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7 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
ALAMEDA COUNTY

FEB 17 2016

CLERK OF THE SUPERIOR COURT
By YOLANDA ESTRADA Deputy

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF ALAMEDA

12 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 15-770932
13)
14 Plaintiff,) ~~PROPOSED~~ CONSENT
15 v.) JUDGMENT AS TO LOVE'S
16 SPACE JAM JUICE LLC, et al.,) COUNTRY STORES OF
17) CALIFORNIA
18 Defendants.)
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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 Love's Country Stores of California ("Settling
23 Defendant") to settle claims asserted by CEH against Settling Defendant as set forth in the
24 operative Complaint in the matter *Center for Environmental Health v. Space Jam Juice LLC, et*
25 *al.*, Alameda County Superior Court Case No. RG 15-770932 (the "Action"). Settling Defendant
26 is a retailer that does not manufacture the Covered Products. CEH and Settling Defendant are
27 referred to collectively as the "Parties."
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1 **1.2.** On February 27, 2015, CEH served a 60-Day Notice of Violation (the “Notice”)
2 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986, California
3 Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Settling Defendant, the California
4 Attorney General, the District Attorneys of every County in the State of California, and the City
5 Attorneys for every City in State of California with a population greater than 750,000. The
6 Notice alleges violations of Proposition 65 with respect to electronic cigarette devices designed
7 for use with nicotine-containing liquid distributed and/or sold by Settling Defendant.

8 **1.3.** Settling Defendant is a corporation that employs ten (10) or more persons and that
9 distributes and/or sells Covered Products (as defined herein) in the State of California or has done
10 so in the past.

11 **1.4.** 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 distributed and/or sold by Settling Defendant.

18 **1.5.** 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. By execution of this Consent Judgment and
21 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
22 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
23 admission by the Parties of any fact, conclusion of law, or violation of law. Settling Defendant
24 denies the material, factual, and legal allegations in the Notice and Complaint and expressly
25 denies any wrongdoing whatsoever. Except as specifically provided herein, nothing in this
26 Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any
27 of the Parties may have in this or any other pending or future legal proceedings. This Consent
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1 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for
2 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 distributed, and/or sold by Settling Defendant in California, which are designed and
6 intended for use with nicotine-containing liquid.

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 For Covered Products that contain nicotine, the warning shall substantially state the following:

14 **WARNING:** Use of this product will expose you to nicotine, a chemical
15 known to the State of California to cause birth defects or other reproductive
16 harm.

17 For Covered Products that do not contain nicotine, but are designed for use with nicotine-
18 containing products, the warning shall substantially state the following:

19 **WARNING:** Use of this product with nicotine-containing liquid will
20 expose you to nicotine, a chemical known to the State of California to
21 cause birth defects or other reproductive harm.

22 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
23 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be
24 prominently displayed on the outer packaging of the Covered Product with such conspicuousness,
25 as compared with other words, statements, or designs as to render it likely to be read and
26 understood by an ordinary individual prior to sale. To the extent that other warning statements
27 are included on the outer packaging of a Covered Product, the warning required herein shall
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1 either be the first warning or separated from the other warnings by a line that is at least the same
2 height as a line of text on the label. Although Settling Defendant does not presently sell the
3 Covered Products over the internet, in catalogs or via any other sale where the consumer is not
4 physically present and cannot see a warning displayed on the Covered Product prior to purchase
5 or payment, to the extent that Settling Defendant chooses to do so in the future in California, the
6 warning statement shall be displayed in such a manner that it is likely to be read and understood
7 as being applicable to the Covered Product being purchased in California prior to the
8 authorization of or actual payment. Placement of the warning statement at the bottom of an
9 internet webpage that offers multiple products for sale does not satisfy the requirements of this
10 Section.

11 **3.2. Optional Additional Injunctive Provisions.** In exchange for a waiver of the
12 additional penalty/payment in lieu of penalty payments set forth in Section 4.1.5 below, Settling
13 Defendant shall undertake one or more of the additional actions below.

14 **3.2.1. Prohibition on Sales and Advertising to Minors.** Settling Defendant
15 shall not sell Covered Products to persons younger than eighteen (18) years of age and shall take
16 reasonable steps to prevent the sale of Covered Products to such persons, including, but not
17 limited to the following measures:

18 **3.2.1.1.** Settling Defendant shall implement one or more systems for
19 checking the age of persons who purchase Covered Products in person. The system shall include
20 age verification by requiring and checking an official government identification card of anyone
21 appearing to be under twenty-six (26) years old who purchases Covered Products in person. The
22 system shall be put into place within ninety (90) days of the Effective Date.

