

1 Mark N. Todzo, State Bar No. 168389
2 Abigail Blodgett, State Bar No. 278813
3 503 Divisadero Street
4 San Francisco, CA 94117
5 Telephone: (415) 913-7800
6 Facsimile: (415) 759-4112
7 mtodzo@lexlawgroup.com
8 ablodgett@lexlawgroup.com

9 Attorneys for Plaintiff
10 CENTER FOR ENVIRONMENTAL HEALTH

11
12 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA

14 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG-15770932
15)
16 Plaintiff,)
17)
18 v.) **[PROPOSED] CONSENT**
19) **JUDGMENT AS TO FIVE PAWNS,**
20) **INC.**
21)
22 SPACE JAM JUICE LLC, et al.)
23)
24 Defendants.)
25)
26)
27)
28)

19 **1. INTRODUCTION**

20 **1.1.** This Consent Judgment is entered into by Plaintiff Center for Environmental
21 Health, a non-profit corporation (“CEH”), and Five Pawns, Inc. (“Settling Defendant”) to settle
22 claims asserted by CEH against Settling Defendant as set forth in the operative Complaint in the
23 matter *Center for Environmental Health v. Space Jam Juice, LLC, et al.*, Alameda County
24 Superior Court Case No. RG-15770932 (the “Action”). CEH and Settling Defendant are
25 referred to collectively as the “Parties.”

26 **1.2.** On February 5, 2015, CEH served a 60-Day Notice of Violation (the “Notice”)
27 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986, California
28

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

6 **1.3.** Settling Defendant is a corporation that employs ten (10) or more persons and that
7 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
8 California or has done so in the past.

9 **1.4.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
10 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
11 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)
12 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
13 Consent Judgment as a full and final resolution of all claims which were or could have been
14 raised in the Complaint based on the facts alleged in the Notice and Complaint with respect to
15 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

16 **1.5.** The Parties enter into this Consent Judgment as a full and final settlement of all
17 claims which were or could have been raised in the Complaint arising out of the facts or conduct
18 related to Settling Defendant alleged therein through the Effective Date. By execution of this
19 Consent Judgment and agreeing to comply with its terms, the Parties do not admit any fact,
20 conclusion of law, or violation of law, nor shall compliance with the Consent Judgment constitute
21 or be construed as an admission by the Parties of any fact, conclusion of law, or violation of law.
22 Settling Defendant denies the material, factual, and legal allegations in the Notice and Complaint
23 and expressly denies any wrongdoing whatsoever. Except as specifically provided herein,
24 nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument,
25 or defense any of the Parties may have in this or any other pending or future legal proceedings.
26 CEH and Settling Defendant enter into this Consent Judgment as a full and final settlement of all
27 claims that were raised in the Complaint, arising out of the facts or conduct alleged therein, and
28

1 intend for this Consent Judgment to constitute a final judgment on the merits of contested issues
2 between the Parties that will bind those in privity with either Party. It is the intent of the parties
3 that this is a final judgment for purposes of res judicata effect, one judgment rule, and claim
4 preclusion. This Consent Judgment is the product of negotiation and compromise and is accepted
5 by the Parties solely for purposes of settling, compromising, and resolving issues disputed in this
6 Action.

7 **1.6.** Settling Defendant contends that the Covered Products specifically identified in
8 Section 2.1 are named after sophisticated chess moves in the strategic game of chess and the
9 descriptions of the tastes thereof are not targeted to appeal to minors. CEH does not dispute this
10 contention.

11 **2. DEFINITIONS**

12 **2.1.** “Covered Products” means nicotine-containing liquid for use with electronic
13 cigarette devices manufactured, distributed, and/or sold by Settling Defendant in California,
14 including, but not limited to, the following vapor products of Settling Defendant that contain
15 nicotine: Castle Long, Castle Long Reserve, Sixty-Four, Lucena, Bowden’s Mate, Black Flag
16 Fallen, Fifth Rank, Queenside, Perpetual Check, Absolute Pin, Grandmaster, and Gambit.

