

1 LEXINGTON LAW GROUP
Mark N. Todzo, State Bar No. 168389
2 Lucas Williams, State Bar No. 264518
Abigail Blodgett, State Bar No. 278813
3 503 Divisadero Street
San Francisco, CA 94117
4 Telephone: (415) 913-7800
5 Facsimile: (415) 759-4112
mtodzo@lexlawgroup.com
6 lwilliams@lexlawgroup.com
ablodgett@lexlawgroup.com

7 Attorneys for Plaintiff
8 CENTER FOR ENVIRONMENTAL HEALTH

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

13
14 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 15-794040
15 Plaintiff,)
16 v.) **[PROPOSED] CONSENT**
17 NJOY, INC. DBA NJOY ENDS, et al.,) **JUDGMENT AS TO R.J. REYNOLDS**
18 Defendants.) **VAPOR COMPANY**
19)
20)
21)

22 **1. INTRODUCTION**

23 **1.1.** This Consent Judgment is entered into by Plaintiff Center for Environmental
24 Health, a non-profit corporation (“CEH”), and Defendant R.J. Reynolds Vapor Company
25 (“RJR”), in *Center for Environmental Health v. NJOY, Inc. dba NJOY Ends, et al.*, Alameda
26 County Superior Court Case No. RG 15-794040 (the “Action”). CEH and RJR are referred to
27 separately as “Party” and collectively as the “Parties.”
28

1 **1.2.** CEH states that on September 2, 2015, it served four 60-Day Notices of Violation
2 (the “Notices”) relating to the California Safe Drinking Water and Toxic Enforcement Act of
3 1986, California Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on RJRV, the
4 California Attorney General, the District Attorneys of every County in the State of California, and
5 the City Attorneys for every City in State of California with a population greater than 750,000.
6 The Notices allege violations of Proposition 65 with regard to exposures to formaldehyde and
7 acetaldehyde from original and menthol VUSE Solo brand electronic cigarettes and original and
8 menthol VUSE Solo brand pre-filled cartridges (collectively, the “Products”), and allege that
9 those exposures require a warning pursuant to Proposition 65. On November 19, 2015, CEH filed
10 this Action.

11 **1.3.** RJRV vigorously disputes the allegations in the Notices and in this Action.
12 Pursuant to section 431.30(d) of the California Code of Civil Procedure, RJRV denied the
13 allegations in the Action and asserted numerous affirmative defenses on December 29, 2015.
14 RJRV contends that any alleged exposure to either formaldehyde or acetaldehyde from the
15 Products does not exceed the applicable No Significant Risk Levels established by the State under
16 Proposition 65 and, accordingly, neither alleged exposure requires a warning under Proposition
17 65. RJRV has presented extensive product testing and consumer data regarding the Products to
18 CEH that is consistent with RJRV’s position regarding the alleged exposures at issue.

19 **1.4.** RJRV asserts that it has voluntarily complied with the marketing and advertising
20 restrictions from the 1998 Master Settlement Agreement (“MSA”) with regard to the Products.
21 CEH does not dispute this assertion. A true and correct copy of the MSA is available at:
22 <http://www.rjrt.com/youth-tobacco-prevention/responsible-marketing/msa/msa-fulltext/>.

23 **1.5.** On or about November 6, 2015, RJRV states it provided the following additional
24 Proposition 65 warning to California retailers with a retail contract with RJRV and to California
25 retailers who had ordered the Products from RJRV:
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
26
27
28

WARNING: VUSE contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

(the “Retail Warning”). RJRV contends that by providing the Retail Warning prior to the filing of this Action it legally mooted any claimed obligation to provide the Proposition 65 warning sought in the Notices. CEH disputes this contention.

1.6. On or about June 1, 2016, RJRV states it modified the Proposition 65 warning on packaging for the Products manufactured after that date as follows:

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

(the “Current Warning”).

1.7. Taking into account its own employees and those who provide services to it by operation of service agreements with affiliated corporations, RJRV is a corporation that employs ten (10) or more persons and manufactures the Products.

1.8. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this Court has jurisdiction over the allegations contained in the Notices and the Action and personal jurisdiction over RJRV as to the acts alleged in the Action; (ii) venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims which were or could have been raised in the Action based on the facts alleged in the Notices and Action with respect to the Products.

1.9. The Parties enter into this Consent Judgment as a full and final settlement of all claims that were or could have been raised in the Action arising out of the facts alleged in the Notices or Action. By execution of this Consent Judgment and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an admission by RJRV of any fact, any conclusion of law, or any violation of law. RJRV expressly denies the material, factual, and legal

1 allegations in the Notices and Action and expressly denies any wrongdoing or liability
2 whatsoever, under Proposition 65 or any other California statute, regulation, or common law.
3 This Consent Judgment is the product of negotiation and compromise and is accepted by the
4 Parties solely for purposes of settling, compromising, and resolving the issues addressed in the
5 Notices and Action, and to avoid the significant expense, burden and attorneys' fees, associated
6 with litigating these matters.

