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ENDORSED
FILED
ALAMEDA COUNTY

JUL 28 2016

6 Attorneys for Plaintiff
7 CENTER FOR ENVIRONMENTAL HEALTH

CLERK OF THE SUPERIOR COURT
By Christina Momon, Deputy

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

12
13 CENTER FOR ENVIRONMENTAL HEALTH,)
14 Plaintiff,)
15 v.)
16 SPACE JAM JUICE LLC et al.,)
17 Defendants.)

Case No. RG15770932

**[PROPOSED] CONSENT
JUDGMENT AS TO DEFENDANT
MT. BAKER VAPOR LLC**

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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 the Defendant Mt. Baker Vapor (“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-15770932 (the “Action”). CEH and Settling
26 Defendant are referred to collectively as the “Parties.”

27 **1.2.** On February 27, 2015, CEH served a 60-Day Notice of Violation (the “February
28 27, 2015 Notice”) relating to the California Safe Drinking Water and Toxic Enforcement Act of

1 1986, California Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Settling
2 Defendant, the California Attorney General, the District Attorneys of every County in the State of
3 California, and the City Attorneys for every City in State of California with a population greater
4 than 750,000. The February 27, 2015 Notice alleges violations of Proposition 65 with respect to
5 the presence of nicotine in liquid for use with electronic cigarette devices manufactured,
6 distributed, and/or sold by Settling Defendant.

7 **1.3.** On January 13, 2016, CEH served 60-Day Notices of Violation (the “January 13,
8 2016 Notices”) on Settling Defendant, the California Attorney General, the District Attorneys of
9 every County in the State of California, and the City Attorneys for every City in State of
10 California with a population greater than 750,000. The January 13, 2016 Notices allege
11 violations of Proposition 65 with respect to the presence of formaldehyde and acetaldehyde in
12 liquid for use with electronic cigarette devices manufactured, distributed, and/or sold by Settling
13 Defendant. On January 20, 2016 CEH served a 60-Day Notice of Violation (the “January 20,
14 2016 Notice”) on Settling Defendant, the California Attorney General, the District Attorneys of
15 every County in the State of California, and the City Attorneys for every City in State of
16 California with a population greater than 750,000. The January 20, 2016 Notice alleges
17 violations of Proposition 65 with respect to nicotine, formaldehyde and acetaldehyde exposures
18 resulting from the sale and use of electronic cigarette devices designed for use with e-liquids
19 manufactured, distributed, and/or sold by Settling Defendant. The February 27, 2015 Notice and
20 the January 13 and January 20, 2016 Notices shall collectively be referred to as the “Notices.”
21 Upon entry of this Consent Judgment, the Complaint shall be deemed amended to include the
22 allegations of the January 13, 2016 and January 20, 2016 Notices.

23 **1.4.** Settling Defendant is a limited liability company that employs ten (10) or more
24 persons and that manufactures, distributes, and/or sells Covered Products (as defined herein) in
25 the State of California or has done so in the past.

26 **1.5.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
27 Court has jurisdiction over the allegations of violations contained in the Notices and Complaint
28 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)

1 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
2 Consent Judgment as a full and final resolution of all claims which were or could have been
3 raised in the Complaint based on the facts alleged in the Notices and Complaint with respect to
4 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

5 **1.6.** The Parties enter into this Consent Judgment as a full and final settlement of all
6 claims which were or could have been raised in the Complaint arising out of the facts or conduct
7 related to Settling Defendant alleged therein. By execution of this Consent Judgment and
8 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
9 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
10 admission by the Parties of any fact, conclusion of law, or violation of law. Settling Defendant
11 denies the material, factual, and legal allegations in the Notices and Complaint and expressly
12 denies any wrongdoing whatsoever. Except as specifically provided herein, nothing in this
13 Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any
14 of the Parties may have in this or any other pending or future legal proceedings. This Consent
15 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for
16 purposes of settling, compromising, and resolving issues disputed in this Action.

17 **2. DEFINITIONS**

18 **2.1.** “Covered Products” means “Covered Liquid Products” and “Covered Device
19 Products.”

20 **2.2.** “Covered Liquid Products” means nicotine-containing liquid manufactured,
21 distributed, and/or sold by Settling Defendant for use in California for use with electronic
22 cigarette devices.

