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7 CENTER FOR ENVIRONMENTAL HEALTH

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 **RC15770932**

12 CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation,

13 Plaintiff,

14 v.

15 SPACE JAM JUICE LLC; AMERICAN
16 VAPOR INC.; AVAIL VAPOR, LLC; CLS
TRADING, LLC; CYCLOPS VAPOR, LLC;
17 FIVE PAWNS; LOVE'S COUNTRY STORES
OF CALIFORNIA; MT. BAKER VAPOR LLC;
18 NATIONAL TOBACCO COMPANY, L.P.;
PINK SPOT VAPORS INC.; PROVAPE
19 INCORPORATED; ROBINSON OIL
CORPORATION DBA ROTTEN ROBBIE;
20 SAFFIRE VAPOR, INC.; and DOES 1 through
700, inclusive,

21 Defendants.
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Case No. _____

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code § 25249.6, *et seq.*

(Other)

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 nicotine, a chemical known to the State
7 of California to cause birth defects or other reproductive harm. Such exposures have occurred,
8 and continue to occur, through the manufacture, distribution, sale and/or use of two types of
9 products: (i) nicotine-containing liquids for use with electronic cigarettes ("E-Liquids"); and (ii)
10 electronic cigarette devices, also known as tanks and vape pens, which contain nicotine or are
11 designed and intended for use with nicotine-containing E-Liquids ("E-Cigarette Devices"). E-
12 Liquids and E-Cigarette Devices are collectively referred to herein as "Products." Individuals in
13 California, including children and women of childbearing age, are exposed to nicotine through
14 ordinary use of the Products.

15 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*
16 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
17 to chemicals known to the State to cause birth defects or other reproductive harm without
18 providing clear and reasonable warnings to individuals prior to their exposure. Defendants
19 introduce Products containing significant quantities of nicotine into the California marketplace,
20 exposing consumers of their Product, many of whom are children and women of childbearing
21 age, to nicotine.

22 3. Despite the fact that Defendants expose women of childbearing age,
23 children and other individuals in California who come into contact with the Products to nicotine,
24 Defendants provide no warnings whatsoever about the reproductive hazards associated with these
25 nicotine exposures. Defendants' conduct thus violates the warning provision of Proposition 65.
26 Health & Safety Code § 25249.6.

27 PARTIES

28 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a

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

11 5. Defendant SPACE JAM JUICE LLC is a person in the course of doing
12 business within the meaning of Health & Safety Code § 25249.11. SPACE JAM JUICE LLC
13 manufactures, distributes and/or sells E-Liquids for sale or use in California.

14 6. Defendant AMERICAN VAPOR INC. is a person in the course of doing
15 business within the meaning of Health & Safety Code § 25249.11. AMERICAN VAPOR INC.
16 manufactures, distributes and/or sells Liquids and E-Cigarette Devices for sale or use in
17 California.

18 7. Defendant AVAIL VAPOR, LLC is a person in the course of doing
19 business within the meaning of Health & Safety Code § 25249.11. AVAIL VAPOR, LLC
20 manufactures, distributes and/or sells E-Cigarette Devices for sale or use in California.

21 8. Defendant CLS TRADING, LLC is a person in the course of doing
22 business within the meaning of Health & Safety Code § 25249.11. CLS TRADING, LLC
23 manufactures, distributes and/or sells E-Liquids for sale or use in California.

24 9. Defendant CYCLOPS VAPOR, LLC is a person in the course of doing
25 business within the meaning of Health & Safety Code § 25249.11. CYCLOPS VAPOR, LLC
26 manufactures, distributes and/or sells E-Liquids for sale or use in California.

27 10. Defendant FIVE PAWNS is a person in the course of doing business
28 within the meaning of Health & Safety Code § 25249.11. FIVE PAWNS manufactures,

1 distributes and/or sells E-Liquids for sale or use in California.

2 11. Defendant LOVE'S COUNTRY STORES OF CALIFORNIA is a person
3 in the course of doing business within the meaning of Health & Safety Code § 25249.11.
4 LOVE'S COUNTRY STORES OF CALIFORNIA manufactures, distributes and/or sells E-
5 Cigarette Devices for sale or use in California.

6 12. Defendant MT. BAKER VAPOR LLC is a person in the course of doing
7 business within the meaning of Health & Safety Code § 25249.11. MT. BAKER VAPOR LLC
8 manufactures, distributes and/or sells E-Liquids for sale or use in California.

9 13. Defendant NATIONAL TOBACCO COMPANY, L.P. is a person in the
10 course of doing business within the meaning of Health & Safety Code § 25249.11. NATIONAL
11 TOBACCO COMPANY, L.P. manufactures, distributes and/or sells E-Cigarette Devices for sale
12 or use in California.

13 14. Defendant PINK SPOT VAPORS INC. is a person in the course of doing
14 business within the meaning of Health & Safety Code § 25249.11. PINK SPOT VAPORS INC.
15 manufactures, distributes and/or sells E-Liquids and E-Cigarette Devices for sale or use in
16 California.

17 15 Defendant PROVAPE INCORPORATED is a person in the course of
18 doing business within the meaning of Health & Safety Code § 25249.11. PROVAPE
19 INCORPORATED manufactures, distributes and/or sells E-Liquids for sale or use in California.

20 16. Defendant ROBINSON OIL CORPORATION DBA ROTTEN ROBBIE
21 is a person in the course of doing business within the meaning of Health & Safety Code §
22 25249.11. ROBINSON OIL CORPORATION DBA ROTTEN ROBBIE manufactures,
23 distributes and/or sells E-Cigarette Devices for sale or use in California.

