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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,)
15 v.) **[PROPOSED] CONSENT**
16 SPACE JAM JUICE LLC, et al.,) **JUDGMENT AS TO CB**
17) **DISTRIBUTORS, INC.**
18 Defendants.)
19)

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 CB Distributors, 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 27, 2015, CEH served a 60-Day Notice of Violation (the “Notice”)
2 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986, California
3 Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) on Settling Defendant, the California
4 Attorney General, the District Attorneys of every County in the State of California, and the City
5 Attorneys for every City in State of California with a population greater than 750,000. The
6 Notice alleges violations of Proposition 65 with respect to the presence of nicotine in electronic
7 cigarette devices designed for use with nicotine-containing liquid manufactured, distributed,
8 and/or sold by Settling Defendant.

9 **1.3.** Subsequently, on September 2, 2015, CEH served additional Notices of
10 Proposition 65 violation alleging exposures to formaldehyde and acetaldehyde in electronic
11 cigarette devices designed for use with nicotine-containing liquid manufactured, distributed,
12 and/or sold by Settling Defendant as well as the liquids used in such products.

13 **1.4.** Settling Defendant is a corporation that employs ten (10) or more persons and that
14 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
15 California or has done so in the past.

16 **1.5.** On August 25, 2015, the Complaint was amended to add Settling Defendant as a
17 party.

18 **1.6.** For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
19 Court has jurisdiction over the allegations of violations contained in the Notice and Complaint
20 and personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (ii)
21 venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this
22 Consent Judgment as a full and final resolution of all claims which were or could have been
23 raised in the Complaint based on the facts alleged in the Notice and Complaint with respect to
24 Covered Products manufactured, distributed, and/or sold by Settling Defendant.

25 **1.7.** The Parties enter into this Consent Judgment as a full and final settlement of all
26 claims which were or could have been raised in the Complaint arising out of the facts or conduct
27 related to Settling Defendant alleged therein. By execution of this Consent Judgment and
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1 agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or
2 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
3 admission by the Parties of any fact, conclusion of law, or violation of law. Settling Defendant
4 denies the material, factual, and legal allegations in the Notice and Complaint and expressly
5 denies any wrongdoing whatsoever. Except as specifically provided herein, nothing in this
6 Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any
7 of the Parties may have in this or any other pending or future legal proceedings. This Consent
8 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for
9 purposes of settling, compromising, and resolving issues disputed in this Action.

10 **1.8.** Upon entry of this Consent Judgment, the Complaint in the Action shall be
11 deemed amended as to Settling Defendant to include the allegations set forth in the Second
12 Notices.

13 **2. DEFINITIONS**

14 **2.1.** “Covered Device Products” means electronic cigarette devices, also known as
15 tanks and vape pens, which contain nicotine or are designed and intended for use with nicotine-
16 containing liquid, manufactured, distributed, and/or sold by Settling Defendant in California.

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

20 **2.3.** “Covered Products” means Covered Device Products and Covered Liquid
21 Products.

22 **2.4.** “Effective Date” means the date on which the Court enters this Consent Judgment.

23 **3. INJUNCTIVE RELIEF**

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

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WARNING! This product contains nicotine, a chemical known to the State of California to cause birth defects or other reproductive harm and chemicals known to cause cancer. This product is not a safe alternative to smoking. Not suitable for pregnant or nursing women.

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 and chemicals known to cause cancer. Use of this product with non-nicotine-containing liquid will expose you to chemicals known to cause cancer. This product is not a safe alternative to smoking. Not suitable for pregnant or nursing women.

For Covered Liquid Products that do not contain nicotine, the warning shall state the following:

WARNING! Use of this product will expose you to chemicals known to cause cancer. This product is not a safe alternative to smoking.

The warnings 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 prominently displayed on the outer packaging of the Covered Product with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual prior to sale. To the extent that other warning statements are included on the outer packaging of a Covered Product, the warning required herein shall be separated from the other warnings by a line that is at least the same height as a line of text on the label. For internet, catalog, or any other sale where the consumer is not physically present and cannot see a warning displayed on the Covered Product prior to purchase or payment, 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 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

1 multiple products for sale does not satisfy the requirements of this Section. The warning labels
2 attached hereto as Exhibit A shall be deemed to satisfy the requirements of this section.

3 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** In an
4 effort to ensure that consumers receive clear and reasonable warnings in compliance with
5 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
6 within thirty (30) days following the Effective Date, Settling Defendant shall send a letter, by
7 certified mail, to each of its California retailers or distributors to whom Settling Defendant
8 reasonably believes it sold Covered Products within the three months preceding the Effective
9 Date, and inform them that Settling Defendant has changed the warning on its labels. In addition
10 the letter shall do one of the following, at Settling Defendant's option: (1) inform the retailer or
11 distributor that it may exchange the product with the old label for product with the new label; or
12 (2) provide a reasonably sufficient number of stickers, containing the warning language set forth
13 in Section 3.1 above, to permit the retailer or distributor to affix the warning on each Covered
14 Product such customer has purchased from Settling Defendant, and instruction for the placement
15 of the stickers.

