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9 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

AUG - 8 2017

CLERK OF THE SUPERIOR COURT
By YOLANDA ESTRADA Deputy

10 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF ALAMEDA

12 CENTER FOR ENVIRONMENTAL HEALTH,)

13 Plaintiff,)

14 v.)

15 NJOY, INC. DBA NJOY ENDS, et al.,)

16 Defendants.)
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Case No. RG 15-794040

~~PROPOSED~~ CONSENT
JUDGMENT AS TO FONTEM US,
INC.

1. INTRODUCTION

1.1. This Consent Judgment is entered into by Plaintiff Center for Environmental Health, a non-profit corporation (“CEH”), and Fontem US, Inc. (“Settling Defendant”) to settle claims asserted by CEH against Settling Defendant as set forth in the operative Complaint in the matter *Center for Environmental Health v. NJOY, Inc. dba NJOY Ends, et al.*, Alameda County Superior Court Case No. RG 15-794040 (the “Action”). CEH and Settling Defendant are referred to collectively as the “Parties.”

1.2. On September 2, 2015, CEH served a 60-Day Notice of Violation (the “Notice”) relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986, California

1 Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Settling Defendant, the California
2 Attorney General, the District Attorneys of every County in the State of California, and the City
3 Attorneys for every City in State of California with a population greater than 750,000. The
4 Notice alleges violations of Proposition 65 with regard to exposures to formaldehyde resulting
5 from use of Settling Defendant’s e-cigarette devices (the “Products”).

6 **1.3.** On November 19, 2015, CEH filed the Action, naming Settling Defendant as a
7 defendant in the Action.

8 **1.4.** Settling Defendant is a corporation that employs ten (10) or more persons and that
9 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
10 California or has done so in the past.

11 **1.5.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
12 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
13 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)
14 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
15 Consent Judgment as a full and final resolution of all claims which were or could have been
16 raised in the Complaint based on the facts alleged in the Notice and Complaint with respect to
17 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

18 **1.6.** The Parties enter into this Consent Judgment as a full and final settlement of all
19 claims which were or could have been raised in the Complaint arising out of the facts or conduct
20 related to Settling Defendant alleged therein and in the Notice. By execution of this Consent
21 Judgment and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of
22 law, or violation of law, nor shall compliance with the Consent Judgment constitute or be
23 construed as an admission by the Parties of any fact, conclusion of law, or violation of law.
24 Settling Defendant denies the material, factual, and legal allegations in the Notice and Complaint
25 and expressly denies any wrongdoing whatsoever. Except as specifically provided herein,
26 nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument,
27 or defense any of the Parties may have in this or any other pending or future legal proceedings.

1 This Consent Judgment is the product of negotiation and compromise and is accepted by the
2 Parties solely for purposes of settling, compromising, and resolving issues disputed in this Action.

3 **2. DEFINITIONS**

4 **2.1.** “Covered Products” means electronic cigarette devices, also known as tanks and
5 vape pens, which contain nicotine or are designed and intended for use with nicotine-containing
6 liquid, that are manufactured, distributed, and/or sold by Settling Defendant in California.

7 **2.2.** “Effective Date” means the date on which the Court enters this Consent
8 Judgment.


9 **3. INJUNCTIVE RELIEF**

10 **3.1. Clear and Reasonable Warnings for Covered Products.** As of the Effective
11 Date, no Covered Product may be distributed or sold by Settling Defendant in California unless
12 such Covered Product has a clear and reasonable warning on the outer packaging of the Product.


13 The warning shall state the following:

14 **WARNING:** This product contains chemicals known to the State
15 of California to cause cancer and birth defects or other
16 reproductive harm.

