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ALAMEDA COUNTY

APR 11 2019

CLERK OF THE SUPERIOR COURT

By *A. Mendez* Deputy

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

12 CENTER FOR ENVIRONMENTAL HEALTH,)
13)
14 Plaintiff,)
15 v.)
16 NJOY, INC. DBA NJOY ENDS, *et al.*,)
17 Defendants.)

Case No. RG 15-794040

~~PROPOSED~~ CONSENT
JUDGMENT AS TO NJOY, LLC

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 NJOY, LLC (“NJOY” or “Defendant”) to settle
23 claims asserted by CEH against Defendant as set forth in the operative Complaint in the matter
24 *Center for Environmental Health v. NJOY, Inc. dba NJOY Ends, et al.*, Alameda County Superior
25 Court Case No. RG 15-794040 (the “Action”). CEH and Defendant are referred to collectively as
26 the “Parties.”

27 **1.2.** On November 21, 2017, CEH served a 60-Day Notice of Violation (the “Notice”)

1 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986, California
2 Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Defendant, the California
3 Attorney General, the District Attorneys of every County in the State of California, and the City
4 Attorneys for every City in State of California with a population greater than 750,000. The
5 Notice alleges violations of Proposition 65 with regard to exposures to formaldehyde resulting
6 from use of Defendant’s e-cigarette devices and e-liquids.

7 **1.3.** On November 19, 2015, CEH filed the Action which named NJOY, Inc. as a
8 defendant. In September 2016, NJOY, Inc. filed for bankruptcy. By Order dated November 15,
9 2016, the bankruptcy court approved the sale of NJOY, Inc. assets to Defendant (the “Sale
10 Order”). Among other things, the Sale Order provided that the Defendant “is not a ‘successor,’
11 ‘successor-in-interest,’ ‘continuation,’ or ‘substantial continuation’ to or of the Debtor [NJOY,
12 Inc.] or its estate by reason of any theory of Law or equity, and the Purchaser shall not assume,
13 nor be deemed to assume, or in any way be responsible for any liability, claim, or obligation of
14 any of the Debtor and/or its estate.” On February 16, 2017, Defendant closed on the purchase of
15 assets approved by the Sale Order. On February 6, 2018, Defendant was added to the Action via
16 Doe Amendment.

17 **1.4.** Defendant is a corporation that employs ten (10) or more persons and that
18 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
19 California or has done so in the past.

20 **1.5.** Defendant vigorously disputes the allegations in the Notice and in this Action.
21 Pursuant to section 431.30(d) of the California Code of Civil Procedure, Defendant denied the
22 allegations in the Action and asserted numerous affirmative defenses. Defendant contends that
23 any alleged exposure to formaldehyde from the Covered Products does not exceed the applicable
24 No Significant Risk Level established by the State under Proposition 65 and, accordingly, the
25 alleged exposure does not require a warning under Proposition 65. Defendant further contends
26 that the claims asserted hereunder are preempted by the 2009 Tobacco Control Act.

27 **1.6.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
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1 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
2 and personal jurisdiction over Defendant as to the acts alleged in the Complaint; (ii) venue is
3 proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this Consent
4 Judgment as a full and final resolution of all claims which were or could have been raised in the
5 Complaint based on the facts alleged in the Notice and Complaint with respect to Covered
6 Products manufactured, distributed, and/or sold by Defendant.

7 **1.7.** The Parties enter into this Consent Judgment as a full and final settlement of all
8 claims which were or could have been raised in the Complaint arising out of the facts or conduct
9 related to Defendant alleged therein and in the Notice. By execution of this Consent Judgment
10 and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
11 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
12 admission by the Parties of any fact, conclusion of law, or violation of law. Defendant denies the
13 material, factual, and legal allegations in the Notice and Complaint and expressly denies any
14 wrongdoing whatsoever. Except as specifically provided herein, nothing in this Consent
15 Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any of the
16 Parties may have in this or any other pending or future legal proceedings. This Consent Judgment
17 is the product of negotiation and compromise and is accepted by the Parties solely for purposes of
18 settling, compromising, and resolving issues disputed in this Action.

19 **2. DEFINITIONS**

20 **2.1.** “Covered Products” means “Covered Device Products” and “Covered Liquid
21 Products.”