17 **2.2.** “Effective Date” means the date on which the Court enters this Consent
18 Judgment.

19 **2.3.** “Manufacture Date” means the date the Covered Product was manufactured and
20 as may be indicated on a tag attached to the Covered Product.

21 **3. INJUNCTIVE RELIEF**

22 **3.1. Clear and Reasonable Warnings for Covered Products.** As of the Effective
23 Date, no Covered Product may be manufactured for sale, distributed or sold in California unless
24 such Covered Product has a clear and reasonable warning on the outer packaging of the product.
25 The warning shall state the following:

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

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

14 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** In an
15 effort to ensure that consumers receive clear and reasonable warnings in compliance with
16 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
17 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
18 materials by certified mail to each of its California retailers or distributors to whom Settling
19 Defendant reasonably believes sold Covered Products that contained nicotine on or after, and that
20 Settling Defendant believes still has Covered Products in its inventory, if any. Such warning
21 materials shall include a reasonably sufficient number of stickers in order to permit the retailer or
22 distributor to affix the warning on each Covered Product such customer has purchased from
23 Settling Defendant. The warning stickers shall contain the warning language set forth in Section
24 3.1 above. The warning materials shall also include a letter of instruction for the placement of the
25 stickers, and a Notice and Acknowledgment postcard.

26 **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
27 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in
28

1 Section 4.1.5 below, Settling Defendant shall undertake the additional actions below. A Settling
2 Defendant opting to be bound by this Section must provide CEH with a written election.

3 **3.2.1. Product Safety Requirements.** A Settling Defendant opting to participate
4 in Section 3.2 shall make the following change to the Covered Products to increase the safety of
5 such products: Within ninety (90) days following the Effective Date, all Covered Products
6 manufactured for sale in California shall be manufactured with child proof caps. However, if
7 Settling Defendant already manufactures the Covered Products with child proof caps, Settling
8 Defendant will need to continue to manufacture the Covered Products with child proof caps for
9 eligibility of the additional penalty/payment in lieu of penalty payments set forth in Section 4.1.5
10 below.

11 **3.2.2. Prohibition on Sales and Advertising to Minors.** A Settling Defendant
12 opting to participate in Section 3.2 shall not sell Covered Products to persons younger than
13 eighteen (18) years of age and shall take reasonable steps to prevent the sale of Covered Products
14 to such persons, including, but not limited to the following measures:

15 **3.2.2.1.** Settling Defendant shall implement one or more systems for
16 checking the age of persons who purchase Covered Products on the Internet or in person. The
17 system shall include age verification by requiring and checking an official government
18 identification card or verifying through a reputable credit agency the age of anyone who
19 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who
20 purchases in person. The system shall be put into place within ninety (90) days of the Effective
21 Date.

22 **3.2.2.2.** Settling Defendant shall not sell flavored cartridges or any
23 substance to use with Covered Products or other e-cigarettes that are targeted to appeal to minors
24 including, but not limited to, cereal, fruit and candy flavors. The parties agree that the Covered
25 Products, including the flavored cartridges therein, expressly identified in Section 2.1, which are
26 named after chess moves, are not targeted to minors.

1 **3.2.2.3.** Settling Defendant shall not use advertisements that
2 purposely target minors. For example, Defendant will not use cartoons, art, fashion, or music that
3 are specifically intended and designed to appeal to people under the legal smoking age in
4 advertisements or promotional materials that appear in California, including on the Internet, nor
5 will Defendant utilize any form of outdoor advertising within 1,000 feet of any school or
6 playground.

7 **3.2.3. Prohibition on Health and Safety Claims.** A Settling Defendant opting
8 to participate in Section 3.2 shall not make health and or safety claims unless such claims have
9 been reviewed and approved by the Federal Food and Drug Administration. Examples of
10 prohibited claims include the following:

11 **3.2.3.1.** Settling Defendant shall not advertise Covered Products as
12 smoking-cessation devices.

