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7 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED  
FILED  
ALAMEDA COUNTY

FEB 17 2016

CLERK OF THE SUPERIOR COURT  
By YOLANDA ESTRADA Deputy

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF ALAMEDA

13 CENTER FOR ENVIRONMENTAL HEALTH, )

14 Plaintiff, )

15 v. )

16 SPACE JAM JUICE LLC, et al., )

17 Defendants. )  
18 )  
19 )

Case No. RG 15-770932

~~PROPOSED~~ CONSENT  
JUDGMENT AS TO NATIONAL  
TOBACCO COMPANY, L.P.

21 **1. INTRODUCTION**

22 **1.1.** This Consent Judgment is entered into by Plaintiff Center for Environmental  
23 Health, a non-profit corporation (“CEH”), and National Tobacco Company, L.P. (“Settling  
24 Defendant”) to settle claims asserted by CEH against Settling Defendant as set forth in the  
25 operative Complaint in the matter *Center for Environmental Health v. Space Jam Juice LLC, et*  
26 *al.*, Alameda County Superior Court Case No. RG 15-770932 (the “Action”). CEH and Settling  
27 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.** 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 Settling Defendant is served  
9 with notice that the Court has entered this Consent Judgment.

10 **3. INJUNCTIVE RELIEF**

11 **3.1. Clear and Reasonable Warnings for Covered Products.** As of the Effective  
12 Date, no Covered Product may be manufactured for sale, distributed or sold in California unless  
13 such Covered Product has a clear and reasonable warning on the outer packaging of the product.  
14 The warning shall state one of the following:

15 **WARNING:** You should not use products that contain nicotine if you are  
16 pregnant or nursing; nicotine is known to cause birth defects or other  
17 reproductive harm.

18 Or

19 **WARNING:** Use of this product will expose you to nicotine, a chemical  
20 known to cause birth defects or other reproductive harm.

21 Or

22 **WARNING:** Using this product will expose the user to chemicals,  
23 including nicotine, known to the State of California to cause cancer and  
24 birth defects or other reproductive harm.

25 The warning shall not be preceded by, surrounded by, or include any additional words or phrases  
26 that contradict, obfuscate, or otherwise undermine the warning. The warning statement shall be  
27 prominently displayed on the outer packaging of the Covered Product with such conspicuousness,

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

11 **3.1.1. Warnings for Covered Products in the Stream of Commerce.** In an  
12 effort to ensure that consumers receive clear and reasonable warnings in compliance with  
13 Proposition 65 for Covered Products that have not been labeled in accordance with Section 3.2,  
14 within thirty (30) days following the Effective Date, Settling Defendant shall provide warning  
15 materials by certified mail to each of its California retailers or distributors that Settling Defendant  
16 reasonably believes are selling or offering Covered Products for sale without a clear and  
17 reasonable warning as of to the Effective Date. Such warning materials shall include shelf  
18 sign(s), point of sale display(s), or a reasonably sufficient number of stickers in order to permit  
19 the retailer or distributor to affix the warning on each Covered Product such customer has  
20 purchased from Settling Defendant. The warning materials shall contain the warning language  
21 set forth in Section 3.2 above. The warning materials shall also include a letter of instruction for  
22 the placement of the materials, and a notice and acknowledgment postcard.

23 **3.2. Optional Additional Injunctive Provisions.** In order for Settling Defendant to be  
24 eligible for a waiver of the additional penalty/payment in lieu of penalty payments set forth in  
25 Section 4.1.5 below, Settling Defendant shall undertake one or more of the additional actions  
26 below. A Settling Defendant opting to be bound by this Section must provide CEH with a written  
27 election stating which optional provision(s) it is agreeing to implement.

1                   **3.2.1. Prohibition on Sales and Advertising to Minors.** A Settling Defendant  
2 opting to participate in Section 3.2 shall not sell Covered Products to persons younger than  
3 eighteen (18) years of age and shall take reasonable steps to prevent the sale of Covered Products  
4 to such persons, including, but not limited to the following measures:

5                   **3.2.1.1.** Settling Defendant shall implement one or more systems for  
6 checking the age of persons who purchase Covered Products on the Internet or in person. The  
7 system shall include age verification by requiring and checking an official government  
8 identification card or verifying through a reputable credit agency the age of anyone who  
9 purchases Covered Products on the Internet, or of anyone under twenty-six (26) years old who  
10 purchases in person. The system shall be put into place within ninety (90) days of the Effective  
11 Date.

