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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] AMENDED CONSENT
17) JUDGMENT AS TO AVAIL VAPOR,
18 v.) LLC
19)
20 SPACE JAM JUICE LLC, et al.,)
21)
22 Defendants.)

23 **1. INTRODUCTION**

24 **1.1.** This Amended Consent Judgment is entered into by Plaintiff Center for
25 Environmental Health, a non-profit corporation (“CEH”), and Avail Vapor, LLC (“Settling
26 Defendant”) to settle claims asserted by CEH against Settling Defendant as set forth in the
27 operative Complaint in the matter *Center for Environmental Health v. Space Jam Juice LLC, et*
28 *al.*, Alameda County Superior Court Case No. RG-15770932 (the “Action”). CEH and Settling
Defendant are referred 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.** On May 19, 2015, CEH filed the Action naming Settling Defendant.

10 **1.4.** On July 27, 2015, the Parties entered into a Consent Judgment resolving CEH’s
11 claims relating to its February 27, 2015 Notice.

12 **1.5.** On September 2, 2015, CEH served four additional 60-Day Notices of Violation
13 (the “Second Notices”) alleging additional violations with regard to the Products. Specifically,
14 the Second Notices allege that the Products produce formaldehyde and acetaldehyde when used in
15 their intended fashion.

16 **1.6.** Settling Defendant is a corporation that employs ten (10) or more persons and that
17 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
18 California or has done so in the past.

19 **1.7.** For purposes of this Amended Consent Judgment only, the Parties stipulate that:
20 (i) this Court has jurisdiction over the allegations of violations contained in the Notice, Second
21 Notices, and Complaint and personal jurisdiction over Settling Defendant as to the acts alleged in
22 the Complaint; (ii) venue is proper in the County of Alameda; and (iii) this Court has jurisdiction
23 to enter this Consent Judgment as a full and final resolution of all claims which were or could
24 have been raised in the Complaint based on the facts alleged in the Notice and Complaint with
25 respect to Covered Products manufactured, distributed, and/or sold by Settling Defendant.

26 **1.8.** The Parties enter into this Amended Consent Judgment as a full and final
27 settlement of all claims which were or could have been raised in the Complaint arising out of the
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1 facts or conduct related to Settling Defendant alleged therein and in the Notice and Second
2 Notices. By execution of this Consent Judgment and agreeing to comply with its terms, the
3 Parties do not admit any fact, conclusion of law, or violation of law, nor shall compliance with
4 the Amended Consent Judgment constitute or be construed as an admission by the Parties of any
5 fact, conclusion of law, or violation of law. Settling Defendant denies the material, factual, and
6 legal allegations in the Notice and Complaint and expressly denies any wrongdoing whatsoever.
7 Except as specifically provided herein, nothing in this Amended Consent Judgment shall
8 prejudice, waive, or impair any right, remedy, argument, or defense any of the Parties may have
9 in this or any other pending or future legal proceedings. This Amended Consent Judgment is the
10 product of negotiation and compromise and is accepted by the Parties solely for purposes of
11 settling, compromising, and resolving issues disputed in this Action.

12 **1.9.** Upon entry of this Amended Consent Judgment, the Complaint in the Action shall
13 be deemed amended as to Settling Defendant to include the allegations set forth in the Second
14 Notices.

15 **2. DEFINITIONS**

16 **2.1.** “Covered Products” means “Covered Liquid Products” and “Covered Device
17 Products.”

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

21 **2.3.** “Covered Device Products” means electronic cigarette devices, also known as
22 tanks and vape pens, which contain nicotine or are designed and intended for use with nicotine-
23 containing liquid, that are manufactured, distributed, and/or sold by Settling Defendant in
24 California.

25 **2.4.** “Effective Date” means the date on which the Court enters this Amended Consent
26 Judgment.

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1 **3. INJUNCTIVE RELIEF**

2 **3.1. Clear and Reasonable Warnings for Covered Liquid Products.** As of the
3 Effective Date, no Covered Liquid Product may be manufactured for sale, distributed or sold in
4 California unless such Covered Liquid Product has a clear and reasonable warning on the outer
5 label of the product. The warning shall state the following:

6 **WARNING:** Use of this product will expose you to formaldehyde and
7 acetaldehyde, chemicals known to the State of California to cause cancer.

