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7 CENTER FOR ENVIRONMENTAL HEALTH

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 PHD**
16 SPACE JAM JUICE LLC, et al.,) **MARKETING, INC.**
17 Defendants.)
18)

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 PHD Marketing, Inc. (“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-15-770932 (the “Action”). CEH and Settling Defendant are referred
26 to collectively as the “Parties.”
27

1 **1.2.** On February 5, 2015, CEH served a 60-Day Notice of Violation (the “Nicotine
2 Notice”) relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986,
3 California Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Settling Defendant, the
4 California Attorney General, the District Attorneys of every County in the State of California, and
5 the City Attorneys for every City in State of California with a population greater than 750,000.
6 This Notice alleges violations of Proposition 65 with respect to the presence of nicotine in
7 electronic cigarette devices manufactured, distributed, and/or sold by Settling Defendant.

8 **1.3.** On December 10, 2015, CEH served four 60-Day Notices of Violation (the
9 “Aldehyde Notices”) relating to the California Safe Drinking Water and Toxic Enforcement Act
10 of 1986, California Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Settling
11 Defendant, the California Attorney General, the District Attorneys of every County in the State of
12 California, and the City Attorneys for every City in State of California with a population greater
13 than 750,000. These Notices allege violations of Proposition 65 with respect to the presence of
14 formaldehyde and acetaldehyde resulting from use of Settling Defendant’s e-cigarette devices and
15 the e-liquids used in such devices (the “Products”). (The “Nicotine Notice” and the “Aldehyde
16 Notices” shall be collectively referred to herein as the “Notices”).

17 **1.4.** On May 19, 2015, CEH filed the present Action. On September 18, 2015, CEH
18 added Settling Defendant to the Action via a Doe Amendment. Upon entry of this Consent
19 Judgment, the Complaint in this Action shall be deemed amended to include the allegations and
20 claims of the Aldehyde Notices.

21 **1.5.** Settling Defendant is a corporation that employs nine (9) persons, including one of
22 its shareholders, and that manufactures, distributes, and/or sells Covered Products (as defined
23 herein) in the State of California or has done so in the past.

24 **1.6.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
25 Court has jurisdiction over the allegations of violations contained in the Notices, and Complaint
26 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)
27 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
28 Consent Judgment as a full and final resolution of all claims which were or could have been

1 raised in the Complaint or Amended-Complaint based on the facts alleged in the Notices and
2 Complaint with respect to Covered Products manufactured, distributed, and/or sold by Settling
3 Defendant.

4 **1.7.** The Parties enter into this Consent Judgment as a full and final settlement of all
5 claims which were or could have been raised by Plaintiff in the Complaint or any Amended-
6 Complaint arising out of the facts or conduct related to Settling Defendant's alleged therein and in
7 the Notices. By execution of this Consent Judgment and agreeing to comply with its terms, the
8 Parties do not admit any fact, conclusion of law, or violation of law, nor shall compliance with
9 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
10 conclusion of law, or violation of law. Settling Defendant denies the material, factual, and legal
11 allegations in the Notices and Complaint and expressly denies any wrongdoing whatsoever. This
12 Consent Judgment is the product of negotiation and compromise and is accepted by the Parties
13 solely for purposes of settling, compromising, and resolving issues disputed in this Action.

14 **2. DEFINITIONS**

15 **2.1.** "Covered Products" means "Covered Liquid Products" and "Covered Device
16 Products."

17 **2.2.** "Covered Liquid Products" means liquids that are designed for use with electronic
18 cigarette devices, also known as tanks and vape pens, that are manufactured, distributed, and/or
19 that may be sold by Settling Defendant in California.

20 **2.3.** "Covered Device Products" means electronic cigarette devices, also known as
21 tanks and vape pens, which contain nicotine or are designed and intended for use with nicotine-
22 containing liquid, that are manufactured, distributed, and/or may be sold by Settling Defendant in
23 California.

24 **2.4.** "Effective Date" means the date on which the Court enters this Consent Judgment.