12                   **3.2.1.2.** Settling Defendant shall not use advertisements that target  
13 minors. Specifically, Settling Defendant will not use models or images of people that appear to  
14 be younger than twenty-eight (28) years of age, cartoons, art, fashion, or music that is intended  
15 and designed to appeal to people under the legal smoking age in advertisements or promotional  
16 materials that appear in California, including on the Internet. Additionally, Settling Defendant  
17 will not: (a) advertise in any media that has more than 25% under 18 readership; (b) utilize any  
18 form of outdoor advertising within 1,000 feet of any school or playground; (c) advertise using  
19 Instagram; and (d) sponsor any athletic, musical or other cultural events unless such events are  
20 designated as prohibiting patrons under the age of 18.

21                   **3.2.2. Prohibition on Health and Safety Claims.** A Settling Defendant opting  
22 to participate in Section 3.2 shall not make health and or safety claims unless such claims have  
23 been reviewed and approved by the Federal Food and Drug Administration. Examples of  
24 prohibited claims include the following:

25                   **3.2.2.1.** Settling Defendant shall not advertise Covered Products as  
26 smoking-cessation devices. This prohibition includes any claims or testimonials about quitting  
27 smoking, using e-cigarettes as a treatment for tobacco dependence or addiction.

1                                   **3.2.2.2.**           Settling Defendant shall not make any claim that the  
2 Covered Products do not contain carcinogens or are better or safer than tobacco.

3                                   **3.2.2.3.**           Settling Defendant shall not make any claim that the  
4 Covered Products produce no second hand smoke.

5 **4.       PAYMENTS**

6           **4.1.**       Settling Defendant shall initially pay to CEH the total sum of \$65,000, which shall  
7 be allocated as follows:

8                           **4.1.1.**   \$2,600 as a civil penalty pursuant to California Health & Safety Code §  
9 25249.7(b), such money to be apportioned by CEH in accordance with California Health &  
10 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of  
11 Environmental Health Hazard Assessment).

12                           **4.1.2.**   \$3,900 as a payment in lieu of civil penalty pursuant to California Health &  
13 Safety Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use  
14 such funds to continue its work educating and protecting people from exposures to toxic  
15 chemicals. CEH may also use a portion of such funds to monitor compliance with this Consent  
16 Judgment and to purchase and test Settling Defendant's Products to confirm compliance. In  
17 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four  
18 percent (4%) of such funds to award grants to grassroots environmental justice groups working to  
19 educate and protect the public from exposures to toxic chemicals. The method of selection of  
20 such groups can be found at the CEH website at [www.ceh.org/justicefund](http://www.ceh.org/justicefund).

21                           **4.1.3.**   \$58,500 as a reimbursement of a portion of CEH's reasonable attorneys'  
22 fees and costs. This amount shall be divided into two checks: (1) a check for \$52,000 shall be  
23 made payable to the Lexington Law Group; and (2) a check for \$6,500 shall be made payable to  
24 the Center for Environmental Health.

25                           **4.1.4.**   The payments required under Sections 4.1.1-4.1.3 shall be made in four (4)  
26 separate checks, all to be delivered within ten (10) days following the Effective Date. The  
27 payments required pursuant to Sections 4.1.1 and 4.1.2 shall each be made payable to the Center  
28

1 for Environmental Health. All checks shall be delivered to Mark Todzo at Lexington Law Group  
2 at the address set forth in Section 8.1.2.

3 **4.1.5.** In the event that Settling Defendant elects to not certify its compliance with  
4 one or more of the optional provisions in Section 3.2 in accordance with that Section, within  
5 ninety (90) days following the Effective Date, Defendant must make an additional payment for  
6 each provision not certified, as follows: (i) \$15,000 if Settling Defendant elects to not participate  
7 in Section 3.2.1; and (ii) \$15,000 if Settling Defendant elects to not participate in Section 3.2.2.  
8 Each of these payments shall be paid in two (2) separate checks, each payable to the Center for  
9 Environmental Health, to be allocated as follows:

10 **4.1.5.1.** Forty percent (40%) of the total payment specified in Section  
11 4.1.5 shall constitute a penalty pursuant to California Health & Safety Code § 25249.7(b), such  
12 money to be apportioned by CEH in accordance with California Health & Safety Code §  
13 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental Health  
14 Hazard Assessment).

