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CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

NOV 19 2015

CLERK OF THE SUPERIOR COURT
By Sam E. Mamas Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

RG 15794040

11 CENTER FOR ENVIRONMENTAL)
12 HEALTH, a non-profit corporation,)
13 Plaintiff,)
14 v.)
15 NJOY, INC. DBA NJOY ENDS; FONTEM US,)
16 INC.; R.J. REYNOLDS VAPOR COMPANY;)
and DOES 1 through 60, inclusive,)
17 Defendants.)

Case No. _____

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code § 25249.6, *et seq.*
(Other)

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1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This Complaint seeks to remedy Defendants' continuing failure to warn
6 individuals in California that they are being exposed to formaldehyde and/or acetaldehyde,
7 chemicals known to the State of California to cause cancer. Such exposures have occurred, and
8 continue to occur, through the manufacture, distribution, sale and/or use of two types of products:
9 (i) liquids used with electronic cigarette devices ("E-Liquids"); and (ii) electronic cigarette
10 devices, also known as tanks and vape pens, which contain E-Liquids or are designed and
11 intended for use with E-Liquids ("E-Cigarettes"). E-Liquids and E-Cigarettes are collectively
12 referred to herein as "Products." Individuals in California are exposed to formaldehyde and/or
13 acetaldehyde through ordinary use of the Products.

14 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*
15 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
16 to chemicals known to the State to cause cancer without providing clear and reasonable warnings
17 to individuals prior to such exposures. Defendants introduce Products that produce significant
18 quantities of formaldehyde and/or acetaldehyde into the California marketplace, exposing
19 consumers of their Products, many of whom are children and teenagers, to formaldehyde and/or
20 acetaldehyde every time they use the Products.

21 3. Despite the fact that Defendants expose children and other individuals in
22 California who use the Products to formaldehyde and/or acetaldehyde, Defendants provide no
23 warnings whatsoever about the carcinogenic hazards associated with formaldehyde and/or
24 acetaldehyde exposures. Defendants' conduct thus violates the warning provision of Proposition
25 65. *See* Health & Safety Code § 25249.6.

26 **PARTIES**

27 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
28 non-profit corporation dedicated to protecting the public from environmental health hazards and

1 toxic exposures. CEH is based in Oakland, California and incorporated under the laws of the
2 State of California. CEH is a “person” within the meaning of Health & Safety Code §
3 25249.11(a) and brings this enforcement action in the public interest pursuant to Health & Safety
4 Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group
5 that has prosecuted a large number of Proposition 65 cases in the public interest. These cases
6 have resulted in significant public benefit, including the reformulation of thousands of products
7 to remove toxic chemicals to make them safer. CEH also provides information to Californians
8 about the health risks associated with exposure to hazardous substances, where manufacturers
9 and other responsible parties fail to do so.

10 5. Defendant NJOY, INC. DBA NJOY ENDS is a person in the course of
11 doing business within the meaning of Health & Safety Code § 25249.11. NJOY, INC. DBA
12 NJOY ENDS manufactures, distributes and/or sells E-Liquids and E-Cigarettes that produce
13 formaldehyde and acetaldehyde for sale or use in California.

14 6. Defendant FONTEM US, INC. is a person in the course of doing business
15 within the meaning of Health & Safety Code § 25249.11. FONTEM US, INC. manufactures,
16 distributes and/or sells E-Cigarettes that produce formaldehyde for sale or use in California.

17 7. Defendant R.J. REYNOLDS VAPOR COMPANY is a person in the
18 course of doing business within the meaning of Health & Safety Code § 25249.11. R.J.
19 REYNOLDS VAPOR COMPANY manufactures, distributes and/or sells E-Liquids and E-
20 Cigarettes that produce formaldehyde and acetaldehyde for sale or use in California.

21 8. DOES 1 through 20 are each a person in the course of doing business
22 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 20 manufacture,
23 distribute and/or sell E-Liquids and/or E-Cigarettes that produce formaldehyde for sale or use in
24 California.