25 **3. INJUNCTIVE RELIEF**

26 **3.1. Clear and Reasonable Warnings for Nicotine-Containing Covered Liquid**
27 **Products.** As of the Effective Date and moving forward, no nicotine-containing Covered Liquid
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1 Product may be manufactured for sale, distributed or sold in California by Settling Defendant
2 unless such nicotine-containing Covered Liquid Product has a clear and reasonable warning on
3 the outer label of the product. The warning shall state the following:

4 **WARNING:** Use of this product will expose you to nicotine, a chemical
5 known to the State of California to cause birth defects or other reproductive
6 harm, and formaldehyde and acetaldehyde, chemicals known to cause
7 cancer.

8 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
9 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be
10 prominently displayed on the nicotine-containing Covered Liquid Product with such
11 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
12 read and understood by an ordinary individual prior to sale. To the extent that other warning
13 statements are included on the outer label of a nicotine-containing Covered Liquid Product, the
14 warning required herein shall be separated from the other warnings by a line that is at least the
15 same height as a line of text on the label. For internet, catalog, or any other sale where the
16 consumer is not physically present and cannot see a warning displayed on the nicotine-containing
17 Covered Liquid Product prior to purchase or payment, the warning statement shall be displayed in
18 such a manner that it is likely to be read and understood as being applicable to the nicotine-
19 containing 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 **3.1.1. Warnings for Nicotine-Containing Covered Liquid Products in the**
23 **Stream of Commerce.** As of the Effective Date, in an effort to ensure that future consumers
24 receive clear and reasonable warnings in compliance with Proposition 65 for nicotine-containing
25 Covered Liquid Products that have not been labeled in accordance with Section 3.1, Settling
26 Defendant shall provide warning materials by certified mail to each of its California retailers or
27 distributors to whom Settling Defendant reasonably believes sold nicotine-containing Covered
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1 Liquid Products prior to the Effective Date. Such warning materials shall include a reasonably
2 sufficient number of stickers in order to permit the retailer or distributor to affix the warning on
3 each nicotine-containing Covered Liquid Product such customer has purchased from Settling
4 Defendant. The warning stickers shall contain the warning language set forth in Section 3.1
5 above. The warning materials shall also include a letter of instruction for the placement of the
6 stickers, and a Notice and Acknowledgment postcard.

7 **3.2. Clear and Reasonable Warnings for Non-Nicotine-Containing Covered**
8 **Liquid Products.** As of the Effective Date, no non-nicotine-containing Covered Liquid Product
9 may be manufactured for sale, distributed or sold in California unless such non-nicotine-
10 containing Covered Liquid Product has a clear and reasonable warning on the outer label of the
11 product. The warning shall state the following:

12 **WARNING:** Use of this product will expose you to formaldehyde and
13 acetaldehyde, chemicals known to the State of California to cause cancer.

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

1 **3.2.1. Warnings for Non-Nicotine-Containing Covered Liquid Products in**
2 **the Stream of Commerce.** As of the Effective Date, in an effort to ensure that future consumers
3 receive clear and reasonable warnings in compliance with Proposition 65 for non-nicotine-
4 containing Covered Products that have not been labeled in accordance with Section 3.2, Settling
5 Defendant shall provide warning materials by certified mail to each of its California retailers or
6 distributors to whom Settling Defendant reasonably believes sold non-nicotine-containing
7 Covered Liquid Products prior to the Effective Date. Such warning materials shall include a
8 reasonably sufficient number of stickers in order to permit the retailer or distributor to affix the
9 warning on each non-nicotine-containing Covered Liquid Product such customer has purchased
10 from Settling Defendant. The warning stickers shall contain the warning language set forth in
11 Section 3.2 above. The warning materials shall also include a letter of instruction for the
12 placement of the stickers, and a Notice and Acknowledgment postcard.

13 **3.3. Clear and Reasonable Warnings for Covered Device Products.** As of the
14 Effective Date, no Covered Device Product may be manufactured for sale, distributed or sold in
15 California unless such Covered Device Product has a clear and reasonable warning on the outer
16 packaging of the product. For Covered Device Products that contain nicotine, the warning shall
17 state the following:

18 **WARNING:** Use of this product will expose you to nicotine, a chemical
19 known to the State of California to cause birth defects or other reproductive
20 harm, and formaldehyde and acetaldehyde, chemicals known to cause
21 cancer.