22 **2.2.** “Covered Device Products” means electronic cigarette devices, also known as
23 tanks and vape pens, which contain nicotine or are designed and intended for use with nicotine-
24 containing liquid, that are manufactured, distributed, and/or sold by Defendant in California.

25 **2.3.** “Covered Liquid Products” means liquids that are designed for use with electronic
26 cigarette devices, also known as tanks and vape pens, that are manufactured, distributed, and/or
27 sold by Defendant in California.

1 **2.4.** “Effective Date” means the date on which the Court enters this Consent
2 Judgment.

3 **3. INJUNCTIVE RELIEF**

4 **3.1. Reformulation Option.** A Covered Product shall not require a warning pursuant
5 to Proposition 65 with regard to formaldehyde exposures to the extent that testing performed on
6 the Covered Product in accordance with the test protocol attached hereto as Exhibit A
7 demonstrates that ordinary use of the Covered Product will expose a user to less than 40
8 micrograms of formaldehyde in a single day. Defendant may comply with the above requirements
9 by relying on information obtained from its suppliers regarding the results of the testing, provided
10 such reliance is in good faith. Obtaining test results from an accredited laboratory using a test
11 protocol substantially similar to the one attached hereto as Exhibit A showing that ordinary use of
12 the Covered Product will expose a user to less than 40 micrograms of formaldehyde in a single
13 day shall be deemed to establish good faith reliance.

14 **3.2. Clear and Reasonable Warnings for Covered Products.** Defendant shall
15 provide clear and reasonable warnings for all Covered Products, within ninety (90) days of the
16 Effective Date, except for those Covered Products described in Section 3.1, sold in California in
17 accordance with this Section 3.2.

18 **3.2.1. Warnings for Covered Products Sold Directly to Consumers by**
19 **Defendant on Its Website.** Within ninety (90) days of the Effective Date, no Covered Product
20 shall be sold by Defendant on its website to a customer in California unless the following warning
21 is provided:



22 **WARNING:** This product can expose you to chemicals including formaldehyde,
23 which are known to the State of California to cause cancer, and nicotine, which is
24 known to the state of California to cause birth defects or other reproductive harm.
25 For more information go to www.P65Warnings.ca.gov.

26 OR



27 **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov.

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 displayed in such a manner that it is likely to be read and understood as being applicable to the
4 Covered Product being purchased by a customer in California prior to the authorization of or
5 actual payment. The warning language is not prominently displayed if the customer must search
6 for the warning language in the general content of Defendant’s website or if a reasonable
7 consumer cannot determine the specific Covered Product to which the warning applies.
8 Placement of the warning statement at the bottom of an internet webpage that offers multiple
9 products for sale does not satisfy the requirements of this Section.

10 **3.2.2. Warnings for Covered Products Sold at Brick and Mortar Retail**

11 **Stores.** Within ninety (90) days of the Effective Date, Defendant shall not sell or ship for sale
12 any Covered Products to brick and mortar retailers located in California or distributors that
13 Defendant has reason to believe may resell Covered Products to brick and mortar retailers located
14 in California unless such Covered Products: (i) conspicuously display the warning set forth in
15 Section 3.2.1 on the Covered Products’ outer packaging; or (ii) are accompanied by warning signs
16 to be posted in retail outlets together with a letter providing directions for the posting of such
17 signs. The warning signs shall measure a minimum of 5 inches by 4 inches and shall, in no less
18 than 24 point font, state the following:



19 **WARNING:** Use of [Name of Each Covered Product Sold by the Retailer or
20 reference to all products on sale at that Retailer or all of Defendant’s products on
21 sale at that Retailer] can expose you to chemicals including formaldehyde, which
22 are known to the State of California to cause cancer, and nicotine, which is known
23 to the state of California to cause birth defects or other reproductive harm. For
24 more information go to www.P65Warnings.ca.gov.