23 **3.2.1.2.** Settling Defendant shall not have advertisements in stores
24 for the Covered Products that target minors. Specifically, Settling Defendant shall not have
25 displays or advertisements for Covered Products in California stores with models or images of
26 people that Settling Defendant knows or should know are younger than twenty-six (26) years of
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1 age, cartoons, and that are intended and designed to target and cause sales to people under the
2 legal smoking age.

3 **3.2.2. Prohibition on Sales of Cereal or Candy-Flavored Cartridges.** Settling
4 Defendant shall instruct its suppliers and distributors that it will not sell or accept cereal or candy-
5 flavored cartridges to use with Covered Products or other e-cigarettes. These instructions shall be
6 in writing and made available to CEH upon reasonable request.

7 **3.2.3. Prohibition on Health and Safety Claims.** Settling Defendant shall not
8 post any displays, posters or other advertising materials regarding the Covered Products that
9 make health and or safety claims, unless such claims have been reviewed and approved by the
10 Federal Food and Drug Administration. Examples of prohibited claims include the following:

11 **3.2.3.1.** Any statement that the Covered Products are smoking-
12 cessation devices. This prohibition includes any claims or testimonials about quitting smoking,
13 using e-cigarettes as a treatment for tobacco dependence or addiction.

14 **3.2.3.2.** Any statement that the Covered Products do not contain
15 carcinogens or are better or safer than tobacco.

16 **3.2.3.3.** Any statement that the Covered Products produce no second
17 hand smoke.

18 **4. PAYMENTS**

19 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$20,000, which shall
20 be allocated as follows:

21 **4.1.1.** \$1,610 as a civil penalty pursuant to California Health & Safety Code §
22 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
23 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
24 Environmental Health Hazard Assessment).

25 **4.1.2.** \$2,415 as a payment in lieu of civil penalty pursuant to California Health &
26 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
27 such funds to continue its work educating and protecting people from exposures to toxic
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1 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
2 Judgment and to purchase Settling Defendant's Products to confirm compliance. In addition, as
3 part of its Community Environmental Action and Justice Fund, CEH will use four percent (4%)
4 of such funds to award grants to grassroots environmental justice groups working to educate and
5 protect the public from exposures to toxic chemicals. The method of selection of such groups can
6 be found at the CEH website at www.ceh.org/justicefund.

7 **4.1.3.** \$15,975 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 \$13,975 shall be
9 made payable to the Lexington Law Group; and (2) a check for \$2,000 shall be made payable to
10 the 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. The payment required pursuant to Section 4.1.3 shall be made payable
15 to Lexington Law Group. All checks shall be delivered to Mark Todzo at Lexington Law Group
16 at the address set forth in Section 8.1.2.

17 **4.1.5.** In the event that Settling Defendants elect not to certify their compliance
18 with one or more of the optional provisions in Section 3.2 in accordance with that Section, within
19 ninety (90) days following the Effective Date, Settling Defendants must make an additional
20 payment for each provision not certified, as follows: (i) \$1,000 if Settling Defendants elect to not
21 participate in Section 3.2.1; (ii) \$1,000 if Settling Defendants elect to not participate in Section
22 3.2.2; and (iii) \$1,000 if Settling Defendants elect to not participate in Section 3.2.3. Each of
23 these payments shall be paid in two (2) separate checks, each payable to the Center for
24 Environmental Health, to be allocated as follows:

25 **4.1.5.1.** Forty percent (40%) of the total payment specified in Section
26 4.1.5 shall constitute a penalty pursuant to California Health & Safety Code § 25249.7(b), such
27 money to be apportioned by CEH in accordance with California Health & Safety Code §
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1 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
2 Hazard Assessment).

3 **4.1.5.2.** Sixty percent (60%) of the total payment specified in Section
4 4.1.5 shall constitute a payment in lieu of civil penalty pursuant to California Health & Safety
5 Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use such
6 funds to continue its work educating and protecting people from exposures to toxic chemicals.
7 CEH may also use a portion of such funds to monitor compliance with this Consent Judgment and
8 to purchase and test Settling Defendant's Products to confirm compliance. In addition, as part of
9 its Community Environmental Action and Justice Fund, CEH will use four percent (4%) of such
10 funds to award grants to grassroots environmental justice groups working to educate and protect
11 the public from exposures to toxic chemicals. The method of selection of such groups can be
12 found at the CEH website at www.ceh.org/justicefund.

