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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 SAFFIRE**
16 SPACE JAM JUICE LLC, et al.,) **VAPOR, 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 Saffire Vapor, Inc. (“Settling Defendant”) to settle
23 claims asserted by CEH against Settling Defendant as set forth in the operative Complaint in the
24 matter *Center for Environmental Health v. Space Jam Juice LLC, et al.*, Alameda County
25 Superior Court Case No. RG-15770932 (the “Action”). CEH and Settling Defendant are referred
26 to collectively as the “Parties.”

1 **1.2.** On February 27, 2015, CEH served 60-Day Notices of Violation (the “Notices”)
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 Notices allege violations of Proposition 65 with respect to the presence of nicotine in liquid for
7 use with electronic cigarette devices and electronic cigarette devices designed for use with
8 nicotine-containing liquids manufactured, distributed, 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 Notices 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 Notices 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 Notices and Complaint and expressly
26 deny 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 “Covered Liquid Products” and “Covered Device
6 Products.”

7 **2.2.** “Covered Liquid Products” means nicotine-containing liquid for use with
8 electronic cigarette devices manufactured, distributed, and/or sold by Settling Defendant in
9 California.

10 **2.3.** “Covered Device Products” means electronic cigarette devices, also known as
11 tanks and vape pens, which contain nicotine or are designed and intended for use with nicotine-
12 containing liquid, manufactured, distributed, and/or sold by Settling Defendant in California.

13 **2.4.** “Effective Date” means the date on which the Court enters this Consent Judgment.

14 **2.5.** “Manufacture Date” means the date the Covered Product was manufactured and
15 as may be indicated on a tag attached to the Covered Product.

16 **3. INJUNCTIVE RELIEF**

17 **3.1. Clear and Reasonable Warnings for Covered Liquid Products.** As of the
18 Effective Date, no Covered Liquid Product may be manufactured for sale, distributed or sold in
19 California unless such Covered Liquid Product has a clear and reasonable warning on the outer
20 label of the product. The warning shall state the following:

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

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

9 **3.1.1. Warnings for Covered Liquid Products in the Stream of Commerce.**

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

20 **3.2. Clear and Reasonable Warnings for Covered Device Products.** As of the

21 Effective Date, no Covered Device Product may be manufactured for sale, distributed or sold in
22 California unless such Covered Device Product has a clear and reasonable warning on the outer
23 packaging of the product. For Covered Device Products that contain nicotine, the warning shall
24 state the following:

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

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

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

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

20 **3.3. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
21 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in
22 Section 4.1.5 below, Settling Defendant shall undertake the additional actions below. A Settling
23 Defendant opting to be bound by this Section must provide CEH with a written election.

24 **3.3.1. Product Safety Requirements.** A Settling Defendant opting to participate
25 in Section 3.3 shall make the following changes to the Covered Products to increase the safety of
26 such products:
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1 **3.3.1.1. Covered Liquid Products.** Within 90 days following the
2 Effective Date, all Covered Liquid Products manufactured for sale in California shall be
3 manufactured with child proof caps.

4 **3.3.1.2. Covered Device Products.** Within 90 days following the
5 Effective Date, all Covered Device Products manufactured for sale in California shall be
6 manufactured with voltage settings not to exceed 4.0 volts.

7 **3.3.2. Prohibition on Sales and Advertising to Minors.** A Settling Defendant
8 opting to participate in Section 3.3 shall not sell Covered Products to persons younger than 18
9 years of age and shall take reasonable steps to prevent the sale of Covered Products to such
10 persons, including, but not limited to the following measures:

11 **3.3.2.1.** Settling Defendant shall implement one or more systems for
12 checking the age of persons who purchase Covered Products on the Internet or in person. The
13 system shall include age verification by requiring and checking an official government
14 identification card or verifying through a reputable credit agency the age of anyone who
15 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who
16 purchases in person. The system shall be put into place within 90 days of the Effective Date.

17 **3.3.2.2.** Settling Defendant shall not sell flavored cartridges or any
18 substance to use with Covered Products or other e-cigarettes that are targeted to appeal to minors
19 including, but not limited to, cereal, fruit and candy flavors.

20 **3.3.2.3.** Settling Defendant shall not use advertisements that target
21 minors. Specifically, Defendant will not use models or images of people that appear to be
22 younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended and
23 designed to appeal to people under the legal smoking age in advertisements or promotional
24 materials that appear in California, including on the Internet. Additionally, Settling Defendant
25 will not: (a) advertise in any media that has more than 25% under 18 readership; (b) utilize any
26 form of outdoor advertising within 1000 feet of any school or playground; (c) advertise using
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1 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are
2 designated as prohibiting patrons under the age of 18.