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 sign shall be
27 displayed either in or on the display case where the Covered Products are displayed or on a wall

1 abutting where the Covered Products are displayed or stored, whichever ensures that the sign is
2 displayed in such a manner that it is likely to be read and understood as being applicable to the
3 Covered Product being purchased prior to the authorization of or actual payment. The warning
4 signs shall be sent with a cover letter describing how and where the warning signs must be
5 placed, Defendant's mechanism for checking compliance with the sign postings, and the penalties
6 that will be imposed if the retailer does not comply with the sign posting requirements. The text
7 of the letter described in this Section shall be agreed upon by the Parties in all material respects.

8 **3.2.3. Warnings for Covered Products Sold by Third Party Online Retailers.**

9 Within ninety (90) days of the Effective Date, Defendant shall not sell or ship for sale any
10 Covered Products to online retailers that Defendant has reason to believe may sell Covered
11 Products into California or distributors that Defendant has reason to believe may sell Covered
12 Products to online retailers that sell Covered Products in California unless such Covered Products
13 are accompanied by a letter instructing that for any Covered Product sold by an online retailer to a
14 customer in California, the following warning shall be provided:



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

19 OR



20 **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov.

21 The letter must further instruct that the warning shall not be preceded by, surrounded by, or
22 include any additional words or phrases that contradict, obfuscate, or otherwise undermine the
23 warning. It must also inform the retail customer that the warning statement must be displayed in
24 such a manner that it is likely to be read and understood as being applicable to the Covered
25 Product being purchased prior to the authorization of or actual payment and that placement of the
26 warning statement at the bottom of an internet webpage that offers multiple products for sale does
27 not satisfy the requirements of this Section.

1 **3.2.4. Warnings for Covered Products in the Stream of Commerce.** In an
2 effort to ensure that consumers receive a clear and reasonable warning in compliance with
3 Proposition 65 for Covered Products that have not been sold in accordance with Section 3.2,
4 within ninety (90) days following the Effective Date, Defendant shall provide warning signs by
5 certified mail or a next day delivery service such as Federal Express to each of its California brick
6 and mortar retailers or distributors to whom Defendant reasonably believes sold Covered
7 Products prior to the Effective Date. Such warning signs shall measure a minimum of 5 inches by
8 4 inches and shall, in no less than 24 point font, state the following:



9 **WARNING:** Use of [Name of Each Covered Product Sold by the Retailer or
10 reference to all products on sale at that Retailer or all of Defendant’s products on
11 sale at that Retailer] can expose you to chemicals including formaldehyde, which
12 are known to the State of California to cause cancer, and nicotine, which is known
13 to the state of California to cause birth defects or other reproductive harm. For
14 more information go to www.P65Warnings.ca.gov.

15 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
16 that contradict, obfuscate, or otherwise undermine the warning. The warning sign shall be
17 displayed either in or on the display case where the Covered Products are displayed or on a wall
18 abutting where the Covered Products are displayed or stored, whichever ensures that the sign is
19 displayed in such a manner that it is likely to be read and understood as being applicable to the
20 Covered Product being purchased prior to the authorization of or actual payment. The warning
21 signs shall be sent with a cover letter describing how and where the warning signs should be
22 placed, Defendant’s mechanism for checking compliance with the sign postings, and the penalties
23 that will be imposed if the retailer does not comply with the sign posting requirement. The letter
24 described in this Section shall be substantially similar to the letter agreed upon by the Parties.

25 **3.2.5. Monitoring of Distributors and Retailers.** Defendant shall monitor its
26 customers’ compliance with Sections 3.2.2 – 3.2.4 of this Consent Judgment, including
27 monitoring Defendant’s California retailers to determine whether the warning signs are
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1 conspicuously posted and in accordance with Sections 3.2.2 and 3.2.4.

2 **3.2.5.1. Penalties for Non-Complying Retailers.** As described in the
3 letter attached hereto as Exhibit B, the following penalties shall be imposed to California retailers
4 that fail to post the warning signs required by this Consent Judgment:

5 **a. 1st Failure (All Partners):** Defendant shall transmit written notice
6 of the violation to the California retailer that failed to post the warning sign(s) informing it of the
7 date of the violation and providing additional warning signs. The notice will further inform such
8 retailer of the additional penalties that will be imposed for future violations;