25 9. DOES 21 through 40 are each a person in the course of doing business
26 within the meaning of Health & Safety Code § 25249.11. DOES 21 through 40 manufacture,
27 distribute and/or sell E-Liquids and/or E-Cigarettes that produce acetaldehyde for sale or use in
28 California.

1 10. DOES 41 through 60 are each a person in the course of doing business
2 within the meaning of Health & Safety Code § 25249.11. DOES 41 through 60 manufacture,
3 distribute and/or sell E-Liquids and/or E-Cigarettes that produce formaldehyde and acetaldehyde
4 for sale or use in California.

5 11. The true names of DOES 1 through 60 are unknown to CEH at this time.
6 When their identities are ascertained, the Complaint shall be amended to reflect their true names.

7 12. The defendants identified in paragraphs 5 through 7 and DOES 1 through
8 60 are collectively referred to herein as “Defendants.”

9 **JURISDICTION AND VENUE**

10 13. The Court has jurisdiction over this action pursuant to Health & Safety
11 Code § 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant
12 to California Constitution Article VI, Section 10, because this case is a cause not given by statute
13 to other trial courts.

14 14. This Court has jurisdiction over Defendants because each Defendant is a
15 business entity that does sufficient business, has sufficient minimum contacts in California, or
16 otherwise intentionally avails itself of the California market through the sale, marketing, or use
17 of Products in California and/or by having such other contacts with California so as to render the
18 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair
19 play and substantial justice.

20 15. Venue is proper in the Alameda Superior Court because one or more of the
21 violations arise in the County of Alameda.

22 **BACKGROUND FACTS**

23 **Use of the Products and the Associated Health Risks**

24 16. Over the past several years, consumer use of the Products has exploded
25 due to aggressive and unrestricted marketing, increased restrictions on the use of traditional
26 cigarettes, and an inaccurate perception that E-Cigarettes are “healthy” alternatives to traditional
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1 smoking.¹ Despite the Products' reputation as a "healthy" alternative to smoking, studies reveal
2 multiple problems with using the Products including health risks to the user, adverse impacts on
3 the health and safety of children, teens, and young adults, and a lack of scientific evidence
4 showing that the Products are effective smoking cessation devices or that they reduce the
5 consumption of traditional cigarettes.

6 17. Unlike traditional cigarettes that burn tobacco leaf and cause the resulting
7 smoke to be inhaled, E-Cigarettes heat E-Liquids that generally contains nicotine, flavorings,
8 additives, and propylene glycol. The heated E-Liquid is then transformed into an aerosol that is
9 inhaled by the user.²

10 18. One of the largest concerns over use of the Products is their impact on the
11 health and safety of children, teens, and young adults. Studies indicate that E-Cigarette use
12 among middle and high school students more than doubled from 2011 to 2012.³ An analysis of
13 the 2011-2013 National Youth and Tobacco Survey reported that more than a quarter-million
14 youth who had never smoked a traditional cigarette used the Products in 2013, a three-fold
15 increase since 2011, and that youth who used the Products were nearly twice as likely to try
16 traditional cigarettes as those who never used E-Cigarettes.⁴

17 19. This dramatic rise in adolescent use is directly tied to aggressive marketing
18 efforts for the Products. E-Cigarette ads are in magazines and newspapers, on TV and the radio,

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20 ¹ See Ron Chapman, MD, MPH, *Cal. Dept. of Public Health, Cal. Tobacco Control*
21 *Program, State Health Officer's Report on E-Cigarettes: A Community Health Threat*, (Jan.
22 2015), 6, [http://www.cdph.ca.gov/programs/tobacco/Documents/Media/State%20Health-e-](http://www.cdph.ca.gov/programs/tobacco/Documents/Media/State%20Health-e-cig%20report.pdf)
23 [cig%20report.pdf](http://www.cdph.ca.gov/programs/tobacco/Documents/Media/State%20Health-e-cig%20report.pdf).

24 ² *Id.* at 3.