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

24 **WARNING:** Use of this product with nicotine-containing liquid will
25 expose you to nicotine, a chemical known to the State of California to
26 cause birth defects or other reproductive harm, and formaldehyde and
27 acetaldehyde, chemicals known to cause cancer.

1 The warning shall not be preceded by, surrounded by, or include any additional words or phrases
2 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be
3 prominently displayed on the outer packaging of the Covered Device Product with such
4 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
5 read and understood by an ordinary individual prior to sale. To the extent that other warning
6 statements are included on the outer packaging of a Covered Device Product, the warning
7 required herein shall be separated from the other warnings by a line that is at least the same height
8 as a line of text on the label. For internet, catalog, or any other sale where the consumer is not
9 physically present and cannot see a warning displayed on the Covered Device Product prior to
10 purchase or payment, the warning statement shall be displayed in such a manner that it is likely to
11 be read and understood as being applicable to the Covered Device Product being purchased prior
12 to the authorization of or actual payment. Placement of the warning statement at the bottom of an
13 internet webpage that offers multiple products for sale does not satisfy the requirements of this
14 Section.

15 **3.3.1. Warnings for Covered Device Products in the Stream of Commerce.**

16 As of the Effective Date, in an effort to ensure that future consumers receive clear and reasonable
17 warnings in compliance with Proposition 65 for Covered Products that have not been labeled in
18 accordance with Section 3.3, Settling Defendant shall provide warning materials by certified mail
19 to each of its California retailers or distributors to whom Settling Defendant reasonably believes
20 sold Covered Device Products prior to the Effective Date. Such warning materials shall include a
21 reasonably sufficient number of stickers in order to permit the retailer or distributor to affix the
22 warning on each Covered Device Product such customer has purchased from Settling Defendant.
23 The warning stickers shall contain the warning language set forth in Section 3.3 above. The
24 warning materials shall also include a letter of instruction for the placement of the stickers, and a
25 Notice and Acknowledgment postcard.

26 **3.4. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
27 eligible for any waiver of the additional civil penalty/payment in lieu of penalty payments set

1 forth in Section 4.1.5 below, Settling Defendant shall undertake one or more of the additional
2 actions below. If Settling Defendant opts to be bound by this Section, Settling Defendant must
3 provide CEH with a written election stating which optional provision(s) it is agreeing to
4 implement.

5 **3.4.1. Product Reformulation.** Within ninety (90) days following the Effective
6 Date, all Covered Products manufactured for sale in California shall be manufactured such that
7 use of the Covered Products will not produce detectable levels of formaldehyde and acetaldehyde.

8 **3.4.2. Product Safety Requirements.** If Settling Defendant opts to participate in
9 Section 3.4, Settling Defendant shall make the following changes to the Covered Products to
10 increase the safety of such products:

11 **3.4.2.1.** Within ninety (90) days following the Effective Date, all
12 Covered Liquid Products manufactured for sale in California shall be manufactured with child
13 proof caps in accordance with the standards set forth in 16 C.F.R. § 1700.15(b) and flow
14 restrictions in accordance with the standard set forth in 16 C.F.R. § 1700.15(d).

15 **3.4.2.2.** Within ninety (90) days following the Effective Date, all
16 Covered Products manufactured for sale in California shall be manufactured without diacetyl in
17 the Covered Products.

18 **3.4.2.3.** Within ninety (90) days following the Effective Date,
19 Settling Defendant shall implement one or more systems to ensure that no one who purchases
20 Covered Products from Settling Defendant's website is a minor.

21 **3.4.3. Prohibition on Advertising to Minors.** Settling Defendant shall not use
22 advertisements that target minors. Specifically, Settling Defendant will not use models or images
23 of people that appear to be younger than twenty- (21) years of age, cartoons, art, fashion, or music
24 that is intended and designed to appeal to people under the legal smoking age in advertisements
25 or promotional materials that appear in California, including on the Internet.

26 **3.4.4. Prohibition on Health and Safety Claims.** If Settling Defendant opts to
27 participate in Section 3.4, Settling Defendant shall not make health and or safety claims unless

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

3 **3.4.4.1.** Settling Defendant shall not advertise Covered Products as
4 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
5 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

6 **3.4.4.2.** Settling Defendant shall not make any claim that the
7 Covered Products do not expose users to carcinogens or are better or safer than tobacco.