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

21 **3.1.1. Warnings for Covered Liquid Products in the Stream of Commerce.**

22 In an effort to ensure that consumers receive clear and reasonable warnings in compliance with
23 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.1,
24 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
25 materials by certified mail to each of its California retailers or distributors to whom Settling
26 Defendant reasonably believes sold Covered Liquid Products prior to the Effective Date. Such
27 warning materials shall include a reasonably sufficient number of stickers in order to permit the
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1 retailer or distributor to affix the warning on each Covered Liquid Product such customer has
2 purchased from Settling Defendant. The warning stickers shall contain the warning language set
3 forth in Section 3.1 above. The warning materials shall also include a letter of instruction for the
4 placement of the stickers, and a Notice and Acknowledgment postcard.

5 **3.2. Clear and Reasonable Warnings for Covered Device Products.** As of the
6 Effective Date, no Covered Device Product may be manufactured for sale, distributed or sold in
7 California unless such Covered Device Product has a clear and reasonable warning on the outer
8 packaging of the product. For Covered Device Products that contain nicotine, the warning shall
9 state the following:

10 **WARNING:** Use of this product will expose you to nicotine, a chemical
11 known to the State of California to cause birth defects or other reproductive
12 harm, and formaldehyde and acetaldehyde, chemicals known to cause
13 cancer.

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

16 **WARNING:** Use of this product with nicotine-containing liquid will
17 expose you to nicotine, a chemical known to the State of California to
18 cause birth defects or other reproductive harm, and formaldehyde and
19 acetaldehyde, chemicals known to cause cancer.

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

7 **3.2.1. Warnings for Covered Device Products in the Stream of Commerce.**

8 In an effort to ensure that consumers receive clear and reasonable warnings in compliance with
9 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.2,
10 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning
11 materials by certified mail to each of its California retailers or distributors to whom Settling
12 Defendant reasonably believes sold Covered Device Products prior to the Effective Date. Such
13 warning materials shall include a reasonably sufficient number of stickers in order to permit the
14 retailer or distributor to affix the warning on each Covered Device Product such customer has
15 purchased from Settling Defendant. The warning stickers shall contain the warning language set
16 forth in Section 3.2 above. The warning materials shall also include a letter of instruction for the
17 placement of the stickers, and a Notice and Acknowledgment postcard.

18 **3.3. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be
19 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in
20 Section 4.1.5 below, Settling Defendant shall undertake the additional actions below. If Settling
21 Defendant opts to be bound by this Section, Settling Defendant must provide CEH with a written
22 election stating which optional provision(s) it is agreeing to implement.

23 **3.3.1. Product Safety Requirements.** A Settling Defendant opting to participate
24 in Section 3.3 shall make the following changes to the Covered Products to increase the safety of
25 such products:
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1 **3.3.1.1.** Within ninety (90) days following the Effective Date, all
2 Covered Liquid Products manufactured for sale in California shall be manufactured with child
3 proof caps in accordance with the standards set forth in 16 C.F.R. § 1700.15(b).

4 **3.3.1.2.** Within ninety (90) days following the Effective Date, all
5 Covered Products manufactured for sale in California shall be manufactured such that use of the
6 Covered Products will not produce detectable levels of formaldehyde and acetaldehyde.

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
9 eighteen (18) years of age and shall take reasonable steps to prevent the sale of Covered Products
10 to such 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 ninety (90) days of the Effective
17 Date.

18 **3.3.2.2.** Settling Defendant shall not use advertisements that target
19 minors. Specifically, Settling Defendant will not use models or images of people that appear to
20 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended
21 and designed to appeal to people under the legal smoking age in advertisements or promotional
22 materials that appear in California, including on the Internet. Additionally, Settling Defendant
23 will not: (a) advertise in any media that has more than 25% under 18 readership; (b) utilize any
24 form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using
25 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are
26 designated as prohibiting patrons under the age of eighteen (18).