25 ³ Catherine Corey, MSPH, *et al.*, *Notes From the Field: Electronic Cigarette Use Among*
26 *Middle and High School Students-U.S., 2011-2012*, Center for Disease Control and Prevention,
27 *MMWR Morbidity and Mortality Weekly Report*, 62(35):729-730 (Sept. 6, 2013),
28 [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm?utm_source=rss&utm_medium=rss&utm_campaign=notes-from-the-field-electronic-cigarette-use-among-middle-and-high-scho-](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm?utm_source=rss&utm_medium=rss&utm_campaign=notes-from-the-field-electronic-cigarette-use-among-middle-and-high-school-students-united-states-20112012)
[ol-students-united-states-20112012](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm?utm_source=rss&utm_medium=rss&utm_campaign=notes-from-the-field-electronic-cigarette-use-among-middle-and-high-scho).

⁴ See Rebecca E. Bunnell, *et al.*, *Intentions to Smoke Cigarettes Among Never-Smoking*
U.S. Middle and High School Electronic Cigarette Users, *Natl. Youth Tobacco Survey*
2011-2013, *Nicotine & Tobacco Research* (2014),
<http://ntr.oxfordjournals.org/content/early/2014/08/18/ntr.ntu166.full.pdf+html>.

1 and online, particularly on social media sites such as Facebook, Instagram, YouTube, and
2 Twitter.⁵ In only three years, money spent on Product advertising has increased 1,200 percent or
3 12-fold.⁶ The industry spent \$39 million on advertising between June and November 2013,
4 alone.⁷

5 20. Moreover, a number of recent studies have shown that E-Cigarette users
6 are no more likely to quit than regular smokers, including one study finding that 89 percent of
7 E-Cigarette users are still using them one year later.⁸ Another study showed that E-Cigarette
8 users are a third less likely to quit smoking traditional cigarettes, contradicting the theory that the
9 Products help people successfully quit their nicotine habits.⁹ Finally, statistics show that dual
10 use of traditional cigarettes and the Products is continuing to rise, which may lessen any potential
11 benefit of cutting back on tobacco cigarettes.¹⁰

12 **Proposition 65 and the Alleged Violations**

13 21. The People of the State of California have declared by initiative under
14 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
15 defects, or other reproductive harm.” Proposition 65 § 1(b).

16 22. To effectuate this goal, Proposition 65 prohibits exposing people to
17 chemicals listed by the State of California as known to cause cancer, birth defects, or other
18 reproductive harm without a “clear and reasonable warning,” unless the business responsible for
19 the exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6
20 states, in pertinent part:

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23 ⁵ See Chapman, *A Community Health Threat*, at 7.

24 ⁶ *Id.*

25 ⁷ Legacy, *Vaporized: E-cigarettes, Advertising, and Youth* (May 2014), at 7,
http://truthinitiative.org/sites/default/files/LEG-Vaporized-E-cig_Report-May2014.pdf.

26 ⁸ See Chapman, *A Community Health Threat*, at 6.

27 ⁹ See *id.*

28 ¹⁰ *Id.* at 7.

1 No person in the course of doing business shall knowingly and
2 intentionally expose any individual to a chemical known to the
3 state to cause cancer or reproductive toxicity without first giving
4 clear and reasonable warning to such individual . . .

5 23. On January 1, 1988, the State of California officially listed formaldehyde
6 as a chemical known to cause cancer. 27 Cal. Code Regs. ("C.C.R.") § 27001(c). On January 1,
7 1989, one year after it was listed as a chemical known to cause cancer, formaldehyde became
8 subject to the clear and reasonable warning requirement regarding carcinogenicity under
9 Proposition 65. *Id.*; Health & Safety Code § 25249.10(b).

10 24. On April 1, 1988, the State of California officially listed acetaldehyde as a
11 chemical known to cause cancer. 27 C.C.R. § 27001(b). On April 1, 1989, one year after it was
12 listed as a chemical known to cause cancer, acetaldehyde became subject to the clear and
13 reasonable warning requirement regarding carcinogenicity under Proposition 65. *Id.*; Health &
14 Safety Code § 25249.10(b).