7 **2. PROPOSITION 65 WARNING**

8 **2.1** RJRV shall continue to include the Current Warning or, at its sole discretion, the
9 variant of the Current Warning quoted in footnote one,¹ on packaging of all of the Products
10 manufactured on or after June 1, 2016, for sale in California. This warning requirement shall
11 remain in effect unless or until this provision of the Consent Judgment is modified or vacated, or
12 this Consent Judgment is terminated, in accordance with Section 4 below.

13 **3. PAYMENTS**

14 **3.1.** RJRV shall pay to CEH the total sum of \$94,750 to be allocated by CEH without
15 any admission or concession by RJRV that any particular allocation is appropriate (either as to
16 amount or asserted purpose). CEH has allocated the payment as follows:

17 **3.1.1.** \$9,100 as a civil penalty pursuant to California Health & Safety Code §
18 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
19 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
20 Environmental Health Hazard Assessment).

21 **3.1.2.** \$13,650 as a payment in lieu of civil penalty pursuant to California Health
22 & Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will
23 use such funds to continue its work educating and protecting people from exposures to toxic
24 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
25

26 ¹ WARNING: This product contains, or is intended to be used with a product that contains,
27 chemicals known to the State of California to cause cancer and birth defects or other reproductive
28 harm.

1 Judgment and to purchase the Products to confirm compliance. In addition, as part of its
2 Community Environmental Action and Justice Fund, CEH will use four percent (4%) of such
3 funds to award grants to grassroots environmental justice groups working to educate and protect
4 the public from exposures to toxic chemicals. The method of selection of such groups can be
5 found at the CEH website at www.ceh.org/justicefund.

6 **3.1.3.** \$72,000 as a reimbursement of a portion of CEH's reasonable attorneys'
7 fees and costs.

8 **3.1.4.** The payment required by this Agreement shall be made by wire transfer to
9 the Lexington Law Group for that firm to pay out and allocate as set out above. Lexington Law
10 Group shall supply RJRV with a form W-9 and wiring instructions for its attorney trust account.

11 **4. ENFORCEMENT AND MODIFICATION OF CONSENT JUDGMENT**

12 **4.1.** Either Party may, by motion or application for an order to show cause before the
13 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
14 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 2
15 above, the moving Party shall provide the other Party with a Notice of Violation. The Parties
16 shall then meet and confer regarding the basis for the anticipated motion or application in an
17 attempt to resolve it informally, including providing a reasonable opportunity of at least thirty
18 (30) days to cure any alleged violation. Should such attempts at informal resolution fail, the Party
19 may file its enforcement motion or application. The prevailing Party on any motion to enforce
20 this Consent Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a
21 result of such motion or application. This Consent Judgment may only be enforced by the
22 Parties.

23 **4.2.** This Consent Judgment may only be modified by written agreement of CEH and
24 RJRV, or upon motion of CEH or RJRV as provided by law. The following are examples of
25 possible grounds for modification: (i) RJRV's contention that California law ceases to require the
26 Current Warning or substantially similar variant, (ii) RJRV's contention that federal law requires
27 a different warning (or specifies that the Current Warning or substantially similar variant should
28

1 be removed), or (iii) there is a decision of a controlling state or federal court that RJRV contends
2 holds that the warning requirement of Proposition 65 is preempted, modified, or otherwise
3 unenforceable under state and/or federal law.

4 **5. CLAIMS COVERED AND RELEASED**

5 **5.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting in
6 the public interest, and RJRV and RJRV’s parents, officers, directors, shareholders, divisions,
7 subdivisions, subsidiaries, affiliates (including, but not limited to, operating companies of or other
8 entities owned in whole or in part by Reynolds American Inc.), their respective successors and
9 assigns (collectively, “RJRV Releasees”), and all entities to whom they distribute or sell or have
10 distributed or sold the Products including, but not limited to, distributors, wholesalers, customers,
11 retailers, franchisees, cooperative members, and licensees (collectively, “Downstream RJRV
12 Releasees”), of all claims alleged in the Notices and Action arising from any alleged violation of
13 Proposition 65 that has been or could have been asserted in the public interest against RJRV,
14 RJRV Releasees, and Downstream RJRV Releasees regarding any alleged failure to warn about
15 exposure to formaldehyde and/or acetaldehyde in the Products manufactured, distributed,
16 marketed or sold prior to the date this Consent Judgment is entered by the Court (the “Effective
17 Date”).

18 **5.2.** CEH, for itself only, releases, waives, and forever discharges any and all claims it
19 has or could have asserted against RJRV, RJRV Releasees, and Downstream RJRV Releasees
20 arising from any alleged violation of Proposition 65 or any other statute, regulation or common
21 law regarding any alleged failure to warn about exposure to formaldehyde and/or acetaldehyde in
22 connection with the Products manufactured, distributed, marketed, or sold prior to the Effective
23 Date.