1 **3.3.3. Prohibition on Health and Safety Claims.** A Settling Defendant opting
2 to participate in Section 3.3 shall not make health and or safety claims unless such claims have
3 been reviewed and approved by the Federal Food and Drug Administration. Examples of
4 prohibited claims include the following:

5 **3.3.3.1.** Settling Defendant shall not advertise Covered Products as
6 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting
7 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

8 **3.3.3.2.** Settling Defendant shall not make any claim that the
9 Covered Products do not expose users carcinogens or are better or safer than tobacco.

10 **3.3.3.3.** Settling Defendant shall not make any claim that the
11 Covered Products produce no second hand smoke.

12 **4. PAYMENTS**

13 **4.1.** Settling Defendant shall initially pay to CEH the total sum of \$22,500, which shall
14 be allocated as follows:

15 **4.1.1.** \$570 as a civil penalty pursuant to California Health & Safety Code §
16 25249.7(b), such money to be apportioned by CEH in accordance with California Health &
17 Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of
18 Environmental Health Hazard Assessment).

19 **4.1.2.** \$855 as a payment in lieu of civil penalty pursuant to California Health &
20 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use
21 such funds to continue its work educating and protecting people from exposures to toxic
22 chemicals. CEH may also use a portion of such funds to monitor compliance with this Amended
23 Consent Judgment and to purchase and test Settling Defendant’s Products to confirm compliance.
24 In addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
25 percent (4%) of such funds to award grants to grassroots environmental justice groups working to
26 educate and protect the public from exposures to toxic chemicals. The method of selection of
27 such groups can be found at the CEH website at www.ceh.org/justicefund.

1 **4.1.3.** \$21,075 as a reimbursement of a portion of CEH’s reasonable attorneys’
2 fees and costs. This amount shall be divided into two checks: (1) a check for \$18,575 shall be
3 made payable to Lexington Law Group; and (2) a check for \$2,500 shall be made payable to the
4 Center for Environmental Health.

5 **4.1.4.** The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)
6 separate checks, all to be delivered within ten (10) days following the Effective Date. The
7 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center
8 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group
9 at the address set forth in Section 8.1.2.

10 **4.1.5.** In the event that Settling Defendant elects not to certify its compliance with
11 one or more of the optional provisions in Section 3.3 in accordance with that Section, within
12 ninety (90) days following the Effective Date, Settling Defendant must make an additional
13 payment for each provision not certified, as follows: (i) \$4,000 if Settling Defendant elects to not
14 participate in Section 3.3.1; (ii) \$3,500 if Settling Defendant elects to not participate in Section
15 3.3.2; and (iii) \$3,500 if Settling Defendant elects to not participate in Section 3.3.3. Each of
16 these payments shall be paid in two separate checks, each payable to the Center for
17 Environmental Health, to be allocated as follows:

18 **4.1.5.1.** Forty percent (40%) shall constitute a civil penalty pursuant to
19 California Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in
20 accordance with California Health & Safety Code § 25249.12 (25% to CEH and 75% to the State
21 of California’s Office of Environmental Health Hazard Assessment).

22 **4.1.5.2.** Sixty percent (60%) shall constitute a payment in lieu of civil
23 penalty pursuant to California Health & Safety Code § 25249.7(b) and California Code of
24 Regulations, Title 11, § 3203(b). CEH will use such funds to continue its work educating and
25 protecting people from exposures to toxic chemicals. CEH may also use a portion of such funds
26 to monitor compliance with this Amended Consent Judgment and to purchase and test Settling
27 Defendant’s Products to confirm compliance. In addition, as part of its Community
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1 Environmental Action and Justice Fund, CEH will use four percent (4%) of such funds to award
2 grants to grassroots environmental justice groups working to educate and protect the public from
3 exposures to toxic chemicals. The method of selection of such groups can be found at the CEH
4 website at www.keh.org/justicefund.

