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11 CENTER FOR ENVIRONMENTAL HEALTH

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13 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF ALAMEDA
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16 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 15-770932
17)
18 Plaintiff,)
19)
20 v.) **[PROPOSED] CONSENT**
21) **JUDGMENT AS TO S & E**
22) **DISTRIBUTOR, INC.**
23)
24 SPACE JAM JUICE LLC, et al.,)
25)
26)
27 Defendants.)
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31 **1. INTRODUCTION**

32 **1.1.** This Consent Judgment is entered into by Plaintiff Center for Environmental
33 Health, a non-profit corporation (“CEH”), and S & E Distributor, Inc. (“Settling Defendant”) to
34 settle claims asserted by CEH against Settling Defendant as set forth in the operative Complaint
35 in the matter *Center for Environmental Health v. Space Jam Juice LLC, et al.*, Alameda County
36 Superior Court Case No. RG 15-770932 (the “Action”). CEH and Settling Defendant are referred
37 to collectively as the “Parties.”
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1 **1.2.** On February 5, 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 electronic
7 cigarette devices designed for use with nicotine-containing liquid manufactured, distributed,
8 and/or sold by Settling Defendant.

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

12 **1.4.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
13 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
14 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)
15 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
16 Consent Judgment as a full and final resolution of all claims which were or could have been
17 raised in the Complaint based on the facts alleged in the Notice and Complaint with respect to
18 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

19 **1.5.** The Parties enter into this Consent Judgment as a full and final settlement of all
20 claims which were or could have been raised in the Complaint arising out of the facts or conduct
21 related to Settling Defendant alleged therein. By execution of this Consent Judgment and
22 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
23 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
24 admission by the Parties of any fact, conclusion of law, or violation of law. Settling Defendant
25 denies the material, factual, and legal allegations in the Notice and Complaint and expressly
26 denies any wrongdoing whatsoever. Except as specifically provided herein, nothing in this
27 Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any
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1 of the Parties may have in this or any other pending or future legal proceedings. This Consent
2 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for
3 purposes of settling, compromising, and resolving issues disputed in this Action.

4 **2. DEFINITIONS**

5 **2.1.** “Covered Products” means electronic cigarette devices, also known as tanks and
6 vape pens, which contain nicotine or are designed and intended for use with nicotine-containing
7 liquid, manufactured, distributed, and/or sold by Settling Defendant in California.

8 **2.2.** “Effective Date” means the date on which the Court enters this Consent 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 manufactured for sale, distributed or sold 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 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 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 be

1 separated from the other warnings by a line that is at least the same height as a line of text on the
2 label. For internet, catalog, or any other sale where the consumer is not physically present and
3 cannot see a warning displayed on the Covered Product prior to purchase or payment, the warning
4 statement shall be displayed in such a manner that it is likely to be read and understood as being
5 applicable to the Covered Product being purchased prior to the authorization of or actual
6 payment. Placement of the warning statement at the bottom of an internet webpage that offers
7 multiple products for sale does not satisfy the requirements of this Section. Excepted from this
8 section are replacement parts for products that do not contain nicotine and will not lead to
9 nicotine exposure if operated as sold including but not limited to individually sold batteries,
10 charger, and other similar products.

11 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** In an
12 effort to ensure that consumers receive clear and reasonable warnings in compliance with
13 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
14 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
15 materials by certified mail to each of its California retailers or distributors to whom Settling
16 Defendant reasonably believes sold Covered Products prior to the Effective Date. Such warning
17 materials shall include a reasonably sufficient number of stickers in order to permit the retailer or
18 distributor to affix the warning on each Covered Product such customer has purchased from
19 Settling Defendant. The warning stickers shall contain the warning language set forth in Section
20 3.1 above. The warning materials shall also include a letter of instruction for the placement of the
21 stickers, and a Notice and Acknowledgment postcard.

22 **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
23 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in
24 Section 4.1.5 below, Settling Defendant shall undertake one or more of the additional actions
25 below. A Settling Defendant opting to be bound by this Section must provide CEH with a written
26 election stating which optional provision(s) it is agreeing to implement.

