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ENDORSED
FILED
ALAMEDA COUNTY

OCT 06 2015

K. McCoy, Exec. Off./Clerk

6 Attorneys for Plaintiff
7 CENTER FOR ENVIRONMENTAL HEALTH

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

12 CENTER FOR ENVIRONMENTAL HEALTH,)

13 Plaintiff,)

14 v.)

15 SPACE JAM JUICE LLC, et al.,)

16 Defendants.)
17)
18)
19)

Case No. RG 15-770932

~~VAM~~
~~[PROPOSED]~~ CONSENT
JUDGMENT AS TO PROVAPE
INCORPORATED

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 ProVape Incorporated (“Settling Defendant”) to
23 settle claims asserted by CEH against Settling Defendant as set forth in the operative Complaint
24 in the matter *Center for Environmental Health v. Space Jam Juice LLC, et al.*, Alameda County
25 Superior Court Case No. RG-15770932 (the “Action”). CEH and Settling Defendant are referred
26 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 the presence of nicotine in liquid for
7 use with electronic cigarette devices manufactured, 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 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
10 California or has done so in the past.

11 **1.4.** 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 manufactured, 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 nicotine-containing liquid for use with electronic
5 cigarette devices manufactured, distributed, and/or sold by Settling Defendant in California.

6 **2.2.** “Effective Date” means the date on which the Court enters this Consent
7 Judgment.

8 **2.3.** “Manufacture Date” means the date the Covered Product was manufactured and
9 as may be indicated on a tag attached to the Covered Product.

10 **3. INJUNCTIVE RELIEF**

11 **3.1. Clear and Reasonable Warnings for Covered Products.** As of the Effective
12 Date, no Covered Product may be manufactured for sale, distributed or sold in California unless
13 such Covered Product has a clear and reasonable warning on the outer label of the product. The
14 warning shall state the following:

15 **WARNING:** This product contains nicotine, a chemical known to the State
16 of California to cause birth defects or other reproductive harm.

17 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
18 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be
19 prominently displayed on the Covered Product with such conspicuousness, as compared with
20 other words, statements, or designs as to render it likely to be read and understood by an ordinary
21 individual prior to sale. To the extent that other warning statements are included on the outer
22 label of a Covered Product, the warning required herein shall be separated from the other
23 warnings by a line that is at least the same height as a line of text on the label. For internet,
24 catalog, or any other sale where the consumer is not physically present and cannot see a warning
25 displayed on the Covered Product prior to purchase or payment, the warning statement shall be
26 displayed in such a manner that it is likely to be read and understood as being applicable to the
27 Covered Product being purchased prior to the authorization of or actual payment. Placement of

1 the warning statement at the bottom of an internet webpage that offers multiple products for sale
2 does not satisfy the requirements of this Section.

3 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** In an
4 effort to ensure that consumers receive clear and reasonable warnings in compliance with
5 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
6 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
7 materials by certified mail to each of its California retailers or distributors to whom Settling
8 Defendant reasonably believes sold Covered Products that contained nicotine on or after. Such
9 warning materials shall include a reasonably sufficient number of stickers in order to permit the
10 retailer or distributor to affix the warning on each Covered Product such customer has purchased
11 from Settling Defendant. The warning stickers shall contain the warning language set forth in
12 Section 3.1 above. The warning materials shall also include a letter of instruction for the
13 placement of the stickers, and a Notice and Acknowledgment postcard.

14 **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
15 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in
16 Section 4.1.5 below, Settling Defendant shall undertake one or more of the additional actions
17 below. A Settling Defendant opting to be bound by this Section must provide CEH with a written
18 election stating which optional provision(s) it is agreeing to implement.

19 **3.2.1. Product Safety Requirements.** A Settling Defendant opting to participate
20 in Section 3.2.1 shall make the following change to the Covered Products to increase the safety of
21 such Products: Within ninety (90) days following the Effective Date, all Covered Products
22 manufactured for sale in California shall be manufactured with child proof caps.

23 **3.2.2. Prohibition on Sales to Minors.** A Settling Defendant opting to
24 participate in Section 3.2.2 shall not sell Covered Products to persons younger than eighteen (18)
25 years of age and shall take reasonable steps to prevent the sale of Covered Products to such
26 persons, including, but not limited to: implementing one or more systems for checking the age of
27 persons who purchase Covered Products on the Internet or in person. The system shall include

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1 age verification by requiring and checking an official government identification card or verifying
2 through a reputable service, such as IDology, the age of anyone who purchases Covered Products
3 on the Internet, or of anyone under twenty-six (26) years old who purchases in person. The
4 system shall be put into place within ninety (90) days of the Effective Date. Settling Defendant
5 shall retain all records of potential underage purchasers from any identification card verification
6 services utilized and make all such records regarding how such potential purchasers were
7 addressed available for inspection by CEH within thirty (30) days of any written request made by
8 CEH to Settling Defendant.