16 **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
17 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in
18 Section 4.1.5 below, Settling Defendant shall elect to comply with one or more of the provisions
19 3.2.1, 3.2.2, and/or 3.2.3. A Settling Defendant making such election must do so in writing to
20 CEH, identifying which sections it is electing.

21 **3.2.1. Product Safety Requirements.** A Settling Defendant opting to participate
22 in Section 3.2 shall do the following to increase the safety of such Products:

23 **3.2.1.1.** Within ninety (90) days following the Effective Date, all
24 Covered Liquid Products manufactured for sale in California shall be manufactured with child
25 proof caps in accordance with the standards set forth in 16 C.F.R. §1700.15(b).

1 **3.2.1.2.** Within ninety (90) days following the Effective Date, all
2 Covered Liquid Products manufactured for sale in California shall be manufactured with flow
3 restrictions as described in 16 C.F.R. §1700.15(d).

4 **3.2.2. Prohibition on Sales and Advertising to Minors.** A Settling Defendant
5 opting to participate in Section 3.2 shall not sell Covered Products to persons younger than
6 eighteen (18) years of age and shall take reasonable steps to prevent the sale of Covered Products
7 to such persons, including, but not limited to the following measures:

8 **3.2.2.1.** Settling Defendant shall either: (1) implement one or more
9 systems for checking the age of persons who purchase Covered Products on the Internet or in
10 person; or (2) certify that it makes no such sales. The system shall include age verification by
11 requiring and checking an official government identification card or verifying through a reputable
12 credit agency the age of anyone who purchases Covered Products on the Internet, or of anyone
13 under twenty-six (26) years old who purchases in person. The system shall be put into place
14 within ninety (90) days of the Effective Date.

15 **3.2.2.2.** To the extent that Settling Defendant advertises to end-
16 users, Settling Defendant shall not use advertisements that target minors. Specifically, Settling
17 Defendant will not use models or images of people that appear to be younger than twenty-eight
18 (28) years of age, cartoons, art, fashion, or music that is intended and designed to appeal to people
19 under the legal smoking age in advertisements or promotional materials that appear in California,
20 including on the Internet. Additionally, Settling Defendant will not: (a) advertise in any media
21 that has more than 25% under 18 readership; (b) utilize any form of outdoor advertising within
22 1,000 feet of any school or playground; (c) advertise using Instagram; and (d) sponsor any
23 athletic, musical or other cultural events unless such events are designated as prohibiting patrons
24 under the age of 18.

25 **3.2.3. Prohibition on Health and Safety Claims.** Should Settling Defendant opt
26 to participate in Section 3.2, it shall not make health and or safety claims unless such claims have
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1 been reviewed and approved by the Federal Food and Drug Administration. Examples of
2 prohibited claims include the following:

3 **3.2.3.1.** 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 **3.2.3.2.** Settling Defendant shall not make any claim that the
7 Covered Products do not contain carcinogens or are better or safer than tobacco.

8 **3.2.3.3.** Settling Defendant shall not make any claim that the
9 Covered Products produce no second hand smoke.

10 **3.2.3.4.** The Parties acknowledge that the warning statement set
11 forth above in Section 3.1, if not controverted by any other statement by Settling Defendant,
12 satisfies this Section 3.2.3.

13 **4. PAYMENTS**

14 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$50,000, which shall
15 be allocated as follows:

16 **4.1.1.** \$1,750 as a civil penalty pursuant to California Health & Safety Code §
17 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
18 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
19 Environmental Health Hazard Assessment).

20 **4.1.2.** \$2,625 as a payment in lieu of civil penalty pursuant to California Health &
21 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
22 such funds to continue its work educating and protecting people from exposures to toxic
23 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
24 Judgment and to purchase and test Settling Defendant's Products to confirm compliance. In
25 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
26 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
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1 educate and protect the public from exposures to toxic chemicals. The method of selection of
2 such groups can be found at the CEH website at www.ceh.org/justicefund.

3 **4.1.3.** \$45,625 as a reimbursement of a portion of CEH's reasonable attorneys'
4 fees and costs. This amount shall be divided into two checks: (1) a check for \$40,625 shall be
5 made payable to Lexington Law Group; and (2) a check for \$5,000 shall be made payable to the
6 Center for Environmental Health.

7 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
8 separate checks, all to be delivered within ten (10) days following the Effective Date. The
9 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
10 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group
11 at the address set forth in Section 8.1.2.