15 **4.1.5.2.** Sixty percent (60%) of the total payment specified in Section  
16 4.1.5 shall constitute a payment in lieu of civil penalty pursuant to California Health & Safety  
17 Code § 25249.7(b) and California Code of Regulations, Title 11, § 3203(b). CEH will use such  
18 funds to continue its work educating and protecting people from exposures to toxic chemicals.  
19 CEH may also use a portion of such funds to monitor compliance with this Consent Judgment and  
20 to purchase and test Settling Defendant's Products to confirm compliance. In addition, as part of  
21 its Community Environmental Action and Justice Fund, CEH will use four percent (4%) of such  
22 funds to award grants to grassroots environmental justice groups working to educate and protect  
23 the public from exposures to toxic chemicals. The method of selection of such groups can be  
24 found at the CEH website at [www.ceh.org/justicefund](http://www.ceh.org/justicefund).

## 25 **5. ENFORCEMENT OF CONSENT JUDGMENT**

26 **5.1.** CEH may, by motion or application for an order to show cause before the Superior  
27 Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment.

1 Prior to bringing any motion or application to enforce the requirements of Section 3 above, CEH  
2 shall provide Settling Defendant with a Notice of Violation and a copy of any test results which  
3 purportedly support CEH's Notice of Violation. The Parties shall then meet and confer regarding  
4 the basis for CEH's anticipated motion or application in an attempt to resolve it informally,  
5 including providing Settling Defendant a reasonable opportunity of at least thirty (30) days to  
6 cure any alleged violation. Should such attempts at informal resolution fail, CEH may file its  
7 enforcement motion or application. The prevailing party on any motion to enforce this  
8 Consent Judgment shall be entitled to its reasonable attorney's fees and costs incurred as a result  
9 of such motion or application. This Consent Judgment may only be enforced by the Parties.

10 **6. MODIFICATION OF CONSENT JUDGMENT**

11 **6.1.** This Consent Judgment may only be modified by written agreement of CEH and  
12 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

13 **7. CLAIMS COVERED AND RELEASE**

14 **7.1.** This Consent Judgment is a full, final, and binding resolution between CEH acting  
15 in the public interest and Settling Defendant and Settling Defendant's parents, officers, directors,  
16 shareholders, divisions, subdivisions, subsidiaries, and their respective successors and assigns  
17 ("Defendant Releasees") and all entities to whom they distribute or sell or have distributed or sold  
18 Covered Products including, but not limited to, Robinson Oil Corporation dba Rotten Robbie, and  
19 its other distributors, wholesalers, customers, retailers, franchisees, cooperative members, and  
20 licensees ("Downstream Defendant Releasees"), of all claims alleged in the Complaint in this  
21 Action arising from any violation of Proposition 65 that have been or could have been asserted in  
22 the public interest against Settling Defendant and Downstream Defendant Releasees, regarding  
23 the failure to warn about exposure to nicotine in the Covered Products manufactured, distributed,  
24 or sold by Settling Defendant prior to the Effective Date.

25 **7.2.** CEH, for itself, releases, waives, and forever discharges any and all claims alleged  
26 in the Complaint against Settling Defendant and Downstream Defendant Releasees arising from  
27 any violation of Proposition 65 that have been or could have been asserted regarding the failure to



1 warn about exposure to nicotine in connection with Covered Products manufactured, distributed,  
2 or sold by Settling Defendant prior to the Effective Date.

3           **7.3.** Compliance with the terms of this Consent Judgment by Settling Defendant and  
4 the Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling  
5 Defendant and Downstream Defendant Releasees with respect to any alleged failure to warn  
6 about nicotine in Covered Products manufactured, distributed, or sold by Settling Defendant after  
7 the Effective Date.