23 **2.3.** “Covered Device Products” means electronic cigarette devices, also known as
24 tanks and vape pens, which contain nicotine or are designed and intended for use with nicotine-
25 containing liquid, and which are manufactured, distributed, and/or sold by Settling Defendant in
26 California.

27 **2.4.** “Effective Date” means the date on which the Court enters this Consent Judgment.

28 **2.5.** “Listed Chemicals” means nicotine, acetaldehyde and formaldehyde.

1 **3. INJUNCTIVE RELIEF**

2 **3.1. Clear and Reasonable Warnings for Covered Liquid Products.** As of the
3 Effective Date, no Covered Liquid Product may be manufactured for sale, distributed or sold in
4 California unless such Covered Liquid Product has a clear and reasonable warning on the outer
5 label of the product. The warning shall state the following:

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

8 Or

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

11 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
12 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be
13 prominently displayed on the Covered Liquid Product with such conspicuousness, as compared
14 with other words, statements, or designs as to render it likely to be read and understood by an
15 ordinary individual prior to sale, and shall be separated from any other warnings on the product.
16 For internet, catalog, or any other sale where the consumer is not physically present and cannot
17 see a warning displayed on the Covered Liquid Product prior to purchase or payment, the warning
18 statement shall be displayed in such a manner that it is likely to be read and understood as being
19 applicable to the Covered Liquid Product being purchased prior to the authorization of or actual
20 payment. Placement of the warning statement at the bottom of an internet webpage that offers
21 multiple products for sale does not satisfy the requirements of this Section.

22 **3.2. Clear and Reasonable Warnings for Covered Device Products.** As of the
23 Effective Date, Settling Defendant shall provide a clear and reasonable warning for all Covered
24 Device Products sold on Settling Defendant’s website. For Covered Device Products that contain
25 nicotine, the warning shall state the following:

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

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Or

WARNING: Use of this product can expose you to chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

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

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

Or

WARNING: Use of this product with electronic cigarette liquid can expose you to chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

The warning shall not be preceded by, surrounded by, or include any additional words or phrases that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be displayed in such a manner that it is likely to be read and understood as being applicable to the Covered Device Product being purchased prior to the authorization of or actual payment. Placement of the warning statement at the bottom of an internet webpage that offers multiple products for sale does not satisfy the requirements of this Section.

3.3. Optional Additional Injunctive Provisions. In exchange for the waiver(s) of the additional penalty/payment in lieu of penalty payments set forth in Section 4.1.5 below, Settling Defendant shall undertake the additional actions below. If Settling Defendant opts to be bound by this Section, Settling Defendant must provide CEH with a written election stating which optional provision(s) it is agreeing to implement.

3.3.1. Product Modifications. Within ninety (90) days following the Effective Date, all Covered Liquid Products manufactured for sale in California shall be manufactured such that use of the Covered Liquid Products will not produce detectable levels of formaldehyde and acetaldehyde.

1 **3.3.2. Product Safety Requirements.** Within ninety (90) days following the
2 Effective Date, all Covered Liquid Products manufactured for sale in California shall be
3 manufactured with child-resistant caps in accordance with the standards set forth in 16 C.F.R. §
4 1700.15(b) and flow restrictions in accordance with the standard set forth in 16 C.F.R. §
5 1700.15(d).

6 **3.3.3. Prohibition on Sales and Advertising to Minors.** Within ninety (90)
7 days following the Effective Date, Settling Defendant shall not sell Covered Products to
8 consumers younger than 18 years of age and shall take reasonable steps to prevent the sale of
9 Covered Products to such persons, including, but not limited to the following measures:

10 **3.3.3.1.** Settling Defendant shall implement one or more systems for
11 checking the age of consumers who purchase Covered Products from Settling Defendant. The
12 system may, but is not required to, include age verification by requiring and checking an official
13 government identification card or verifying through a reputable credit agency the age of anyone
14 who purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old
15 who purchases in person. The system shall be put into place within 90 days of the Effective Date.
16 If, despite reasonable commercial efforts, Settling Defendant has been unable to implement such
17 a system within 90 days of the Effective Date, Settling Defendant may extend the time period to
18 do so by an additional 90 days by providing notice to Plaintiff along with a report of the efforts
19 Settling Defendant has taken to implement the system to date. Before either Party may seek relief
20 from the court regarding a proposed extension of the initial 90-day period, it must meet and
21 confer in good faith with the other party in an attempt to resolve the dispute.