24 **5.3.** Compliance with the terms of this Consent Judgment by RJRV, RJRV Releasees,
25 and Downstream RJRV Releasees shall constitute compliance with Proposition 65 by RJRV,
26 RJRV Releasees, and Downstream RJRV Releasees with respect to any alleged failure to warn
27 about formaldehyde and/or acetaldehyde exposures from the Products manufactured, distributed,
28

1 marketed, or sold by RJRV, RJRV Releasees, and Downstream RJRV Releasees after the
2 Effective Date.

3 **6. COVENANT NOT TO SUE**

4 **6.1.** CEH agrees not to file suit against RJRV, RJRV Releasees, and Downstream
5 RJRV Releasees with respect to any of the claims released herein. This provision does not impair
6 CEH's ability to enforce the terms of this Consent Judgment in accordance with Section 4.

7 **7. NOTICE**

8 **7.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
9 notice shall be sent by first class and electronic mail as follows:

10 **7.1.1. Notices to RJRV.** The person for RJRV to receive notices pursuant to this
11 Consent Judgment shall be:

12 Donald F. Zimmer, Jr.
13 King & Spalding LLP
14 101 Second Street, Suite 2300
15 San Francisco, CA 94105
fzimmer@kslaw.com

16 **7.1.2. Notices to Plaintiff.** The person for CEH to receive notices pursuant to
17 this Consent Judgment shall be:

18 Mark Todzo
19 Lexington Law Group
20 503 Divisadero Street
21 San Francisco, CA 94117
mtodzo@lexlawgroup.com

22 **7.2.** Any Party may modify the person and address to whom the notice is to be sent by
23 sending the other Parties notice by first class and electronic mail.

24 **8. COURT APPROVAL**

25 **8.1.** This Consent Judgment shall become effective on the Effective Date, provided
26 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
27 RJRV shall support approval of such Motion.

1 **8.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
2 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
3 purpose.

4 **9. GOVERNING LAW AND CONSTRUCTION**

5 **9.1.** The terms and obligations arising from this Consent Judgment shall be construed
6 and enforced in accordance with the laws of the State of California.

7 **10. ENTIRE AGREEMENT**

8 **10.1.** This Consent Judgment contains the sole and entire agreement and understanding
9 of CEH and RJRV with respect to the entire subject matter hereof, and any and all prior
10 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
11 merged herein.

12 **10.2.** There are no warranties, representations, or other agreements between CEH and
13 RJRV except as expressly set forth herein. No representations, oral or otherwise, express or
14 implied, other than those specifically referred to in this Consent Judgment have been made by any
15 Party hereto.

16 **10.3.** No other agreements not specifically contained or referenced herein, oral or
17 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
18 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
19 any of the Parties hereto only to the extent that they are expressly incorporated herein.

20 **10.4.** No supplementation, modification, waiver, or termination of this Consent
21 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

22 **10.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
23 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
24 such waiver constitute a continuing waiver.

25 **11. RETENTION OF JURISDICTION**

26 **11.1.** This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.

28

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

2 **12.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
3 by the Party he or she represents to stipulate to this Consent Judgment to enter into and execute
4 the Consent Judgment on behalf of the Party represented, and to legally bind that Party.

5 **13. NO EFFECT ON OTHER SETTLEMENTS**

6 **13.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
7 against another entity on terms that are different from those contained in this Consent Judgment.

8 **14. EXECUTION IN COUNTERPARTS**

9 **14.1.** This Consent Judgment may be executed in counterparts and by means of
10 facsimile, which taken together shall be deemed to constitute one document.

11
12 **IT IS SO STIPULATED:**

13
14 **CENTER FOR ENVIRONMENTAL HEALTH**

15 
16 _____
17 Michael Green
18 Chief Executive Officer

19
20 **R.J. REYNOLDS VAPOR COMPANY**

21
22 _____
23 Signature

24 _____
25 Printed Name

26
27 _____
28 Title

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

2 **12.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
3 by the Party he or she represents to stipulate to this Consent Judgment to enter into and execute
4 the Consent Judgment on behalf of the Party represented, and to legally bind that Party.

5 **13. NO EFFECT ON OTHER SETTLEMENTS**

6 **13.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
7 against another entity on terms that are different from those contained in this Consent Judgment.

8 **14. EXECUTION IN COUNTERPARTS**

9 **14.1.** This Consent Judgment may be executed in counterparts and by means of
10 facsimile, which taken together shall be deemed to constitute one document.

11
12 **IT IS SO STIPULATED:**

13
14 **CENTER FOR ENVIRONMENTAL HEALTH**

15
16 _____
17 Charlie Pizarro
18 Associate Director

19
20 **R.J. REYNOLDS VAPOR COMPANY**

21 
22 _____
23 Signature

24 
25 _____
26 Printed Name

27 
28 _____
Title

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

IT IS SO ORDERED:

Dated: _____, 2016

Judge of the Superior Court