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11 CENTER FOR ENVIRONMENTAL HEALTH

ENCORPED  
FILED  
ALAMEDA COUNTY

OCT 06 2015

\* McCoy, Exec. Off./Clerk

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

14 CENTER FOR ENVIRONMENTAL HEALTH, )

15 Plaintiff, )

16 v. )

17 SPACE JAM JUICE LLC, et al., )

18 Defendants. )

Case No. RG 15-770932

**[PROPOSED] CONSENT  
JUDGMENT AS TO AVAIL VAPOR,  
LLC**

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

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

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

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

1 of the Parties may have in this or any other pending or future legal proceedings. This Consent  
2 Judgment is the product of negotiation and compromise and is accepted by the Parties solely for  
3 purposes of settling, compromising, and resolving issues disputed in this Action.

## 4 **2. DEFINITIONS**

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

8 **2.2.** "Effective Date" means the date on which the Court enters this Consent Judgment.

9 **2.3.** "Manufacture Date" means the date the Covered Product was manufactured and  
10 as may be indicated on a tag attached to the Covered Product.

## 11 **3. INJUNCTIVE RELIEF**

12 **3.1. Clear and Reasonable Warnings for Covered Products.** As of the Effective  
13 Date, no Covered Product may be manufactured for sale, distributed or sold in California unless  
14 such Covered Product has a clear and reasonable warning on the outer packaging of the product.  
15 For Covered Products that contain nicotine, the warning shall state the following:

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

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

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

24 The warning shall not be preceded by, surrounded by, or include any additional words or phrases  
25 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be  
26 prominently displayed on the outer packaging of the Covered Product with such conspicuousness,  
27 as compared with other words, statements, or designs as to render it likely to be read and

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

10 **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be  
11 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in  
12 Section 4.1.5 below, Settling Defendant shall undertake the additional actions below. If Settling  
13 Defendant opts to be bound by this Section, Settling Defendant must provide CEH with a written  
14 election.

15 **3.2.1. Product Safety Requirements.** A Settling Defendant opting to participate  
16 in Section 3.2 shall make the following changes to the Covered Products to increase the safety of  
17 such products: Within ninety (90) days following the Effective Date, all Covered Products  
18 manufactured for sale in California shall be manufactured with voltage settings not to exceed 4.0  
19 volts.

20 **3.2.2. Prohibition on Sales and Advertising to Minors.** A Settling Defendant  
21 opting to participate in Section 3.2 shall not sell Covered Products to persons younger than  
22 eighteen (18) years of age and shall take reasonable steps to prevent the sale of Covered Products  
23 to such persons, including, but not limited to the following measures:

24 **3.2.2.1.** Settling Defendant shall implement one or more systems for  
25 checking the age of persons who purchase Covered Products on the Internet or in person. The  
26 system shall include age verification by requiring and checking an official government  
27 identification card or verifying through a reputable credit agency the age of anyone who

1 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who  
2 purchases in person. The system shall be put into place within ninety (90) days of the Effective  
3 Date.

4 **3.2.2.2.** Settling Defendant shall not use advertisements that target  
5 minors. Specifically, Settling Defendant will not use models or images of people that appear to  
6 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended  
7 and designed to appeal to people under the legal smoking age in advertisements or promotional  
8 materials that appear in California, including on the Internet. Additionally, Settling Defendant  
9 will not: (a) advertise in any media that has more than 25% under 18 readership; (b) utilize any  
10 form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using  
11 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are  
12 designated as prohibiting patrons under the age of eighteen (18).

13 **3.2.3. Prohibition on Health and Safety Claims.** A Settling Defendant opting  
14 to participate in Section 3.2 shall not make health and or safety claims unless such claims have  
15 been reviewed and approved by the Federal Food and Drug Administration. Examples of  
16 prohibited claims include the following:

17 **3.2.3.1.** Settling Defendant shall not advertise Covered Products as  
18 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting  
19 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

20 **3.2.3.2.** Settling Defendant shall not make any claim that the  
21 Covered Products do not expose users carcinogens or are better or safer than tobacco.

22 **3.2.3.3.** Settling Defendant shall not make any claim that the  
23 Covered Products produce no second hand smoke.

24 **4. PAYMENTS**

25 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$20,000, which shall  
26 be allocated as follows:  
27  
28

1                   **4.1.1.** \$570 as a civil penalty pursuant to California Health & Safety Code §  
2 25249.7(b), such money to be apportioned by CEH in accordance with California Health &  
3 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of  
4 Environmental Health Hazard Assessment).