12 **4.1.5.** In the event that Settling Defendant elects to not certify its compliance with
13 one or more of the optional provisions in Section 3.2 in accordance with that Section, within
14 ninety (90) days following the Effective Date, Defendant must make an additional payment for
15 each provision not certified, as follows: (i) \$8,333 if Settling Defendant elects to not participate in
16 Section 3.2.1; (ii) \$8,333 if Settling Defendant elects to not participate in Section 3.2.2; (iii) and
17 \$8,334 if Settling Defendant elects to not participate in Section 3.2.3. Each of these payments
18 shall be paid in two separate checks, each payable to the Center for Environmental Health, to be
19 allocated as follows:

20 **4.1.5.1.** Forty percent (40%) of the total payment specified in Section
21 4.1.5 shall constitute a penalty pursuant to California Health & Safety Code § 25249.7(b), such
22 money to be apportioned by CEH in accordance with California Health & Safety Code §
23 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health
24 Hazard Assessment).

25 **4.1.5.2.** Sixty percent (60%) of the total payment specified in Section
26 4.1.5 shall constitute a payment in lieu of civil penalty pursuant to California Health & Safety
27 Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use such
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1 funds to continue its work educating and protecting people from exposures to toxic chemicals.
2 CEH may also use a portion of such funds to monitor compliance with this Consent Judgment and
3 to purchase and test Settling Defendant's Products to confirm compliance. In addition, as part of
4 its Community Environmental Action and Justice Fund, CEH will use four percent (4%) of such
5 funds to award grants to grassroots environmental justice groups working to educate and protect
6 the public from exposures to toxic chemicals. The method of selection of such groups can be
7 found at the CEH website at www.ceh.org/justicefund.

8 **5. ENFORCEMENT OF CONSENT JUDGMENT**

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

20 **6. MODIFICATION OF CONSENT JUDGMENT**

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

23 **7. CLAIMS COVERED AND RELEASE**

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

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

13 **7.3.** Compliance with Section 3.1 of this Consent Judgment by Settling Defendant shall
14 constitute compliance with Proposition 65 by Settling Defendant and its Downstream Defendant
15 Releasees with respect to any alleged failure to warn about nicotine formaldehyde and/or
16 acetaldehyde in Covered Products manufactured, distributed, or sold by Settling Defendant after
17 the Effective Date.

18 **8. PROVISION OF NOTICE**

19 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
20 notice shall be sent by first class and electronic mail as follows:

21 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
22 receive notices pursuant to this Consent Judgment shall be:

23 Michèle Corash
24 Morrison & Foerster, LLP
25 425 Market Street
26 San Francisco, CA 94105
27 mcorash@mofo.com

28 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
this Consent Judgment shall be:

1 Mark Todzo
2 Lexington Law Group
3 503 Divisadero Street
4 San Francisco, CA 94117
5 mtodzo@lexlawgroup.com

6 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
7 sending the other Parties notice by first class and electronic mail.

8 **9. COURT APPROVAL**

9 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
10 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
11 Settling Defendant shall support approval of such Motion.

12 **9.2.** If this Consent Judgment is not entered by the Court, it shall be of no force or
13 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
14 purpose.

15 **10. GOVERNING LAW AND CONSTRUCTION**

16 **10.1.** The terms and obligations arising from this Consent Judgment shall be construed
17 and enforced in accordance with the laws of the State of California.

18 **11. ENTIRE AGREEMENT**

19 **11.1.** This Consent Judgment contains the sole and entire agreement and understanding
20 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all
21 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
22 merged herein and therein.

23 **11.2.** There are no warranties, representations, or other agreements between CEH and
24 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,
25 express or implied, other than those specifically referred to in this Consent Judgment have been
26 made by any Party hereto.

27 **11.3.** No other agreements not specifically contained or referenced herein, oral or
28 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements

1 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
2 any of the Parties hereto only to the extent that they are expressly incorporated herein.

3 **11.4.** No supplementation, modification, waiver, or termination of this Consent
4 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

5 **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or
6 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
7 such waiver constitute a continuing waiver.

8 **12. RETENTION OF JURISDICTION**

9 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
10 Consent Judgment.

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

12 **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized
13 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
14 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

16 **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim
17 against another entity on terms that are different from those contained in this Consent Judgment.

18 **15. EXECUTION IN COUNTERPARTS**

19 **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by
20 means of facsimile, which taken together shall be deemed to constitute one document.

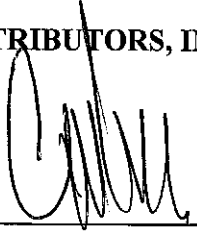
21 **IT IS SO STIPULATED:**

22 **CENTER FOR ENVIRONMENTAL HEALTH**

23
24 

25 _____
26 Charlie Pizarro
27 Associate Director

1 **CB DISTRIBUTORS, INC.**

2 

3
4 Signature

5
6 CARLOS BENGOA

7 Printed Name

8
9 PRESIDENT

10 Title

11
12
13 **IT IS SO ORDERED:**

14
15
16 Dated: _____, 2015

17 _____
Judge of the Superior Court