3 **3.3.3. Prohibition on Health and Safety Claims.** A Settling Defendant opting
4 to participate in Section 3.3 shall not make health and or safety claims unless such claims have
5 been reviewed and approved by the Federal Food and Drug Administration. Examples of
6 prohibited claims include the following:

7 **3.3.3.1.** Settling Defendant shall not advertise Covered Products as
8 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
9 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

10 **3.3.3.2.** Settling Defendant shall not make any claim that the
11 Covered Products do not contain carcinogens or are better or safer than tobacco.

12 **3.3.3.3.** Settling Defendant shall not make any claim that the
13 Covered Products produce no second hand smoke.

14 **4. PAYMENTS**

15 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$20,000, which shall
16 be allocated as follows:

17 **4.1.1.** \$570 as a civil penalty pursuant to California Health & Safety Code §
18 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
19 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
20 Environmental Health Hazard Assessment).

21 **4.1.2.** \$855 as a payment in lieu of civil penalty pursuant to California Health &
22 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
23 such funds to continue its work educating and protecting people from exposures to toxic
24 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent
25 Judgment and to purchase and test Settling Defendant's products to confirm compliance. In
26 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
27 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.** \$18,575 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 \$16,575 shall be
5 made payable to Lexington Law Group; and (2) a check for \$2,000 shall be made payable to
6 CEH.

7 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in three
8 (4) separate checks as described above, all to be delivered within ten (10) days following the
9 Effective Date. All checks shall be delivered to Mark Todzo at Lexington Law Group at the
10 address set forth in Section 8.1.2.

11 **4.1.5.** In the event that Settling Defendant elects to not certify its compliance with
12 Section 3.3 in accordance with that Section, within ninety (90) days following the Effective Date,
13 Settling Defendant must make an additional payment of \$11,000, which shall be paid in two
14 separate checks, each payable to the Center for Environmental Health, to be allocated as follows:

15 **4.1.5.1.** \$4,400 shall constitute a penalty pursuant to California Health
16 & Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with
17 California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California's
18 Office of Environmental Health Hazard Assessment).

19 **4.1.5.2.** \$6,600 shall constitute a payment in lieu of civil penalty
20 pursuant to California Health & Safety Code § 25249.7(b) and California Code of Regulations,
21 Title 11, § 3203(b). CEH will use such funds to continue its work educating and protecting
22 people from exposures to toxic chemicals. CEH may also use a portion of such funds to monitor
23 compliance with this Consent Judgment and to purchase and test Settling Defendant's products to
24 confirm compliance. In addition, as part of its Community Environmental Action and Justice
25 Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental
26 justice groups working to educate and protect the public from exposures to toxic chemicals. The
27 method of selection of such groups can be 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 with a reasonable opportunity of at least thirty (30) days
9 to 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 Consent
11 Judgment shall be entitled to its reasonable attorney’s fees and costs incurred as a result of such
12 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, distributors, wholesalers, customers, retailers,
22 franchisees, cooperative members, and licensees (“Downstream Defendant Releasees”), of all
23 claims alleged in the Complaint in this Action arising from any violation of Proposition 65 that
24 have been or could have been asserted in the public interest against Settling Defendant and
25 Downstream Defendant Releasees, regarding the failure to warn about exposure to nicotine in the
26 Covered Products manufactured, distributed, or sold by Settling Defendant prior to the Effective
27 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 Liz McNulty
17 Archer Norris, LLP
18 4695 MacArthur Court, Suite 350
19 Newport Beach, CA 92660
20 emcnulty@archernorris.com

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

23 Mark Todzo
24 Lexington Law Group
25 503 Divisadero Street
26 San Francisco, CA 94117
27 mtodzo@lexlawgroup.com

28 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
sending the other Parties notice by first class and electronic mail.

1 **9. COURT APPROVAL**

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

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

8 **10. GOVERNING LAW AND CONSTRUCTION**

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

11 **11. ENTIRE AGREEMENT**

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

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

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

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

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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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19 **IT IS SO STIPULATED:**
20 **CENTER FOR ENVIRONMENTAL HEALTH**

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23 _____
24 Charlie Pizarro
25 Associate Director

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SAFFIRE VAPOR, INC.


Signature

Robert E Arnold
Printed Name

CEO
Title

IT IS SO ORDERED:

Dated: _____, 2015

Judge of the Superior Court