9 **b. 2nd Failure (Vape Shops):** Defendant will promptly transmit
10 written notice and warning to the violating store and to its headquarters (if any) with the date and
11 time of the violation: Defendant will immediately suspend access to ordering Covered Products
12 until after receipt by Defendant of a written reaffirmation by the violating store of its commitment
13 to adhere to this policy;

14 **c. 2nd Failure (Grocery Stores, Gas Stations, Convenience Stores,
15 and Drug Stores):** Defendant will immediately transmit second written notice and warning to
16 violating store's headquarters with the date and time of the violation;

17 **d. 3rd Failure (Vape Shops):** Defendant will immediately suspend
18 access to ordering Covered Products for 30 days and until after receipt by Defendant of a written
19 reaffirmation by the violating store of its commitment to adhere to policy against sales to minors;
20 and

21 **e. 4th Failure (Vape Shops):** Defendant will terminate sales of all
22 Covered Products to the violating store location for at least 90 days, and until violating store
23 location has demonstrated to Defendant's satisfaction that permanent and sufficient new measures
24 have been implemented to ensure posting of the warning sign(s).

25 **3.2.5.2. Reporting.** Defendant will file with the Court and serve on
26 CEH annual reports describing in detail the results of the monitoring program required by this
27 Section 3.2.5. The first annual report shall be due six (6) months after the Effective Date, with
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1 subsequent reports annually thereafter.

2 **3.3. Sell-Through Period.** Notwithstanding anything else in this Consent Judgment,
3 the Covered Products that were manufactured prior to ninety (90) days after the Effective Date
4 shall be subject to the release of liability pursuant to Section 7 of this Consent Judgment, without
5 regard to when such Covered Products were, or are in the future, distributed or sold to customers.
6 As a result, the obligation of Defendant, or any of its parents, subsidiaries, affiliates, or
7 downstream retailers set forth in this Consent Judgment, including but not limited to Section 3, do
8 not apply to these products manufactured prior to ninety (90) days after the Effective Date.

9 **4. PAYMENTS**

10 **4.1.** Defendant shall pay to CEH the total sum of \$150,000, which shall be allocated as
11 follows:

12 **4.1.1.** \$25,380 as a civil penalty pursuant to California Health & Safety Code §
13 25249.7(b), such money to be apportioned in accordance with California Health & Safety Code §
14 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental Health
15 Hazard Assessment).

16 **4.1.2.** \$19,020 as an Additional Settlement Payment (“ASP”) in lieu of civil
17 penalty to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of
18 Regulations, Title 11, § 3204. CEH intends to place these funds in CEH’s Toxics and Youth
19 Fund and use them to: (1) support CEH programs and activities that seek to educate the public
20 about nicotine, formaldehyde, and acetaldehyde in electronic cigarettes and other toxic chemicals
21 in consumer products that are marketed to youth; (2) expand its use of social media to
22 communicate with Californians about the risks of exposures to nicotine, formaldehyde, and
23 acetaldehyde and other toxic chemicals in the products they and their children use and about ways
24 to reduce those exposures; and (3) work with industries that market products to youth to reduce
25 exposures to nicotine, formaldehyde, and acetaldehyde and other toxic chemicals, and thereby
26 reduce the public health impacts and risks of exposures to nicotine, formaldehyde, and
27 acetaldehyde and other toxic chemicals in consumer products that are marketed to youth in
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1 California. CEH's educational materials and other communications regarding electronic cigarettes
2 will all be based in science. CEH shall obtain and maintain adequate records to document that
3 ASPs are spent on these activities and CEH agrees to provide such documentation to the Attorney
4 General within thirty (30) days of any request from the Attorney General. The payment pursuant
5 to this Section shall be made payable to the Center for Environmental Health.

6 **4.1.3.** \$105,600 as a reimbursement of a portion of CEH's reasonable attorneys'
7 fees and costs. This amount shall be made payable to Lexington Law Group.

8 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
9 separate checks, all to be delivered within ten (10) days following the Effective Date. The
10 payments required pursuant to Section 4.1.1 shall be made payable to the Center for
11 Environmental Health and OEHHA, the payment required under Section 4.1.2 shall be made
12 payable to the Center for Environmental Health and the payment required under Section 4.1.3
13 shall be made payable to Lexington Law Group. All checks shall be delivered to Mark Todzo at
14 Lexington Law Group at the address set forth in Section 9.1.2.