8           **8. PROVISION OF NOTICE**

9           **8.1.** When any Party is entitled to receive any notice under this Consent Judgment, the  
10 notice shall be sent by first class and electronic mail as follows:

11                   **8.1.1. Notices to Settling Defendant.** The persons for Settling Defendant to  
12 receive notices pursuant to this Consent Judgment shall be:

13                                   Judith M. Praitis  
14                                   Sidley Austin LLP  
15                                   555 West 5th Street  
16                                   Los Angeles, CA 90013  
                                      jpraitis@sidley.com

17                   **8.1.2. Notices to Plaintiff.** The persons for CEH to receive notices pursuant to  
18 this Consent Judgment shall be:

19                                   Mark Todzo  
20                                   Lexington Law Group  
21                                   503 Divisadero Street  
                                      San Francisco, CA 94117  
                                      mtodzo@lexlawgroup.com

22           **8.2.** Any Party may modify the person and address to whom the notice is to be sent by  
23 sending the other Parties notice by first class and electronic mail.

24           **9. COURT APPROVAL**

25           **9.1.** This Consent Judgment shall become effective on the Effective Date, provided  
26 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and  
27 Settling Defendant shall support approval of such Motion.

1           **9.2.** If this Consent Judgment is not entered by the Court within 180 days of the date on  
2 which it is signed by all parties, it shall be of no force or effect and shall not be introduced into  
3 evidence or otherwise used in any proceeding for any purpose. However, the 180 day period may  
4 be extended by written agreement of the Parties without modification of this Consent Judgment.

5           **10. GOVERNING LAW AND CONSTRUCTION**

6           **10.1.** The terms and obligations arising from this Consent Judgment shall be construed  
7 and enforced in accordance with the laws of the State of California.

8           **11. ENTIRE AGREEMENT**

9           **11.1.** This Consent Judgment contains the sole and entire agreement and understanding  
10 of CEH and Settling Defendant with respect to the entire subject matter hereof, and any and all  
11 prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby  
12 merged herein and therein.

13           **11.2.** There are no warranties, representations, or other agreements between CEH and  
14 Settling Defendant except as expressly set forth herein. No representations, oral or otherwise,  
15 express or implied, other than those specifically referred to in this Consent Judgment have been  
16 made by any Party hereto.

17           **11.3.** No other agreements not specifically contained or referenced herein, oral or  
18 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements  
19 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind  
20 any of the Parties hereto only to the extent that they are expressly incorporated herein.

21           **11.4.** No supplementation, modification, waiver, or termination of this Consent  
22 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

23           **11.5.** No waiver of any of the provisions of this Consent Judgment shall be deemed or  
24 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall  
25 such waiver constitute a continuing waiver.

26  
27  
28

1     **12.     RETENTION OF JURISDICTION**

2             **12.1.** This Court shall retain jurisdiction of this matter to implement or modify the  
3 Consent Judgment.

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

5             **13.1.** Each signatory to this Consent Judgment certifies that he or she is fully authorized  
6 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and  
7 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

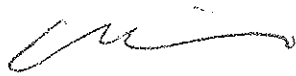
9             **14.1.** Nothing in this Consent Judgment shall preclude CEH from resolving any claim  
10 against another entity on terms that are different from those contained in this Consent Judgment.

11     **15.     EXECUTION IN COUNTERPARTS**

12             **15.1.** The stipulations to this Consent Judgment may be executed in counterparts and by  
13 means of facsimile, which taken together shall be deemed to constitute one document.

14  
15     **IT IS SO STIPULATED:**

16     **CENTER FOR ENVIRONMENTAL HEALTH**

17  
18     

19     \_\_\_\_\_  
20 Charlie Pizarro  
21 Associate Director

22  
23  
24  
25  
26  
27  
28

1 NATIONAL TOBACCO COMPANY, L.P.

2 Brittani Cushman  
3 Signature

4  
5 Brittani Cushman  
6 Printed Name

7 VP - External Affairs  
8 Title

9  
10 **IT IS SO ORDERED:**

11  
12 Dated: FEB 17 2016, ~~2015~~

13 GEORGE C. HERNANDEZ, JR.  
14 Judge of the Superior Court