

1 LEXINGTON LAW GROUP
2 Mark N. Todzo, State Bar No. 168389
3 Abigail Blodgett, State Bar No. 278813
4 503 Divisadero Street
5 San Francisco, CA 94117
6 Telephone: (415) 913-7800
7 Facsimile: (415) 759-4112
8 mtodzo@lexlawgroup.com
9 ablodgett@lexlawgroup.com

10 Attorneys for Plaintiff
11 CENTER FOR ENVIRONMENTAL HEALTH

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13 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF ALAMEDA
15

16 CENTER FOR ENVIRONMENTAL HEALTH,) Case No. RG 15-770932
17)
18 Plaintiff,)
19)
20 v.) **[PROPOSED] CONSENT**
21) **JUDGMENT AS TO NATIONAL**
22) **TOBACCO COMPANY, L.P.**
23)
24 SPACE JAM JUICE LLC, et al.,)
25)
26)
27 Defendants.)
28)

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30
31 **1. INTRODUCTION**

32 **1.1.** This Consent Judgment is entered into by Plaintiff Center for Environmental
33 Health, a non-profit corporation (“CEH”), and National Tobacco Company, L.P. (“Settling
34 Defendant”) to settle claims asserted by CEH against Settling Defendant as set forth in the
35 operative Complaint in the matter *Center for Environmental Health v. Space Jam Juice LLC, et*
36 *al.*, Alameda County Superior Court Case No. RG 15-770932 (the “Action”). CEH and Settling
37 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
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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.** 2.4. “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 **3.2.2.2.** 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.

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
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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.

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
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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
17 jpraitis@sidley.com

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

20 Mark Todzo
21 Lexington Law Group
22 503 Divisadero Street
23 San Francisco, CA 94117
24 mtodzo@lexlawgroup.com

25 **8.2.** Any Party may modify the person and address to whom the notice is to be sent by
26 sending the other Parties notice by first class and electronic mail.

27 **9. COURT APPROVAL**

28 **9.1.** This Consent Judgment shall become effective on the Effective Date, provided
however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
Settling Defendant shall support approval of such Motion.

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.

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15 **IT IS SO STIPULATED:**

16 **CENTER FOR ENVIRONMENTAL HEALTH**

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19 _____
Charlie Pizarro
Associate Director

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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:**

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13 Dated: _____, 2015

Judge of the Superior Court