17 OR

18  **WARNING:** This product can expose you to chemicals including
19 formaldehyde, which is known to the State of California to cause cancer, and
20 nicotine, which is known to the State of California to cause birth defects or other
21 reproductive harm. For more information, go to www.P65Warnings.ca.gov.¹

22 Unless otherwise mandated by law, the warning shall not be preceded by, surrounded by, or
23 include any additional words or phrases that contradict, obfuscate, or otherwise undermine the

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25 ¹In the event that there is insufficient space on the packaging of a Product to adequately
26 display either of the two warnings described in Section 3.1 above (or for some other good-faith
27 reason), Settling Defendant may use the following warning:  **WARNING:** Cancer and
28 Reproductive Harm- www.P65Warnings.ca.gov.

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

13 **4. PAYMENTS**

14 **4.1.** Settling Defendant shall pay to CEH the total sum of \$355,000 which shall be
15 allocated as follows:

16 **4.1.1.** \$46,500 as a civil penalty pursuant to California Health & Safety Code §
17 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
18 Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of
19 Environmental Health Hazard Assessment).

20 **4.1.2.** \$35,000 as an Additional Settlement Payment (“ASP”) in lieu of civil
21 penalty to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of
22 Regulations, Title 11, § 3204. CEH intends to place these funds in CEH’s Toxics and Youth
23 Fund and use them to support CEH programs and activities that seek to educate the public about
24 Lead and other toxic chemicals in consumer products that are marketed to youth, expand its use
25 of social media to communicate with youth in California about the risks of exposures to Lead and
26 other toxic chemicals in the products they use and about ways to reduce those exposures, work
27 with industries that market products to youth to reduce exposure to Lead and other toxic
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1 chemicals, and thereby reduce the public health impacts and risks of exposure to Lead and other
2 toxic chemicals in consumer products that are marketed to youth in California. CEH shall obtain
3 and maintain adequate records to document that ASPs are spent on these activities and CEH
4 agrees to provide such documentation to the Attorney General within thirty days of any request
5 from the Attorney General. The payment pursuant to this Section shall be made payable to the
6 Center for Environmental Health and associated with taxpayer identification number 94-3251981.

7 **4.1.3.** \$273,500 as a reimbursement of a portion of CEH's reasonable attorneys'
8 fees and costs. This amount shall be divided into two checks: (1) a check for \$230,500 shall be
9 made payable to Lexington Law Group; and (2) a check for \$43,000 shall be made payable to the
10 Center for Environmental Health.

11 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
12 separate checks, all to be delivered within ten (10) days following the Effective Date. The
13 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
14 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group
15 at the address set forth in Section 8.1.2.

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1 **5. ENFORCEMENT OF CONSENT JUDGMENT**

2 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
3 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
4 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
5 shall provide Settling Defendant with a Notice of Violation and a copy of any test results which
6 purportedly support CEH’s Notice of Violation. The Parties shall then meet and confer regarding
7 the basis for CEH’s anticipated motion or application in an attempt to resolve it informally,
8 including providing Settling Defendant a reasonable opportunity of at least ninety (90) days to
9 cure any alleged violation. Should such attempts at informal resolution fail, CEH may file its
10 enforcement motion or application. The prevailing party on any motion to enforce this Consent
11 Judgment shall be entitled to its reasonable attorney’s fees and costs incurred as a result of such
12 motion or application. This Consent Judgment may only be enforced by the Parties.

13 **6. MODIFICATION OF CONSENT JUDGMENT**

14 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
15 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law. The
16 following are examples of possible grounds for modification: (i) Settling Defendant’s contention
17 that California law ceases to require the Current Warning or substantially similar variant, (ii)
18 Settling Defendant’s contention that federal law requires a different warning (or specifies that the
19 Current Warning or substantially similar variant should be removed), or (iii) there is a decision of
20 a controlling state or federal court that Settling Defendant contends holds that the warning
21 requirement of Proposition 65 is preempted, modified, or otherwise unenforceable under state
22 and/or federal law.