15 25. Defendants' Products, when used as directed, produce significant amounts
16 of formaldehyde and/or acetaldehyde in the aerosol inhaled by users. Thus, the intended use of
17 Defendants' Products results in consumers, many of whom are children and teenagers, being
18 exposed to formaldehyde and/or acetaldehyde.

19 26. Any person acting in the public interest has standing to enforce violations
20 of Proposition 65, provided that such person has supplied the requisite public enforcers with a
21 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
22 action within such time. Health & Safety Code § 25249.7(d).

23 27. More than sixty days prior to naming each Defendant in this lawsuit, CEH
24 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General,
25 the District Attorneys of every county in California, the City Attorneys of every California city
26 with a population greater than 750,000 and to each of the named Defendants. In compliance with
27 Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
28 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
time period during which violations occurred; (4) specific descriptions of the violations,

1 including (a) the routes of exposure to formaldehyde or acetaldehyde from the Products, and (b)
2 the specific type of Products sold and used in violation of Proposition 65; and (5) the name of the
3 specific Proposition 65-listed chemical that is the subject of the violations described in each
4 Notice of Violation.

5 28. CEH also sent a Certificate of Merit for each Notice to the California
6 Attorney General, the District Attorneys of every county in California, the City Attorneys of
7 every California city with a population greater than 750,000 and to the named Defendants. In
8 compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3101, each of the
9 Certificates certified that CEH's counsel: (1) has consulted with one or more persons with
10 relevant and appropriate experience or expertise who reviewed facts, studies or other data
11 regarding the exposures to formaldehyde or acetaldehyde alleged in each of the Notices; and (2)
12 based on the information obtained through such consultations, believes that there is a reasonable
13 and meritorious case for a citizen enforcement action based on the facts alleged in each of the
14 Notices. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, each of
15 the Certificates served on the Attorney General included factual information – provided on a
16 confidential basis – sufficient to establish the basis for the Certificate, including the identity of
17 the person(s) consulted by CEH's counsel and the facts, studies, or other data reviewed by such
18 persons.

19 29. None of the public prosecutors with the authority to prosecute violations
20 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
21 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in
22 CEH's Notices.

23 30. Defendants both know and intend that consumers in California will use
24 the Products, thus exposing them to formaldehyde and/or acetaldehyde. Under Proposition 65,
25 an exposure is "knowing" where the party responsible for such exposure has:

26 knowledge of the fact that a[n] . . . exposure to a chemical listed
27 pursuant to [Health and Safety Code §25249.8(a)] is occurring.
28 No knowledge that the . . . exposure is unlawful is required.

1 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
2 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2 §
3 12201).

4 31. As companies that manufacture, import, distribute, and/or sell Products
5 for use in the California marketplace, Defendants know or should know that use of the Products
6 produces formaldehyde and/or acetaldehyde, and that individuals who use the Products will be
7 exposed to these carcinogens. The formaldehyde and/or acetaldehyde exposures to consumers
8 who use the Products are a natural and foreseeable consequence of Defendants' placing the
9 Products into the stream of commerce.

10 32. In addition, Defendants have actual knowledge of the fact that the
11 Products expose users to formaldehyde and/or acetaldehyde because CEH's 60-Day Notices of
12 Violation and accompanying Certificates of Merit informed each Defendant of the formaldehyde
13 and/or acetaldehyde produced by their Products.

14 33. Nevertheless, Defendants continue to expose California consumers,
15 including children and teenagers, to formaldehyde and/or acetaldehyde without providing any
16 clear and reasonable warnings regarding the carcinogenic hazards of formaldehyde and/or
17 acetaldehyde from using the Products.

18 34. CEH has engaged in good-faith efforts to resolve the claims alleged herein
19 prior to filing this Complaint.

20 35. Any person "violating or threatening to violate" Proposition 65 may be
21 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to
22 violate" is defined to mean "to create a condition in which there is a substantial probability that a
23 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
24 penalties not to exceed \$2,500 per day for each violation of Proposition 65. Health & Safety
25 Code § 25249.7(b).