15 **5. ENFORCEMENT OF CONSENT JUDGMENT**

16 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
17 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
18 Prior to bringing any motion or application to enforce the requirements of Section 3 above
19 applicable to Defendant, CEH shall provide Defendant with a Notice of Violation and a copy of
20 any test results or other documents which purportedly support CEH's Notice of Violation. The
21 Parties shall then meet and confer regarding the basis for CEH's anticipated motion or application
22 in an attempt to resolve it informally, including providing Defendant a reasonable opportunity of
23 at least thirty (30) days to cure any alleged violation. Should such attempts at informal resolution
24 fail, CEH may file its enforcement motion or application. The prevailing party on any motion to
25 enforce this Consent Judgment shall be entitled to its reasonable attorney's fees and costs
26 incurred as a result of such motion or application. This Consent Judgment may only be enforced
27 by the Parties.

1 **5.2.** To the extent CEH seeks to enforce alleged violations of the retailer posting
2 requirements set forth in Sections 3.2.2 and 3.2.4 above, the following procedures will apply.
3 Should CEH locate a California retailer that is selling Covered Products without a warning sign,
4 CEH may send notice to Defendant identifying the California retailer by name and location, the
5 date of the alleged violation and a photograph demonstrating that the Covered Products are being
6 sold at the store in question. Such notice shall then serve as a first failure pursuant to Section
7 3.2.5. Any additional violations of the California retailer posting requirements by a California
8 retailer that was previously the subject of a notice under this section shall count as additional
9 failures under Section 3.2.5, subject to Defendant’s right to challenge CEH’s notice of violation.
10 Should Defendant choose to contest a notice from CEH, CEH may then bring a motion to enforce
11 the Consent Judgment in accordance with Section 5.1 above.

12 **6. MODIFICATION OF CONSENT JUDGMENT**

13 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
14 Defendant, or upon motion of CEH or Defendant as provided by law. The moving party shall
15 bear the burden of proof on any motion to modify this Consent Judgment. A ruling by a
16 California Court of Appeal or California Supreme Court or a formal statement by the Food and
17 Drug Administration that Proposition 65, as applied to electronic nicotine products, is preempted
18 by the 2009 Tobacco Control Act or other provision of federal law, may constitute grounds for a
19 modification of this Consent Judgment under this section.

20 **7. CLAIMS COVERED AND RELEASE**

21 **7.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting
22 in the public interest and Defendant and Defendant’s parents, officers, directors, shareholders,
23 divisions, subdivisions, subsidiaries, and their respective successors and assigns (“Defendant
24 Releasees”) and all entities to whom they distribute or sell or have distributed or sold Covered
25 Products including, but not limited to, distributors, wholesalers, customers, retailers, franchisees,
26 cooperative members, and licensees (“Downstream Defendant Releasees”), of all claims alleged
27 in the Complaint in this Action arising from any violation of Proposition 65 that have been or
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1 could have been asserted in the public interest against Defendant and Downstream Defendant
2 Releasees, regarding the failure to warn about exposures to formaldehyde in the Covered
3 Products manufactured, distributed, or sold by Defendant prior to the Effective Date.

4 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged
5 in the Complaint against Defendant and Downstream Defendant Releasees arising from any
6 violation of Proposition 65 that have been or could have been asserted regarding the failure to
7 warn about exposure to formaldehyde in connection with Covered Products manufactured,
8 distributed, or sold by Defendant prior to the Effective Date.

9 **7.3.** Compliance with the terms of this Consent Judgment by Defendant and the
10 Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Defendant
11 and Downstream Defendant Releasees with respect to any alleged failure to warn about
12 formaldehyde in Covered Products manufactured, distributed, or sold by Defendant after the
13 Effective Date.