13 **5. ENFORCEMENT OF CONSENT JUDGMENT**

14 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
15 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
16 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
17 shall provide Settling Defendant with a Notice of Violation and a copy of any test results which
18 purportedly support CEH's Notice of Violation. The Parties shall then meet and confer regarding
19 the basis for CEH's anticipated motion or application in an attempt to resolve it informally,
20 including providing Settling Defendant a reasonable opportunity of at least thirty (30) days to
21 cure any alleged violation. Should such attempts at informal resolution fail, CEH may file its
22 enforcement motion or application. The prevailing party on any motion to enforce this Consent
23 Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result of such
24 motion or application. This Consent Judgment may only be enforced by the Parties.

1 **6. MODIFICATION OF CONSENT JUDGMENT**

2 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
3 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

4 **7. CLAIMS COVERED AND RELEASE**

5 **7.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting
6 in the public interest and Settling Defendant. It releases from liability Settling Defendant, and
7 Settling Defendant’s parents, officers, directors, shareholders, divisions, subdivisions,
8 subsidiaries, affiliates, agents and their respective successors, assigns, and Nicotek,
9 LLC(“Defendant Releasees”), of all claims alleged in the Complaint in this Action arising from
10 any violation of Proposition 65 that have been or could have been asserted in the public interest
11 against Settling Defendant and Defendant Releasees, regarding the failure to warn about exposure
12 to nicotine in the Covered Products distributed or sold by Settling Defendant prior to the Effective
13 Date.

14 **7.2.** CEH, acting in the public interest, releases, waives, and forever discharges any and
15 all claims alleged in the Complaint against Settling Defendant and Defendant Releasees arising
16 from any violation of Proposition 65 that have been or could have been asserted regarding the
17 failure to warn about exposure to nicotine in connection with Covered Products distributed or
18 sold by Settling Defendant prior to the Effective Date.

19 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and
20 the Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant
21 and Defendant Releasees with respect to any alleged failure to warn about nicotine in Covered
22 Products distributed or sold by Settling Defendant after the Effective Date.

23 **8. PROVISION OF NOTICE**

24 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
25 notice shall be sent by first class or electronic mail as follows:

26 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
27 receive notices pursuant to this Consent Judgment shall be:
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General Counsel
Love's Country Stores of California
10601 N. Pennsylvania Avenue
Oklahoma City, OK 73120

8.1.2. Notices to Plaintiff. The persons for CEH to receive notices pursuant to this Consent Judgment shall be:

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

8.2. Any Party may modify the person and address to whom the notice is to be sent by sending the other Parties notice by first class or electronic mail.

9. COURT APPROVAL

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

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

10. GOVERNING LAW AND CONSTRUCTION

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

11. ENTIRE AGREEMENT

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

1 **11.2.** There are no warranties, representations, or other agreements between CEH and
2 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
3 express or implied, other than those specifically referred to in this Consent Judgment have been
4 made by any Party hereto.

5 **11.3.** No other agreements not specifically contained or referenced herein, oral or
6 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
7 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
8 any of the Parties hereto only to the extent that they are expressly incorporated herein.

9 **11.4.** No supplementation, modification, waiver, or termination of this Consent
10 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

11 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
12 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
13 such waiver constitute a continuing waiver.

14 **12. RETENTION OF JURISDICTION**

15 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
16 Consent Judgment.

17 **13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

18 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
19 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
20 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

21 **14. NO EFFECT ON OTHER SETTLEMENTS**

22 **14.1.** Except as specifically provided herein, nothing in this Consent Judgment shall
23 preclude CEH from resolving any claim against another entity on terms that are different from
24 those contained in this Consent Judgment.

25 **15. EXECUTION IN COUNTERPARTS**

26 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
27 means of facsimile or email, which taken together shall be deemed to constitute one document.
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1 IT IS SO STIPULATED:

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3 CENTER FOR ENVIRONMENTAL HEALTH

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Charlie Pizarro
Associate Director

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LOVE'S COUNTRY STORES OF CALIFORNIA

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Signature

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14

Printed Name

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16

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Title

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IT IS SO ORDERED:

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Dated: FEB 17 2016, ~~2015~~

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GEORGE C. HERNANDEZ, JR.

Judge of the Superior Court

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IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

LOVE'S COUNTRY STORES OF CALIFORNIA

Signature 

Printed Name
Mark Romo

Title
Owner - of Mendocino

IT IS SO ORDERED:

Dated: _____, 2015

Judge of the Superior Court