9 **3.2.3. Prohibition on Advertising.** A Settling Defendant choosing to participate
10 in Section 3.2.3 shall not sell flavored cartridges or any substance to use with Covered Products
11 or other e-cigarettes that are targeted to appeal to minors including, but not limited to, cereal, fruit
12 and candy flavors and shall not use advertisements that target minors. Specifically, Settling
13 Defendant will not use models or images of people that appear to be younger than twenty-eight
14 (28) years of age, cartoons, art, fashion, or music that is intended and designed to appeal to people
15 under the legal smoking age in advertisements or promotional materials that appear in California,
16 including on the Internet. Additionally, Settling Defendant will not: (a) advertise in any media
17 that has more than 25% under 18 readership; (b) utilize any form of outdoor advertising within
18 1,000 feet of any school or playground; (c) advertise using Instagram; and (d) sponsor any
19 athletic, musical or other cultural events unless such events are designated as prohibiting patrons
20 under the age of 18.

21 **3.2.4. Prohibition on Smoke Cessation Claims.** A Settling Defendant opting to
22 participate in Section 3.2.4 shall not advertise Covered Products for smoking-cessation. This
23 prohibition includes a commitment to remove any claims or testimonials about quitting smoking,
24 or using e-cigarettes as a treatment for tobacco dependence or addiction that are posted by a third
25 party on its website within a reasonable time.

26 **3.2.5. Prohibition on Health and Safety Claims.** A Settling Defendant opting
27 to participate in Section 3.2.5 shall not make health and or safety claims unless such claims have

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1 been reviewed and approved by the Federal Food and Drug Administration. Examples of
2 prohibited claims include the following:

3 **3.2.5.1.** Settling Defendant shall not make any claim that the
4 Covered Products do not contain carcinogens or are better or safer than tobacco.

5 **3.2.5.2.** Settling Defendant shall not make any claim that the
6 Covered Products produce no second hand smoke.

7 **4. PAYMENTS**

8 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$30,000, which shall
9 be allocated as follows:

10 **4.1.1.** \$400 as a civil penalty pursuant to California Health & Safety Code §
11 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
12 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
13 Environmental Health Hazard Assessment). The payment required under this section shall be
14 made by a separate check payable to CEH.

15 **4.1.2.** \$600 as a payment in lieu of civil penalty pursuant to California Health &
16 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
17 such funds to continue its work educating and protecting people from exposures to toxic
18 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
19 Judgment and to purchase and test Settling Defendant's Products to confirm compliance. In
20 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
21 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
22 educate and protect the public from exposures to toxic chemicals. The method of selection of
23 such groups can be found at the CEH website at www.ceh.org/justicefund. The payment required
24 under this section shall be made by a separate check payable to CEH.

25 **4.1.3.** \$29,000 as a reimbursement of a portion of CEH's reasonable attorneys'
26 fees and costs. This amount shall be divided into two checks: (1) a check for \$26,000 shall be
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1 made payable to Lexington Law Group; and (2) a check for \$3,000 shall be made payable to
2 CEH.

3 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
4 separate checks as described above, all to be delivered within ten (10) days following the
5 Effective Date. All checks shall be delivered to Mark Todzo at Lexington Law Group at the
6 address set forth in Section 8.1.2.

7 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
8 one or more provisions in Section 3.2 in accordance with that Section, within ninety (90) days
9 following the Effective Date, Defendant must make an additional payment for each provision not
10 certified:

- 11 • Section 3.2.1 – \$5,000
- 12 • Section 3.2.2 – \$5,000
- 13 • Section 3.2.3 – \$5,000
- 14 • Section 3.2.4 – \$5,000
- 15 • Section 3.2.5 – \$5,000

16 Each payment shall be paid in two separate checks, each payable to the Center for Environmental
17 Health, to be allocated as follows:

18 **4.1.5.1.** Forty percent of the total payment specified in Section 4.1.5
19 shall constitute a penalty pursuant to California Health & Safety Code § 25249.7(b), such money
20 to be apportioned by CEH in accordance with California Health & Safety Code § 25249.12 (25%
21 to CEH and 75% to the State of California’s Office of Environmental Health Hazard
22 Assessment).