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FIRST CAUSE OF ACTION
(Violations of the Health & Safety Code § 25249.6)
(Alleged for Only Formaldehyde Defendants)

36. CEH realleges and incorporates by reference as if specifically set forth herein Paragraphs 1 through 35, inclusive.

37. Formaldehyde is a chemical listed by the State of California as known to cause cancer.

38. By placing their Products into the stream of commerce, Defendants Fontem US, Inc., NJOY, Inc. dba NJOY Ends, R.J. Reynolds Vapor Company, and DOES 1 through 20 and 41 through 60 (collectively, the “Formaldehyde Defendants”) are each a person in the course of doing business within the meaning of Health & Safety Code § 25249.11.

39. Formaldehyde Defendants know that use of their Products will expose users of the Products to formaldehyde. Formaldehyde Defendants intend that their Products be used in a manner that results in users of their Products being exposed to formaldehyde.

40. Formaldehyde Defendants have failed, and continue to fail, to provide prior clear and reasonable warnings regarding the carcinogenic hazards of formaldehyde to users of their Products.

41. By committing the acts alleged above, Formaldehyde Defendants have at all times relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing individuals to formaldehyde without first giving clear and reasonable warnings to such individuals regarding the carcinogenic nature of formaldehyde.

Wherefore, CEH prays for judgment against Formaldehyde Defendants, as set forth hereafter.

SECOND CAUSE OF ACTION
(Violations of the Health & Safety Code § 25249.6)
(Alleged for Only Acetaldehyde Defendants)

42. CEH realleges and incorporates by reference as if specifically set forth herein Paragraphs 1 through 41, inclusive.

43. Acetaldehyde is a chemical listed by the State of California as known to

1 cause cancer.

2 44. By placing their Products into the stream of commerce, Defendants NJOY,
3 Inc. dba NJOY Ends, R.J. Reynolds Vapor Company, and DOES 21 through 60 (collectively, the
4 “Acetaldehyde Defendants”) are each a person in the course of doing business within the
5 meaning of Health & Safety Code § 25249.11.

6 45. Acetaldehyde Defendants know that use of their Products will expose
7 users of the Products to acetaldehyde. Acetaldehyde Defendants intend that their Products be
8 used in a manner that results in users of their Products being exposed to acetaldehyde.

9 46. Acetaldehyde Defendants have failed, and continue to fail, to provide
10 prior clear and reasonable warnings regarding the carcinogenic hazards of acetaldehyde to users
11 of their Products.

12 47. By committing the acts alleged above, Acetaldehyde Defendants have at
13 all times relevant to this Complaint violated Proposition 65 by knowingly and intentionally
14 exposing individuals to acetaldehyde without first giving clear and reasonable warnings to such
15 individuals regarding the carcinogenic nature of acetaldehyde.

16 Wherefore, CEH prays for judgment against Acetaldehyde Defendants, as set
17 forth hereafter.

18 **PRAYER FOR RELIEF**

19 Wherefore, CEH prays for judgment against Defendants as follows:

20 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess
21 civil penalties against each Defendant in the amount of \$2,500 per day for each violation of
22 Proposition 65 according to proof;

23 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
24 preliminarily and permanently enjoin Defendants from offering Products for sale in California
25 without providing prior clear and reasonable warnings, as CEH shall specify in further
26 application to the Court;

27 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
28 Defendants to take action to stop ongoing unwarned exposures to formaldehyde and/or

1 acetaldehyde resulting from use of Products sold by Defendants, as CEH shall specify in further
2 application to the Court;

3 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
4 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

5 5. That the Court grant such other and further relief as may be just and
6 proper.

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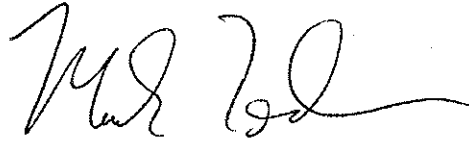
8 Dated: November 19, 2015

Respectfully submitted,

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LEXINGTON LAW GROUP

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Mark N. Todzo
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

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