5                   **4.1.2.** \$855 as a payment in lieu of civil penalty pursuant to California Health &  
6 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use  
7 such funds to continue its work educating and protecting people from exposures to toxic  
8 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent  
9 Judgment and to purchase and test Settling Defendant's Products to confirm compliance. In  
10 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four  
11 percent (4%) of such funds to award grants to grassroots environmental justice groups working to  
12 educate and protect the public from exposures to toxic chemicals. The method of selection of  
13 such groups can be found at the CEH website at [www.ceh.org/justicefund](http://www.ceh.org/justicefund).

14                   **4.1.3.** \$18,575 as a reimbursement of a portion of CEH's reasonable attorneys'  
15 fees and costs. This amount shall be divided into two checks: (1) a check for \$16,575 shall be  
16 made payable to Lexington Law Group; and (2) a check for \$2,000 shall be made payable to  
17 CEH.

18                   **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in three  
19 (3) separate checks, all to be delivered within ten (10) days following the Effective Date. The  
20 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center  
21 for Environmental Health. The payment required pursuant to Section 4.1.3 shall be made payable  
22 to Lexington Law Group. All checks shall be delivered to Mark Todzo at Lexington Law Group  
23 at the address set forth in Section 8.1.2.

24                   **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with  
25 Section 3.2 in accordance with that Section, within ninety (90) days following the Effective Date,  
26 Settling Defendant must make an additional payment of \$11,000, which shall be paid in two  
27 separate checks, each payable to the Center for Environmental Health, to be allocated as follows:

1                   **4.1.5.1.**     \$4,400 shall constitute a penalty pursuant to California Health  
2     & Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with  
3     California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California's  
4     Office of Environmental Health Hazard Assessment).

5                   **4.1.5.2.**     \$6,600 shall constitute a payment in lieu of civil penalty  
6     pursuant to California Health & Safety Code § 25249.7(b) and California Code of Regulations,  
7     Title 11, § 3203(b). CEH will use such funds to continue its work educating and protecting  
8     people from exposures to toxic chemicals. CEH may also use a portion of such funds to monitor  
9     compliance with this Consent Judgment and to purchase and test Settling Defendant's Products to  
10    confirm compliance. In addition, as part of its Community Environmental Action and Justice  
11    Fund, CEH will use four percent (4%) of such funds to award grants to grassroots environmental  
12    justice groups working to educate and protect the public from exposures to toxic chemicals. The  
13    method of selection of such groups can be found at the CEH website at [www.keh.org/justicefund](http://www.keh.org/justicefund).

14    **5.     ENFORCEMENT OF CONSENT JUDGMENT**

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

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1     **11.     ENTIRE AGREEMENT**

2             **11.1.** This Consent Judgment contains the sole and entire agreement and understanding  
3 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all  
4 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby  
5 merged herein and therein.

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

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

14            **11.4.** No supplementation, modification, waiver, or termination of this Consent  
15 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

16            **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or  
17 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall  
18 such waiver constitute a continuing waiver.

19     **12.     RETENTION OF JURISDICTION**

20            **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the  
21 Consent Judgment.

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

23            **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized  
24 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and  
25 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.  
26  
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1     **14. NO EFFECT ON OTHER SETTLEMENTS**

2             **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim  
3 against another entity on terms that are different from those contained in this Consent Judgment.

4     **15. EXECUTION IN COUNTERPARTS**

5             **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by  
6 means of facsimile, which taken together shall be deemed to constitute one document.

7  
8     **IT IS SO STIPULATED:**

9  
10    **CENTER FOR ENVIRONMENTAL HEALTH**

11  
12    

13    \_\_\_\_\_  
14    Charlie Pizarro  
15    Associate Director

16    **AVAIL VAPOR, LLC**

17  
18  
19    \_\_\_\_\_  
20    Signature

21  
22    \_\_\_\_\_  
23    Printed Name

24    \_\_\_\_\_  
25    Title

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

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7  
8     **IT IS SO STIPULATED:**

9  
10    **CENTER FOR ENVIRONMENTAL HEALTH**

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13    \_\_\_\_\_  
14 Charlie Pizarro  
15 Associate Director

16    **AVAIL VAPOR, LLC**

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19    \_\_\_\_\_  
20 Signature

21    \_\_\_\_\_  
22 Printed Name

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24    \_\_\_\_\_  
25 Title

1 **IT IS SO ORDERED:**

2  
3 Dated: October 06, 2015

4 GEORGE C. HERNANDEZ, JR.  
5 Judge of the Superior Court  
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