23 **4.1.5.2.** Sixty percent of the total payment specified in Section 4.1.5
24 shall constitute a payment in lieu of civil penalty pursuant to California Health & Safety Code §
25 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use such funds to
26 continue its work educating and protecting people from exposures to toxic chemicals. CEH may
27 also use a portion of such funds to monitor compliance with this Consent Judgment and to

1 purchase and test Settling Defendant's 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 **5. ENFORCEMENT OF CONSENT JUDGMENT**

7 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
8 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
9 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
10 shall provide Settling Defendant with a Notice of Violation and a copy of any test results and
11 related supporting documentation, including all laboratory results, quality assurance reports and
12 quality control reports associated with testing of the Covered Products, which purportedly support
13 CEH's Notice of Violation. The Parties shall then meet and confer regarding the basis for CEH's
14 anticipated motion or application in an attempt to resolve it informally, including providing
15 Settling Defendant with a reasonable opportunity of at least thirty (30) days to cure any alleged
16 violation. Should such attempts at informal resolution fail, CEH may file its enforcement motion
17 or application. The prevailing party on any motion to enforce this Consent Judgment shall be
18 entitled to its reasonable attorney's fees and costs incurred as a result of such motion or
19 application. This Consent Judgment may only be enforced by the Parties.

20 **6. MODIFICATION OF CONSENT JUDGMENT**

21 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
22 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by 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

1 Covered Products including, but not limited to, distributors, wholesalers, customers, retailers,
2 franchisees, cooperative members, and licensees (“Downstream Defendant Releasees”), of all
3 claims alleged in the Complaint in this Action arising from any violation of Proposition 65 that
4 have been or could have been asserted in the public interest against Settling Defendant and
5 Downstream Defendant Releasees, regarding the failure to warn about exposure to nicotine in the
6 Covered Products manufactured, distributed, or sold by Settling Defendant prior to the Effective
7 Date.

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

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

18 **7.4.** Compliance with the terms of this Consent Judgment by a Settling Defendant
19 constitutes compliance with Proposition 65 with respect to nicotine in Settling Defendant’s
20 Covered Products.

21 **8. PROVISION OF NOTICE**

22 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
23 notice shall be sent by certified and electronic mail as follows:

24 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
25 receive notices pursuant to this Consent Judgment shall be:

26 ProVape, Inc.
27 c/o Ronald J. Meltzer
28 Sinsheimer & Meltzer, Inc., P.S.

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701 Fifth Avenue, Suite 4780
Seattle, WA 98104
rjm@sinsheimer-meltzer.com

And to:

Lawrence B. Burke
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201-5630
larryburke@dwt.com

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 and 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 AND APPLICATION

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.

10.2. This Consent Judgment shall apply to and be binding upon CEH and Settling Defendant, and their respective divisions, subdivisions, and subsidiaries, and the successors or assigns of any of them.

1 **11. ENTIRE AGREEMENT**

2 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
3 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
4 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
5 merged herein and therein.

6 **11.2.** There are no warranties, representations, or other agreements between CEH and
7 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
8 express or implied, other than those specifically referred to in this Consent Judgment have been
9 made by any Party hereto.

10 **11.3.** No other agreements not specifically contained or referenced herein, oral or
11 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
12 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
13 any of the Parties hereto only to the extent that they are expressly incorporated herein.

14 **11.4.** No supplementation, modification, waiver, or termination of this Consent
15 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

16 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
17 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
18 such waiver constitute a continuing waiver.

19 **12. RETENTION OF JURISDICTION**

20 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
21 Consent Judgment.

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

23 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
25 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.
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1 **14. NO EFFECT ON OTHER SETTLEMENTS**


2 14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
3 against another entity on terms that are different from those contained in this Consent Judgment.

4 **15. EXECUTION IN COUNTERPARTS**

5 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by
6 means of facsimile, which taken together shall be deemed to constitute one document.

7
8 **IT IS SO STIPULATED:**

9 **CENTER FOR ENVIRONMENTAL HEALTH**

10 
11 _____

12 Charlie Pizarro
13 Associate Director

14 **PROVAPE INCORPORATED**

15
16 _____
17 Signature

18
19 _____
19 Printed Name

20
21 _____
21 Title

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23 **IT IS SO ORDERED:**

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26 Dated: October 06, 2015

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

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14. NO EFFECT ON OTHER SETTLEMENTS

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

15. EXECUTION IN COUNTERPARTS

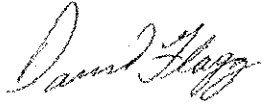
15.1. The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile, which taken together shall be deemed to constitute one document.

IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

PROVAPE INCORPORATED



Signature

David Flagg

Printed Name

CEO

Title

IT IS SO ORDERED:

Dated: _____, 2015

Judge of the Superior Court