24 17. Defendant SAFFIRE VAPOR, INC. is a person in the course of doing
25 business within the meaning of Health & Safety Code § 25249.11. SAFFIRE VAPOR, INC.
26 manufactures, distributes and/or sells E-Liquids and E-Cigarette Devices for sale or use in
27 California.

28 18. DOES 1 through 200 are each a person in the course of doing business

1 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 200 manufacture,
2 distribute and/or sell E-Liquids for sale or use in California.

3 19. DOES 201 through 400 are each a person in the course of doing business
4 within the meaning of Health & Safety Code § 25249.11. DOES 201 through 400 manufacture,
5 distribute and/or sell E-Cigarette Devices for sale or use in California.

6 20. DOES 401 through 700 are each a person in the course of doing business
7 within the meaning of Health & Safety Code § 25249.11. DOES 401 through 700 manufacture,
8 distribute and/or sell E-Liquids and E-Cigarette Devices for sale or use in California.

9 21. The true names of DOES 1 through 700 are unknown to CEH at this time.
10 When their identities are ascertained, the Complaint shall be amended to reflect their true names.

11 22. The defendants identified in paragraphs 5 through 17 and DOES 1
12 through 700 are collectively referred to herein as "Defendants."

13 JURISDICTION AND VENUE

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

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

24 25. Venue is proper in the Alameda Superior Court because one or more of the
25 violations arise in the County of Alameda.

26 BACKGROUND FACTS

27 26. The People of the State of California have declared by initiative under
28 Proposition 65 their right "[t]o be informed about exposures to chemicals that cause cancer, birth

1 defects, or other reproductive harm.” Proposition 65 § 1(b).

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

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

10 28. On April 1, 1990, the State of California officially listed nicotine as a
11 chemical known to cause reproductive toxicity. 27 Cal. Code Regs. (“C.C.R.”) § 27001(c). On
12 April 1, 1991, one year after it was listed as a chemical known to cause reproductive toxicity,
13 nicotine became subject to the clear and reasonable warning requirement regarding reproductive
14 toxicants under Proposition 65. *Id.*; Health & Safety Code § 25249.10(b).

15 29. Individuals who use Defendants’ Products are exposed to sufficient
16 quantities of nicotine such that individuals, including women of childbearing age and children
17 who use the Products or are located in close proximity to those using the Products, are exposed to
18 nicotine. Nicotine is intentionally added as an ingredient in E-Liquids, and some E-Cigarette
19 Devices, such as disposable electronic cigarettes, are pre-loaded with E-Liquids that contain
20 nicotine. E-Cigarette Devices are designed, marketed, and intended to be actively used with E-
21 Liquids. E-Cigarette Devices are also necessary components to the nicotine exposures that result
22 from using E-Liquids because E-Cigarette Devices alter the physical form of E-Liquids by
23 vaporizing such E-Liquids into vapor, causing the exposures to nicotine. Consumers are
24 primarily exposed to nicotine when they inhale the vapor emitted from E-Cigarette Devices
25 containing the E-Liquids.

26 30. The Products are frequently designed for and marketed to children. For
27 example, many E-Liquids are manufactured in flavors that are targeted to appear to minors, such
28 as candy, cereal, and fruit flavors.

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

5 32. More than sixty days prior to naming each Defendant in this lawsuit, CEH
6 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General,
7 the District Attorneys of every county in California, the City Attorneys of every California city
8 with a population greater than 750,000 and to each of the named Defendants. In compliance with
9 Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
10 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
11 time period during which violations occurred; (4) specific descriptions of the violations,
12 including (a) the routes of exposure to nicotine from Products, and (b) the specific type of
13 Products sold and used in violation of Proposition 65; and (5) the name of the specific
14 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

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

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

5 35. Defendants both know and intend that consumers in California, including
6 women of childbearing age and children, will use, inhale, touch, and/or handle Products, thus
7 exposing them to nicotine.

8 36. Under Proposition 65, an exposure is "knowing" where the party
9 responsible for such exposure has:

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

13 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
14 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
15 12201).

16 37. No clear and reasonable warning is provided with Products regarding the
17 reproductive hazards of nicotine.

18 38. Defendants have been informed of the nicotine in their Products by the 60-
19 Day Notice(s) of Violation and accompanying Certificate of Merit served on them by CEH.

20 39. Defendants also have constructive knowledge that their Products contain
21 nicotine due to the widespread media coverage concerning the problem of nicotine in Products.
22 This industry-wide problem of nicotine in Products has been the subject of extensive media
23 coverage, including articles in national newspapers and stories on nationally televised programs.

24 40. As companies that manufacture, import, distribute and/or sell Products for
25 use in the California marketplace, Defendants know or should know that Products contain
26 nicotine and that individuals who use Products will be exposed to nicotine. The nicotine
27 exposures to consumers who use the Products are a natural and foreseeable consequence of
28 Defendants' placing the Products into the stream of commerce.

1 individuals to nicotine without first giving clear and reasonable warnings to such individuals
2 regarding the reproductive toxicity of nicotine.

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

4 **PRAYER FOR RELIEF**

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

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

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

13 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
14 Defendants to take action to stop ongoing unwarned exposures to nicotine resulting from use of
15 Products sold by Defendants, as CEH shall specify in further application to the Court;

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

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

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21 Dated: May 19, 2015

Respectfully submitted,

22 LEXINGTON LAW GROUP

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25 Mark N. Todzo
26 Attorneys for Plaintiff
27 CENTER FOR ENVIRONMENTAL HEALTH
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