14 **8. COVENANT NOT TO SUE**

15 **8.1.** CEH agrees not to file suit against Defendant, Defendant Releasees, and
16 Downstream Defendant Releasees with respect to any of the claims asserted herein. This
17 provision does not impair CEH's ability to enforce the terms of this Consent Judgment in
18 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 Defendant.** The persons for Defendant to receive notices
23 pursuant to this Consent Judgment shall be:

24 George Gigounas
25 DLA Piper LLP (US)
26 555 Mission Street, Ste. 2400
San Francisco, CA 94105-2933

27 **9.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
28

1 this Consent Judgment shall be:

2 Mark Todzo
3 Lexington Law Group
4 503 Divisadero Street
5 San Francisco, CA 94117
6 mtodzo@lexlawgroup.com

7 **9.2.** Any Party may modify the person and address to whom the notice is to be sent by
8 sending the other Parties notice by first class and electronic mail.

9 **10. COURT APPROVAL**

10 **10.1.** This Consent Judgment shall become effective on the Effective Date, provided
11 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
12 Defendant shall support approval of such Motion.

13 **10.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
14 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
15 purpose.

16 **11. GOVERNING LAW AND CONSTRUCTION**

17 **11.1.** The terms and obligations arising from this Consent Judgment shall be construed
18 and enforced in accordance with the laws of the State of California.

19 **12. ENTIRE AGREEMENT**

20 **12.1.** This Consent Judgment contains the sole and entire agreement and understanding
21 of CEH and Defendant with respect to the entire subject matter hereof, and any and all prior
22 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
23 merged herein and therein.

24 **12.2.** There are no warranties, representations, or other agreements between CEH and
25 Defendant except as expressly set forth herein. No representations, oral or otherwise, express or
26 implied, other than those specifically referred to in this Consent Judgment have been made by any
27 Party hereto.

28 **12.3.** No other agreements not specifically contained or referenced herein, oral or
otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements

1 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
2 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
3 any of the Parties hereto only to the extent that they are expressly incorporated herein.

4 **12.4.** No supplementation, modification, waiver, or termination of this Consent
5 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

6 **12.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
7 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
8 such waiver constitute a continuing waiver.

9 **13. RETENTION OF JURISDICTION**

10 **13.1.** This Court shall retain jurisdiction of this matter to implement or modify the
11 Consent Judgment.

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

13 **14.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
14 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
15 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.


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

17 **15.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
18 against another entity on terms that are different from those contained in this Consent Judgment.

19 **16. EXECUTION IN COUNTERPARTS**

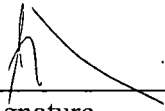
20 **16.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
21 means of facsimile, which taken together shall be deemed to constitute one document.

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23 **IT IS SO STIPULATED:**
24 **CENTER FOR ENVIRONMENTAL HEALTH**

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27 Michael Green
28 CEO

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NJOY, LLC.



Signature

Jeffrey Weiss

Printed Name

General Counsel and EVP of Gov. Affairs

Title

IT IS SO ORDERED:

Dated: 4-10, 2019



Judge of the Superior Court

EXHIBIT A

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1. Determine puff topography (consistency of puff duration, puff interval, puff volume, and average number of puffs per day) for a particular device type based on an IRB-approved human study involving at least 20 participants.
2. Puff duration for a particular device type is determined by collecting data on average puff duration for the study participants, based on ad libitum usage over a period of at least 30 minutes. Such data may be obtained utilizing any scientifically sound method for measurement, including video observation and/or wireless portable monitoring devices or other device-level measurement equipment.
3. Puff interval for a particular device type is determined by collecting data on average puff interval for the study participants, based on ad libitum usage over a period of at least 30 minutes.
4. Puff volume for a particular device type is determined by collecting data on average puff volume for the study participants, based on ad libitum usage over a period of at least 30 minutes. In the absence of such data, puff volume should be assumed to be 55 mL.
5. Average number of puffs per day for a particular device type is determined by collecting data on average number of puffs per day for the study participants.
6. The analysis set forth in this Exhibit A should be conducted utilizing Enthalpy standard operating procedure ENT 305 or another laboratory accredited to at least comparable standards, based on 25 puffs, using the calculated average puff duration, average puff interval, and average puff volume number calculated based on the human study described above. During testing, the device should be operated at its standard operating voltage, meaning that the device if disposable should be a new device and if rechargeable should be a new device that has been fully charged before testing utilizing the supplied charging accessory.
7. Anticipated daily exposure should be calculated based on the results of the laboratory analysis, extrapolated over the course of a day utilizing the calculated average number of puffs per day.