23 **7. CLAIMS COVERED AND RELEASE**

24 **7.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting
25 in the public interest and Settling Defendant and Settling Defendant’s parents, officers, directors,
26 shareholders, divisions, subdivisions, subsidiaries, and their respective successors and assigns
27 (“Defendant Releasees”) and all entities to whom they distribute or sell or have distributed or sold
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1 Covered Products in California including, but not limited to, distributors, wholesalers, customers,
2 retailers, franchisees, cooperative members, and licensees (“Downstream Defendant Releasees”),
3 of all claims which were or could have been raised in the Complaint arising out of the facts or
4 conduct related to Settling Defendant and Downstream Defendant Releasees alleged therein and
5 in the Notice , regarding the failure to warn about exposures to formaldehyde in the Covered
6 Products manufactured, distributed, or sold by Settling Defendant prior to the Effective Date.

7 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims which
8 were or could have been raised in the Complaint arising out of the facts or conduct related to
9 Settling Defendant and Downstream Defendant Releasees alleged therein and in the Notice.

10 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and
11 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
12 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn
13 about formaldehyde in Covered Products manufactured, distributed, or sold by Settling Defendant
14 after the Effective Date.

15 **8. COVENANT NOT TO SUE**

16 **8.1.** CEH agrees not to file suit against Settling Defendant and Downstream Defendant
17 Releasees with respect to any of the claims released herein. This provision does not impair
18 CEH’s ability to enforce the terms of this Consent Judgment in accordance with Section 5.

19 **9. PROVISION OF NOTICE**

20 **9.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
21 notice shall be sent by first class and electronic mail as follows:

22 **9.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
23 receive notices pursuant to this Consent Judgment shall be:

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1 Allan Gabriel
2 Dykema Gossett LLP
3 333 South Grand Ave, Suite 2100
4 Los Angeles, CA 90071
5 agabriel@dykema.com

6 **9.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
7 this Consent Judgment shall be:

8 Mark Todzo
9 Lexington Law Group
10 503 Divisadero Street
11 San Francisco, CA 94117
12 mtodzo@lexlawgroup.com

13 **9.2.** Any Party may modify the person and address to whom the notice is to be sent by
14 sending the other Parties notice by first class and electronic mail.

15 **10. COURT APPROVAL**

16 **10.1.** This Consent Judgment shall become effective on the Effective Date, provided
17 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
18 Settling Defendant shall support approval of such Motion.

19 **10.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
20 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
21 purpose.

22 **11. GOVERNING LAW AND CONSTRUCTION**

23 **11.1.** The terms and obligations arising from this Consent Judgment shall be construed
24 and enforced in accordance with the laws of the State of California.

25 **12. ENTIRE AGREEMENT**

26 **12.1.** This Consent Judgment contains the sole and entire agreement and understanding
27 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
28 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
merged herein and therein.

12.2. There are no warranties, representations, or other agreements between CEH and
Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,

1 express or implied, other than those specifically referred to in this Consent Judgment have been
2 made by any Party hereto.

3 **12.3.** No other agreements not specifically contained or referenced herein, oral or
4 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
5 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
6 any of the Parties hereto only to the extent that they are expressly incorporated herein.

7 **12.4.** No supplementation, modification, waiver, or termination of this Consent
8 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

9 **12.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
10 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
11 such waiver constitute a continuing waiver.

12 **13. RETENTION OF JURISDICTION**

13 **13.1.** This Court shall retain jurisdiction of this matter to implement or modify the
14 Consent Judgment.

15 **14. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

16 **14.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
17 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
18 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

19 **15. NO EFFECT ON OTHER SETTLEMENTS**

20 **15.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
21 against another entity on terms that are different from those contained in this Consent Judgment.

22 **16. EXECUTION IN COUNTERPARTS**

23 **16.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
24 means of facsimile, which taken together shall be deemed to constitute one document.

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IT IS SO STIPULATED:
CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

FONTEM US, INC.

Signature

Printed Name

Title

IT IS SO ORDERED:

Dated: _____, 2017

Judge of the Superior Court

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IT IS SO STIPULATED:
CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

FONTEM US, INC.


Signature

WAYNE JONES
Printed Name

SENIOR VICE PRESIDENT SALES
Title

IT IS SO ORDERED:

Dated: AUG - 8 2017 ~~2017~~

GEORGE C. HERNANDEZ, JR.
Judge of the Superior Court