5 **5. ENFORCEMENT OF AMENDED CONSENT JUDGMENT**

6 **5.1.** CEH may, by motion or application for an order to show cause before the Superior
7 Court of Alameda County, enforce the terms and conditions contained in this Amended Consent
8 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3
9 above, CEH shall provide Settling Defendant with a Notice of Violation and a copy of any test
10 results which purportedly support CEH’s Notice of Violation. The Parties shall then meet and
11 confer regarding the basis for CEH’s anticipated motion or application in an attempt to resolve it
12 informally, including providing Settling Defendant a reasonable opportunity of at least thirty (30)
13 days to cure any alleged violation. Should such attempts at informal resolution fail, CEH may
14 file its enforcement motion or application. The prevailing party on any motion to enforce this
15 Amended Consent Judgment shall be entitled to its reasonable attorney’s fees and costs incurred
16 as a result of such motion or application. This Amended Consent Judgment may only be enforced
17 by the Parties.

18 **6. MODIFICATION OF AMENDED CONSENT JUDGMENT**

19 **6.1.** This Amended Consent Judgment may only be modified by written agreement of
20 CEH and Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

21 **7. CLAIMS COVERED AND RELEASE**

22 **7.1.** This Amended Consent Judgment is a full, final, and binding resolution between
23 CEH acting in the public interest and Settling Defendant and Settling Defendant’s parents,
24 officers, directors, shareholders, divisions, subdivisions, subsidiaries, and their respective
25 successors and assigns (“Defendant Releasees”) and all entities to whom they distribute or sell or
26 have distributed or sold Covered Products including, but not limited to, distributors, wholesalers,
27 customers, retailers, franchisees, cooperative members, and licensees (“Downstream Defendant
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1 Releasees”), of all claims alleged in the Complaint in this Action arising from any violation of
2 Proposition 65 that have been or could have been asserted in the public interest against Settling
3 Defendant and Downstream Defendant Releasees, regarding the failure to warn about exposure to
4 nicotine, formaldehyde and/or acetaldehyde in the Covered Products manufactured, distributed, or
5 sold by Settling Defendant prior to the Effective Date.

6 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged
7 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from
8 any violation of Proposition 65 that have been or could have been asserted regarding the failure to
9 warn about exposure to nicotine formaldehyde and/or acetaldehyde, or regarding the failure to
10 warn about any exposures that may give rise to any violation of Proposition 65 that CEH suspects
11 may exist as of November 23, 2015, in connection with Covered Products manufactured,
12 distributed, or sold by Settling Defendant prior to the Effective Date.

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

18 **8. PROVISION OF NOTICE**

19 **8.1.** When any Party is entitled to receive any notice under this Amended Consent
20 Judgment, the 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 Amended Consent Judgment shall be:

23 Chris Sullivan
24 Diamond McCarthy LLP
25 150 California Street, Suite 2200
26 San Francisco, California 94111
27 csullivan@diamondmcarthy.com

1 **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to
2 this Amended Consent Judgment shall be:

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

8 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
9 sending the other Parties notice by first class and electronic mail.

10 **9. COURT APPROVAL**

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

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

17 **10. GOVERNING LAW AND CONSTRUCTION**

18 **10.1.** The terms and obligations arising from this Amended Consent Judgment shall be
19 construed and enforced in accordance with the laws of the State of California.

20 **11. ENTIRE AGREEMENT**

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

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

1 **11.3.** No other agreements not specifically contained or referenced herein, oral or
2 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
3 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
4 any of the Parties hereto only to the extent that they are expressly incorporated herein.

5 **11.4.** No supplementation, modification, waiver, or termination of this Amended
6 Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby.

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

10 **12. RETENTION OF JURISDICTION**

11 **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the
12 Amended Consent Judgment.

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

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

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

19 **14.1.** Nothing in this Amended Consent Judgment shall preclude CEH from resolving
20 any claim against another entity on terms that are different from those contained in this Amended
21 Consent Judgment.

22 **15. EXECUTION IN COUNTERPARTS**

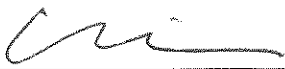
23 **15.1.** The stipulations to this Amended Consent Judgment may be executed in
24 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
25 document.

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IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

AVAIL VAPOR, LLC

Signature

Printed Name

Title

IT IS SO ORDERED:

Dated: _____, 2015

Judge of the Superior Court


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IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

AVAIL VAPOR, LLC



Signature

RUSS ROGERS 11/30/15

Printed Name

COO

Title

IT IS SO ORDERED:

Dated: _____, 2015 _____