1 **3.2.1. Prohibition on Sales and Advertising to Minors.** A Settling Defendant
2 opting to participate in Section 3.2 shall not sell Covered Products to persons younger than
3 eighteen (18) years of age and shall take reasonable steps to prevent the sale of Covered Products
4 to such persons in California, including, but not limited to the following measures:

5 **3.2.1.1.** Settling Defendant shall implement one or more systems for
6 checking the age of persons who purchase Covered Products on the Internet or in person. The
7 system shall include age verification by requiring and checking an official government
8 identification card or verifying through a reputable credit agency the age of anyone who
9 purchases Covered Products on the Internet. Defendant may rely on an independent third party
10 for verification purposes and is not responsible for the third party's mistake or failure to act
11 consistent with the its stated policy. The system shall be put into place within ninety (90) days of
12 the Effective Date.

13 **3.2.1.2.** Settling Defendant shall not sell flavored cartridges or any
14 Covered Products that are targeted to appeal to minors including, but not limited to, cereal and
15 candy flavors.

16 **3.2.1.3.** Settling Defendant shall not use advertisements that target
17 minors. Specifically, Settling Defendant will not use models or images of people that appear to
18 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended
19 and designed to appeal to people under the legal smoking age in advertisements or promotional
20 materials that appear in California, including on the Internet. Additionally, Settling Defendant
21 will not: (a) utilize any form of outdoor advertising within 1,000 feet of any school or
22 playground; (b) actively solicit minors on social media; and/or (c) sponsor any athletic, musical or
23 other cultural events unless such events are designated as prohibiting patrons under the age of 18.

24 **3.2.2. Prohibition on Health and Safety Claims.** A Settling Defendant opting
25 to participate in Section 3.2 shall not make health and or safety claims unless such claims have
26 been reviewed and approved by the Federal Food and Drug Administration. Examples of
27 prohibited claims include the following:
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1 **3.2.2.1.** Settling Defendant shall not advertise Covered Products as
2 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
3 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

4 **3.2.2.2.** Settling Defendant shall not make any claim that the
5 Covered Products do not contain carcinogens or are better or safer than tobacco.

6 **3.2.2.3.** Settling Defendant shall not make any claim that the
7 Covered Products produce no second hand smoke.

8 **4. PAYMENTS**

9 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$40,000, which shall
10 be allocated as follows:

11 **4.1.1.** \$2,050 as a civil penalty pursuant to California Health & Safety Code §
12 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
13 Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of
14 Environmental Health Hazard Assessment).

15 **4.1.2.** \$3,075 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.

24 **4.1.3.** \$34,875 as a reimbursement of a portion of CEH’s reasonable attorneys’
25 fees and costs. This amount shall be divided into two checks: (1) a check for \$30,875 shall be
26 made payable to the Lexington Law Group; and (2) a check for \$4,000 shall be made payable to
27 the Center for Environmental Health.

1 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
2 separate checks, all to be delivered within ten (10) days following the Effective Date. The
3 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
4 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group
5 at the address set forth in Section 8.1.2.

6 **4.1.5.** In the event that Settling Defendant elects to not certify its compliance with
7 one or more of the optional provisions in Section 3.2 in accordance with that Section, within
8 ninety (90) days following the Effective Date, Defendant must make an additional payment for
9 each provision not certified, as follows: (i) \$7,500 if Settling Defendant elects to not participate in
10 Section 3.2.1; and (ii) \$7,500 if Settling Defendant elects to not participate in Section 3.2.2. Each
11 of these payments shall be paid in two (2) separate checks, each payable to the Center for
12 Environmental Health, to be allocated as follows:

13 **4.1.5.1.** Forty percent of the total payment specified in Section 4.1.5
14 shall constitute a penalty pursuant to California Health & Safety Code § 25249.7(b), such money
15 to be apportioned by CEH in accordance with California Health & Safety Code § 25249.12 (25%
16 to CEH and 75% to the State of California’s Office of Environmental Health Hazard
17 Assessment).