22 **3.3.3.2.** Settling Defendant shall not use advertisements that target
23 minors.

24 **3.3.4. Prohibition on Health and Safety Claims.** Within ninety (90) days
25 following the Effective Date, Settling Defendant shall not make health and or safety claims
26 regarding Covered Products unless such claims have been permitted by the Federal Food and
27 Drug Administration. For purposes of this Section, Settling Defendant's publication of pictures
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1 of labeling and/or packaging materials for Covered Products that are not manufactured for or by
2 Settling Defendant shall not constitute making a claim with respect to such Covered Products.

3 **4. PAYMENTS**

4 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$92,500, which shall
5 be allocated as follows:

6 **4.1.1.** \$4,050 as a civil penalty pursuant to California Health & Safety Code §
7 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
8 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
9 Environmental Health Hazard Assessment).

10 **4.1.2.** \$6,075 as a payment in lieu of civil penalty pursuant to California Health &
11 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
12 such funds to continue its work educating and protecting people from exposures to toxic
13 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
14 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
15 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
16 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
17 educate and protect the public from exposures to toxic chemicals. The method of selection of
18 such groups can be found at the CEH website at www.ceh.org/justicefund.

19 **4.1.3.** \$82,375 as a reimbursement of a portion of CEH's reasonable attorneys'
20 fees and costs. This amount shall be divided into two checks: (1) a check for \$73,125 shall be
21 made payable to the Lexington Law Group; and (2) a check for \$9,250 shall be made payable to
22 the Center for Environmental Health.

23 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
24 separate checks, all to be delivered within ten (10) days following the Effective Date. The
25 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
26 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group
27 at the address set forth in Section 8.1.2.

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1 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
2 one or more of the optional provisions in Section 3.3 in accordance with that Section, within ten
3 days following the date on which compliance is due for each optional additional injunctive
4 provision, Settling Defendant must make an additional payment for each provision not certified,
5 as follows: (i) \$13,000 if Settling Defendant elects to not participate in Section 3.3.1; (ii) \$9,000
6 if Settling Defendant elects to not participate in Section 3.3.2; (iii) \$9,000 if Settling Defendant
7 elects to not participate in Section 3.3.3; and (iv) \$9,000 if Settling Defendant elects to not
8 participate in Section 3.3.4. Each of these payments shall be paid in two (2) separate checks, each
9 payable to the Center for Environmental Health, to be allocated as follows:

10 **4.1.5.1** Forty percent (40%) shall constitute a penalty pursuant to
11 California Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in
12 accordance with California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State
13 of California’s Office of Environmental Health Hazard Assessment).

14 **4.1.5.2** Sixty percent (60%) shall constitute a payment in lieu of civil
15 penalty pursuant to California Health & Safety Code § 25249.7(b) and California Code of
16 Regulations, Title 11, § 3203(b). CEH will use such funds to continue its work educating and
17 protecting people from exposures to toxic chemicals. CEH may also use a portion of such funds
18 to monitor compliance with this Consent Judgment and to purchase and test Settling Defendant’s
19 products to confirm compliance. In addition, as part of its Community Environmental Action and
20 Justice Fund, CEH will use four percent (4%) of such funds to award grants to grassroots
21 environmental justice groups working to educate and protect the public from exposures to toxic
22 chemicals. The method of selection of such groups can be found at the CEH website at
23 www.ceh.org/justicefund.

24 **5. ENFORCEMENT OF CONSENT JUDGMENT**

25 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
26 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
27 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
28 shall provide Settling Defendant with a Notice of Violation and a copy of any test results which

1 purportedly support CEH's Notice of Violation. The Parties shall then meet and confer regarding
2 the basis for CEH's anticipated motion or application in an attempt to resolve it informally,
3 including providing the Settling Defendant a reasonable opportunity of at least thirty (30) days to
4 cure any alleged violation. Should such attempts at informal resolution fail, CEH may file its
5 enforcement motion or application. The prevailing party on any motion to enforce this Consent
6 Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result of such
7 motion or application. This Consent Judgment may only be enforced by the Parties.