13 **3.2.3.2.** Settling Defendant shall not make any claim that the
14 Covered Products do not contain carcinogens.

15 **3.2.3.3.** Settling Defendant shall not make any claim that the
16 Covered Products produce no second hand smoke.

17 **4. PAYMENTS**

18 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$44,500 which shall
19 be allocated as follows:

20 **4.1.1.** \$2,793 as a civil penalty pursuant to California Health & Safety Code §
21 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
22 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
23 Environmental Health Hazard Assessment).

24 **4.1.2.** \$4,188 as a payment in lieu of civil penalty pursuant to California Health &
25 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
26 such funds to continue its work educating and protecting people from exposures to toxic
27 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
28

1 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
2 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
3 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
4 educate and protect the public from exposures to toxic chemicals. The method of selection of
5 such groups can be found at the CEH website at www.ceh.org/justicefund.

6 **4.1.3.** \$37,519 as a reimbursement of a portion of CEH's reasonable attorneys'
7 fees and costs. Of this total, \$4,450 shall be made payable to CEH and the remaining \$33,069
8 shall be made payable to Lexington Law Group.

9 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
10 separate checks, all to be delivered within ten (10) days following the Effective Date. The
11 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
12 for Environmental Health. The payments required pursuant to Section 4.1.3 shall be made
13 payable as set forth above. All checks shall be delivered to Mark Todzo at Lexington Law Group
14 at the address set forth in Section 8.1.2.

15 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
16 Section 3.2 in accordance with that Section, within ninety (90) days following the Effective Date,
17 Defendant must make an additional payment for each provision not certified, as follows: (i)
18 \$4,250 if Settling Defendant elects to not participate in Section 3.2.1; (ii) \$4,250 if Settling
19 Defendant elects to not participate in Section 3.2.2; and (iii) \$4,250 if Settling Defendant elects to
20 not participate in Section 3.2.3. Each payment shall be paid in two (2) separate checks, each
21 payable to the Center for Environmental Health, to be allocated as follows:

22 **4.1.5.1.** Forty percent (40%) of each payment specified in Section 4.1.5
23 shall constitute a penalty pursuant to California Health & Safety Code § 25249.7(b), such money
24 to be apportioned by CEH in accordance with California Health & Safety Code § 25249.12 (25%
25 to CEH and 75% to the State of California's Office of Environmental Health Hazard
26 Assessment).

27 **4.1.5.2.** Sixty percent (60%) of each payment specified in Section 4.1.5

28

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

10 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

23 **6. MODIFICATION OF CONSENT JUDGMENT**

24 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
25 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.
26
27
28

1 **7. CLAIMS COVERED AND RELEASE**

2 **7.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting
3 in the public interest and Settling Defendant and Settling Defendant’s parents, officers, directors,
4 shareholders, divisions, subdivisions, subsidiaries, and their respective successors and assigns
5 (“Defendant Releasees”) and all entities to whom they distribute or sell or have distributed or sold
6 Covered Products including, but not limited to, distributors, wholesalers, customers, retailers,
7 franchisees, cooperative members, and licensees (“Downstream Defendant Releasees”), of all
8 claims alleged in the Complaint in this Action arising from any violation of Proposition 65 that
9 have been or could have been asserted in the public interest against Settling Defendant and
10 Downstream Defendant Releasees, regarding the failure to warn about exposure to nicotine in the
11 Covered Products manufactured, distributed, or sold by Settling Defendant prior to the Effective
12 Date.

13 **7.2.** CEH, for itself and acting in the public interest pursuant to Health and Safety Code
14 §25249.7(d), releases, waives, and forever discharges any and all claims alleged in the Complaint
15 against Settling Defendant and Downstream Defendant Releasees arising from any and all
16 violations of Proposition 65 that have been or could have been asserted regarding the failure to
17 warn about exposure to nicotine in connection with Covered Products manufactured, distributed,
18 or sold by Settling Defendant prior to the Effective Date through the Effective Date of this
19 Judgment.

