior written consent of the OAG.

Effective Date

26. This Assurance is effective on the date that it is signed by the Attorney General or his authorized representative (the "Effective Date"), and the document may be executed in counterpart, which shall all be deemed an original for all purposes.

AGREED TO BY THE PARTIES:

Dated: 5/25/15, 2015

Henley LLC

By: Henley LLC By: [Signature], CEO

CONSENTED TO:

Dated: June 2, 2015

ERIC SCHNEIDERMAN
Attorney General of the State of New York

LISA LANDAU
Health Care Bureau Chief

By: [Signature]
CAROL HUNT
Assistant Attorney General, Health Care Bureau