18 **4.1.5.2.** Sixty percent of the total payment specified in Section 4.1.5
19 shall constitute a payment in lieu of civil penalty pursuant to California Health & Safety Code §
20 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use such funds to
21 continue its work educating and protecting people from exposures to toxic chemicals. CEH may
22 also use a portion of such funds to monitor compliance with this Consent Judgment and to
23 purchase and test Settling Defendant’s Products to confirm compliance. In addition, as part of its
24 Community Environmental Action and Justice Fund, CEH will use four percent (4%) of such
25 funds to award grants to grassroots environmental justice groups working to educate and protect
26 the public from exposures to toxic chemicals. The method of selection of such groups can be
27 found at the CEH website at www.ceh.org/justicefund.

1 **5. ENFORCEMENT OF CONSENT JUDGMENT**

2 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
3 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.
4 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH
5 shall provide Settling Defendant with a Notice of Violation and a copy of any test results which
6 purportedly support CEH’s Notice of Violation. The Parties shall then meet and confer regarding
7 the basis for CEH’s anticipated motion or application in an attempt to resolve it informally,
8 including providing Settling Defendant a reasonable opportunity of at least thirty (30) days to
9 cure any alleged violation. Should such attempts at informal resolution fail, CEH may file its
10 enforcement motion or application. The prevailing party on any motion to enforce this
11 Consent Judgment shall be entitled to its reasonable attorney’s fees and costs incurred as a result
12 of such motion or application. This Consent Judgment may only be enforced by the Parties.

13 **6. MODIFICATION OF CONSENT JUDGMENT**

14 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
15 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

16 **7. CLAIMS COVERED AND RELEASE**

17 **7.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting
18 in the public interest and Settling Defendant and Settling Defendant’s parents, officers, directors,
19 shareholders, divisions, subdivisions, subsidiaries, and their respective successors and assigns
20 (“Defendant Releasees”) and all entities to whom they distribute or sell or have distributed or sold
21 Covered Products including, but not limited to, Robinson Oil Corporation dba Rotten Robbie, and
22 its other distributors, wholesalers, customers, retailers, franchisees, cooperative members, and
23 licensees (“Downstream Defendant Releasees”), of all claims alleged in the Complaint in this
24 Action arising from any violation of Proposition 65 that have been or could have been asserted in
25 the public interest against Settling Defendant and Downstream Defendant Releasees, regarding
26 the failure to warn about exposure to nicotine in the Covered Products manufactured, distributed,
27 or sold by Settling Defendant prior to the Effective Date.

1 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged
2 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from
3 any violation of Proposition 65 that have been or could have been asserted regarding the failure to
4 warn about exposure to nicotine in connection with Covered Products manufactured, distributed,
5 or sold by Settling Defendant prior to the Effective Date.

6 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and
7 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
8 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn
9 about nicotine in Covered Products manufactured, distributed, or sold by Settling Defendant after
10 the Effective Date.

11 **8. PROVISION OF NOTICE**

12 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
13 notice shall be sent by first class and electronic mail as follows:

14 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
15 receive notices pursuant to this Consent Judgment shall be:

16 Zachary Stavedahl
17 S & E Distributor, Inc.
18 288 Robbins Drive
19 Troy, MI 48083
 legal@tsunamicig.com

20 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
21 this Consent Judgment shall be:

22 Mark Todzo
23 Lexington Law Group
24 503 Divisadero Street
 San Francisco, CA 94117
 mtodzo@lexlawgroup.com

25 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
26 sending the other Parties notice by first class and electronic mail.

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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.

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1 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
2 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
3 such waiver constitute a continuing waiver.

4 **12. RETENTION OF JURISDICTION**

5 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
6 Consent Judgment.

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

8 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
9 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
10 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

12 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
13 against another entity on terms that are different from those contained in this Consent Judgment.

14 **15. EXECUTION IN COUNTERPARTS**

15 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
16 means of facsimile, which taken together shall be deemed to constitute one document.

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IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

S & E DISTRIBUTOR, INC.

Signature

Printed Name

Title

IT IS SO ORDERED:

Dated: _____, 2015

Judge of the Superior Court

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IT IS SO STIPULATED:
CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

S & E DISTRIBUTOR, INC.

Sarmad Elias
Signature

Sarmad Elias
Printed Name

V. present
Title

IT IS SO ORDERED:

Dated: _____, 2015

Judge of the Superior Court