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11 CENTER FOR ENVIRONMENTAL HEALTH

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

14 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 15-770932
15)
16 Plaintiff,) **[PROPOSED] CONSENT**
17) **JUDGMENT AS TO AVAIL VAPOR,**
18 v.) **LLC**
19)
20 SPACE JAM JUICE LLC, et al.,)
21)
22 Defendants.)
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30 **1. INTRODUCTION**

31 **1.1.** This Consent Judgment is entered into by Plaintiff Center for Environmental
32 Health, a non-profit corporation (“CEH”), and Avail Vapor, LLC (“Settling Defendant”) to settle
33 claims asserted by CEH against Settling Defendant as set forth in the operative Complaint in the
34 matter *Center for Environmental Health v. Space Jam Juice LLC, et al.*, Alameda County
35 Superior Court Case No. RG-15770932 (the “Action”). CEH and Settling Defendant are referred
36 to collectively as the “Parties.”
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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
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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 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
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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
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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:
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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.

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:
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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.ceh.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.

1 **6. MODIFICATION OF CONSENT JUDGMENT**

2 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and
3 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

4 **7. CLAIMS COVERED AND RELEASE**

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

16 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged
17 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from
18 any violation of Proposition 65 that have been or could have been asserted regarding the failure to
19 warn about exposure to nicotine in connection with Covered Products manufactured, distributed,
20 or sold by Settling Defendant prior to the Effective Date.

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

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1 **8. PROVISION OF NOTICE**

2 **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the
3 notice shall be sent by first class and electronic mail as follows:

4 **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to
5 receive notices pursuant to this Consent Judgment shall be:

6 Chris Sullivan
7 Diamond McCarthy LLP
8 150 California Street, Suite 2200
9 San Francisco, California 94111
 csullivan@diamondmcarthy.com

10 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
11 this Consent Judgment shall be:

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

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

18 **9. COURT APPROVAL**

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

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

25 **10. GOVERNING LAW AND CONSTRUCTION**

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

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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.

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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.

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8 **IT IS SO STIPULATED:**

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10 **CENTER FOR ENVIRONMENTAL HEALTH**

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Charlie Pizarro
Associate Director

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AVAIL VAPOR, LLC

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Signature

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Printed Name

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Title

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14. NO EFFECT ON OTHER SETTLEMENTS

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

15. EXECUTION IN COUNTERPARTS

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

IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

AVAIL VAPOR, LLC

Am [Signature]
Signature

RUSSELL ROGERS
Printed Name

COO
Title

IT IS SO ORDERED:

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Dated: _____, 2015

Judge of the Superior Court