8 **6. MODIFICATION OF CONSENT JUDGMENT**

9 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
10 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

11 **7. CLAIMS COVERED AND RELEASE**

12 **7.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting
13 in the public interest and Settling Defendant and Settling Defendant's parents, officers, directors,
14 shareholders, divisions, subdivisions, subsidiaries, and their respective successors and assigns
15 ("Defendant Releasees") and all entities to whom they distribute or sell or have distributed or sold
16 Covered Products including, but not limited to, distributors, wholesalers, customers, retailers,
17 franchisees, cooperative members, and licensees ("Downstream Defendant Releasees"), of all
18 claims alleged in the Complaint in this Action arising from any violation of Proposition 65 that
19 have been or could have been asserted in the public interest against Settling Defendant and
20 Downstream Defendant Releasees, regarding the failure to warn about exposure to Listed
21 Chemicals in, or arising from the use of, the Covered Products manufactured, distributed, or sold
22 by Settling Defendant prior to the Effective Date.

23 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged
24 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from
25 any violation of Proposition 65 that have been or could have been asserted regarding the failure to
26 warn about exposure to Listed Chemicals in connection with Covered Products manufactured,
27 distributed, or sold by Settling Defendant prior to the Effective Date.

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1 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and
2 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by
3 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn
4 about Listed Chemicals in Covered Products manufactured, distributed, or sold by Settling
5 Defendant after the Effective Date.

6 **8. PROVISION OF NOTICE**

7 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
8 notice shall be sent by first class and electronic mail as follows:

9 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
10 receive notices pursuant to this Consent Judgment shall be:

11 Kenny Davis
12 Chief Asset Management Officer
13 Mt Baker Vapor LLC
14 7159 Guide Meridian Road
15 Lynden, WA 98264
16 kenny@mtbakervapor.com

17 With a copy to:

18 Jeffrey Margulies
19 Norton Rose Fulbright US LLP
20 555 South Flower Street, 41st Floor
21 Los Angeles, CA 90071
22 jeff.margulies@nortonrosefulbright.com

23 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
24 this Consent Judgment shall be:

25 Mark Todzo
26 Lexington Law Group
27 503 Divisadero Street
28 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.

1 **9. COURT APPROVAL**

2 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
3 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
4 Settling Defendant shall support approval of such Motion.

5 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
6 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
7 purpose.

8 **10. GOVERNING LAW AND CONSTRUCTION**

9 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
10 and enforced in accordance with the laws of the State of California.

11 **11. ENTIRE AGREEMENT**

12 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
13 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
14 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
15 merged herein and therein.

16 **11.2.** There are no warranties, representations, or other agreements between CEH and
17 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
18 express or implied, other than those specifically referred to in this Consent Judgment have been
19 made by any Party hereto.

20 **11.3.** No other agreements not specifically contained or referenced herein, oral or
21 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
22 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
23 any of the Parties hereto only to the extent that they are expressly incorporated herein.

24 **11.4.** No supplementation, modification, waiver, or termination of this Consent
25 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

26 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
27 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
28 such waiver constitute a continuing waiver.

1 **12. RETENTION OF JURISDICTION**

2 12.1. This Court shall retain jurisdiction of this matter to implement or modify the
3 Consent Judgment.

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

5 13.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
6 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
7 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

9 14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
10 against another entity on terms that are different from those contained in this Consent Judgment.

11 **15. EXECUTION IN COUNTERPARTS**

12 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by
13 means of facsimile, which taken together shall be deemed to constitute one document.

14
15 **IT IS SO STIPULATED:**

16 **CENTER FOR ENVIRONMENTAL HEALTH**

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19 _____
Charlie Pizarro
Associate Director

20
21 **MT BAKER VAPOR LLC**

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23 _____
Signature

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25 _____
Printed Name

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27 _____
Title

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1 **12. RETENTION OF JURISDICTION**

2 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
3 Consent Judgment.

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

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6 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
7 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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12 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
13 means of facsimile, which taken together shall be deemed to constitute one document.

14
15 **IT IS SO STIPULATED:**

16 **CENTER FOR ENVIRONMENTAL HEALTH**

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19 _____
Charlie Pizarro
Associate Director

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21 **MT BAKER VAPOR LLC**

22 DocuSigned by:
James Thompson
83708E931784489...

23 _____
Signature
24 James Thompson

25 _____
Printed Name

26 owner

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IT IS SO ORDERED:

Dated: 6/28, 2016

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