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

25 **8. PROVISION OF NOTICE**

26 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
27 notice shall be sent by first class and electronic mail as follows:
28

1 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
2 receive notices pursuant to this Consent Judgment shall be:

3 John E. Bowerbank
4 Garcia Rainey Blank & Bowerbank LLP
5 695 Town Center Drive, Suite 700
6 Costa Mesa, CA 92626-1993
7 jbowerbank@garciarainey.com

8 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
9 this Consent Judgment shall be:

10 Mark Todzo
11 Lexington Law Group
12 503 Divisadero Street
13 San Francisco, CA 94117
14 mtodzo@lexlawgroup.com

15 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
16 sending the other Parties notice by first class and electronic mail.

17 **9. COURT APPROVAL**

18 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
19 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
20 Settling Defendant shall support approval of such Motion.

21 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
22 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
23 purpose.

24 **10. GOVERNING LAW AND CONSTRUCTION**

25 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
26 and enforced in accordance with the laws of the State of California.

27 **11. ENTIRE AGREEMENT**

28 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all

1 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
2 merged herein and therein.

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

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

11 **11.4.** No supplementation, modification, waiver, or termination of this Consent
12 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

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

16 **12. RETENTION OF JURISDICTION**

17 **12.1.** This Court shall retain limited jurisdiction of this matter to implement or modify
18 the Consent Judgment in accordance with Section 6.1 of this Consent Judgment.

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

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

23 **14. NO EFFECT ON OTHER SETTLEMENTS AND COOPERATION**

24 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
25 against another entity on terms that are different from those contained in this Consent Judgment.

26 **14.2.** In the event of a subsequent action by an entity regarding the same or similar
27 subject matter in the Action or that is covered by this Consent Judgment, Settling Defendant will

28


1 notify CEH of such action so that CEH may review it and cooperate with Settling Defendant with
2 respect to efforts to dismiss such subsequent action. CEH's cooperation may include, but is not
3 necessarily limited to, CEH's and/or its counsel's completion of affidavits in support of any
4 dispositive motion by Settling Defendant based upon *res judicata*, claim preclusion and/or the
5 defense of settlement and release.

6 **15. EXECUTION IN COUNTERPARTS**

7 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
8 means of facsimile, which taken together shall be deemed to constitute one document.

9
10 **IT IS SO STIPULATED:**

11 **CENTER FOR ENVIRONMENTAL HEALTH**

12
13 

14 _____
Charlie Pizarro
Associate Director

15
16 **FIVE PAWNS, INC.**

17
18 _____
Signature

19
20 _____
Printed Name

21
22 _____
Title

23
24 **IT IS SO ORDERED:**

25
26
27 Dated: _____, 2015

Judge of the Superior Court

1 notify CEH of such action so that CEH may review it and cooperate with Settling Defendant with
2 respect to efforts to dismiss such subsequent action. CEH's cooperation may include, but is not
3 necessarily limited to, CEH's and/or its counsel's completion of affidavits in support of any
4 dispositive motion by Settling Defendant based upon *res judicata*, claim preclusion and/or the
5 defense of settlement and release.

6 **15. EXECUTION IN COUNTERPARTS**

7 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by
8 means of facsimile, which taken together shall be deemed to constitute one document.

9
10 **IT IS SO STIPULATED:**

11 **CENTER FOR ENVIRONMENTAL HEALTH**

12
13 _____
14 Charlie Pizarro
15 Associate Director

16 **FIVE PAWNS, INC.**

17 
18 _____
19 Signature

20 RODNEY TERABECK
21 Printed Name

22 PRESIDENT & CEO
23 Title

24 **IT IS SO ORDERED:**

25
26
27 Dated: _____, 2015

Judge of the Superior Court