8 **4. PAYMENTS**

9 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$18,000, which shall
10 be allocated as follows:

11 **4.1.1.** \$825 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). This civil penalty shall be made payable to the
15 Center for Environmental Health.

16 **4.1.2.** \$1,237 as a payment in lieu of civil penalty pursuant to California Health &
17 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
18 such funds to continue its work educating and protecting people from exposures to toxic
19 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
20 Judgment and to purchase and test Settling Defendant's Products to confirm compliance. In
21 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
22 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
23 educate and protect the public from exposures to toxic chemicals. The method of selection of
24 such groups can be found at the CEH website at www.ceh.org/justicefund. This payment in lieu
25 of civil penalty shall be made payable to the Center for Environmental Health.

26 **4.1.3.** \$15,938 as a reimbursement of a portion of CEH's reasonable attorneys'
27 fees and costs. This amount shall be divided into two checks: (1) a check for \$14,138 shall be

1 made payable to Lexington Law Group; and (2) a check for \$1,800 shall be made payable to the
2 Center for Environmental Health. These amounts shall be paid in one (1) check made payable to
3 the Center for Environmental Health, and one (1) separate check made payable to the Lexington
4 Law Group.

5 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
6 separate checks, all to be delivered within twenty (20) days following the Effective Date. All
7 checks shall be delivered to Mark Todzo at Lexington Law Group at the address set forth in
8 Section 8.1.2.

9 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
10 one or more of the optional provisions in Section 3.4 in accordance with that Section, on the date
11 specified in Exhibit A, Settling Defendant must make an additional payment for each provision
12 not certified, as follows: (i) \$1,875 if Settling Defendant elects to not participate in Section 3.4.1;
13 (ii) \$1,875 if Settling Defendant elects to not participate in Section 3.4.2; (iii) \$1,875 if Settling
14 Defendant elects to not participate in Section 3.4.3; and (iv) \$1,875 if Settling Defendant elects to
15 not participate in Section 3.4.4. Each of these payments shall be paid in two separate checks,
16 each payable to the Center for Environmental Health, to be allocated as follows:

17 **4.1.5.1.** Forty percent (40%) shall constitute a civil penalty pursuant to
18 California Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in
19 accordance with California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State
20 of California's Office of Environmental Health Hazard Assessment).

21 **4.1.5.2.** Sixty percent (60%) shall constitute a payment in lieu of civil
22 penalty pursuant to California Health & Safety Code § 25249.7(b) and California Code of
23 Regulations, Title 11, § 3203(b). CEH will use such funds to continue its work educating and
24 protecting people from exposures to toxic chemicals. CEH may also use a portion of such funds
25 to monitor compliance with this Consent Judgment and to purchase and test Settling Defendant's
26 Products to confirm compliance. In addition, as part of its Community Environmental Action and
27 Justice Fund, CEH will use four percent (4%) of such funds to award grants to grassroots

1 environmental justice groups working to educate and protect the public from exposures to toxic
2 chemicals. The method of selection of such groups can be found at the CEH website at
3 www.ceh.org/justicefund.

4 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

16 **6. MODIFICATION OF CONSENT JUDGMENT**

17 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
18 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

19 **7. CLAIMS COVERED AND RELEASE**

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

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

9 **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and
10 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
11 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn
12 about exposures to nicotine, formaldehyde, and/or acetaldehyde from the Covered Products
13 manufactured, distributed, or sold by Settling Defendant after the Effective Date.

14 **8. PROVISION OF NOTICE**

15 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
16 notice shall be sent by first class and electronic mail as follows:

17 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
18 receive notices pursuant to this Consent Judgment shall be:


19 Angelica Leon
20 Beverly Hills Lawyers & Associates
21 9461 Charleville Blvd. #613
22 Beverly Hills, CA 90212
aml@bh-la.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
San Francisco, CA 94117
mtodzo@lexlawgroup.com

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PHD MARKETING, INC.



Signature

Khajadour Semikian

Printed Name

General Manager

Title

IT IS SO ORDERED:

Dated: _____, 2016

Judge of the Superior Court