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CASE MANAGEMENT CONFERENCE SET

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6 Attorney for Plaintiff
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DEPARTMENT 212

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 FOR THE CITY AND COUNTY OF SAN FRANCISCO

11 UNLIMITED JURISDICTION

13 WHITNEY R. LEEMAN, Ph.D.,

14 Plaintiff,

15 v.

17 DR. PEPPER BOTTLING COMPANY OF
18 WEST JEFFERSON, NORTH CAROLINA,
19 INCORPORATED, and DOES 1 through
20 150 inclusive,

Defendants.

Case No.: CGC -06 -452796

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

Health & Safety Code §25249.6 *et seq.*

1 WHITNEY R. LEEMAN, Ph.D., by and through her counsel, on behalf of herself, on behalf
2 all others similarly situated and on behalf of the general public, hereby alleges as follows:

3 **NATURE OF THE ACTION**

4 1. This Complaint is a representative action brought by plaintiff, WHITNEY R.
5 LEEMAN, Ph.D., on behalf of citizens of the State of California, to enforce the People's right to be
6 informed of the presence lead in, and/or on, certain glass-bottled sodas.

7 2. By this complaint, plaintiff seeks to remedy defendants' continuing failure to warn
8 California citizens about their exposure to lead contained in, and/or on, certain glass-bottled sodas
9 placed into the stream of commerce by defendants.

10 3. Lead is listed pursuant to 22 CCR §12000 as a chemical known to cause birth defects
11 and other reproductive harm. Lead shall hereafter be referred to as the "LISTED CHEMICAL."

12 4. The products containing the LISTED CHEMICAL, and for which defendants are
13 responsible, are glass-bottled sodas with: (1) colored artwork or designs (containing lead) on their
14 exterior; (2) lead contained in the soda itself; and/or (3) metal (containing lead) crown caps used to
15 seal the glass soda bottles. These products include, but are not limited to, Mountain Dew Glass
16 Bottle (Model # 0 124450 2) and Original Nehi Peach Glass Bottle (Model # 0 29500 26252 7). All
17 such glass-bottled soda products shall hereafter be referred to as the "PRODUCTS."

18 5. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986, Health
19 & Safety Code §25249.6 *et seq.*¹ (hereafter "Proposition 65"), "No person in the course of doing
20 business shall knowingly and intentionally expose any individual to a chemical known to the state to
21 cause cancer or reproductive toxicity without first giving clear and reasonable warning to such
22 individual...."

23 6. Since February 27, 1987, the State of California has listed lead as a chemical known
24 to cause birth defects and other reproductive harm. Lead became subject to warning requirements
25 one year later and was therefore subject to the "clear and reasonable warning" requirements of
26 Proposition 65 beginning on February 27, 1988. (22 CCR §12000; Health and Safety Code
27 §25249.6 *et seq.*)

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^{1/} Unless specifically noted, all statutory citations refer to California law.

1 7. Defendants' failure to provide proper health hazard warnings about exposure to the
2 LISTED CHEMICAL in conjunction with the sale of the PRODUCTS is a violation of Proposition
3 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for such
4 violations.

5 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary and
6 permanent injunctive relief to compel defendants to provide California citizens with an appropriate
7 Proposition 65 warning regarding the health hazards of the LISTED CHEMICAL.

8 9. Plaintiff also seeks civil penalties against defendants for their violations of
9 Proposition 65, as provided for by Health & Safety Code §25249.7(b).

10 PARTIES

11 10. Plaintiff WHITNEY R. LEEMAN, Ph.D. ("LEEMAN") is a citizen of the State of
12 California who is dedicated to protecting the health of California citizens, including the elimination
13 or reduction of toxic exposures, and who brings this action in the public interest pursuant to Health
14 & Safety Code §25249.7.

15 11. Defendant DR. PEPPER BOTTLING COMPANY OF WEST JEFFERSON,
16 NORTH CAROLINA, INCORPORATED ("WEST JEFFERSON"), is a person doing business
17 within the meaning of Health & Safety Code §25249.11.

18 12. WEST JEFFERSON manufactures, distributes, ships, targets, directs and/or offers
19 the PRODUCTS for sale, use or consumption in the State of California, or implies by its conduct
20 that it manufactures, distributes, ships, targets, directs and/or offers the PRODUCTS for sale, use or
21 consumption in State of California, at retail locations in numerous cities throughout the State of
22 California including Berkeley, Colma, Dublin, Fremont, Newport Beach, Pismo Beach, Redwood
23 City, Sacramento, San Francisco, San Jose, San Luis Obispo, Sunnyvale, Valencia and Walnut
24 Creek.

25 13. DOES 1-50 (hereafter "MANUFACTURER DEFENDANTS") are each persons
26 doing business within the meaning of Health & Safety Code §25249.11.

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1 14. MANUFACTURER DEFENDANTS engage in the process of research, testing,
2 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they engage
3 in the process of research, testing, designing, assembling, fabricating and/or manufacturing, one or
4 more of the PRODUCTS available for consumption or use in the State of California.

5 15. DOES 51-100 (hereafter "DISTRIBUTOR DEFENDANTS") are each persons doing
6 business within the meaning of Health & Safety Code §25249.11.

7 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
8 transport one or more of the PRODUCTS to individuals, businesses or retailers in the State of
9 California.

10 17. DOES 101-150 (hereafter "RETAIL DEFENDANTS") are each persons doing
11 business within the meaning of Health & Safety Code §25249.11.

12 18. RETAIL DEFENDANTS offer one or more of the PRODUCTS for sale to
13 individuals in the State of California.

14 19. At this time, the true names of DOES 1 through 150, inclusive are unknown to
15 LEEMAN, who therefore sues said defendants by their fictitious name pursuant to Code of Civil
16 Procedure §474. LEEMAN is informed and believes, and on that basis alleges, that each of the
17 fictitiously named defendants is responsible for the acts and occurrences herein alleged. When
18 ascertained, their true names shall be reflected in an amended complaint.

19 20. WEST JEFFERSON, MANUFACTURER DEFENDANTS, DISTRIBUTOR
20 DEFENDANTS and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to
21 hereafter as "DEFENDANTS."

22 **VENUE AND JURISDICTION**

23 21. Venue is proper in the San Francisco Superior Court, pursuant to Code of Civil
24 Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because one or
25 more instances of unlawful sale occurred, and continues to occur, in the City and County of San
26 Francisco, including at Bryan's Grocery, and/or because DEFENDANTS conducted, and continue
27 to conduct, business in this County.

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1 22. The California Superior Court has jurisdiction over this action pursuant to California
2 Constitution Article VI, Section 10, which grants the Superior Court “original jurisdiction in all
3 causes except those given by statute to other trial courts.” The statute under which this action is
4 brought does not specify any other basis of jurisdiction.

5 23. The California Superior Court has jurisdiction over DEFENDANTS based on
6 LEEMAN’S information and good faith belief that each defendant is a person, firm, corporation or
7 association that either is a citizen of the State of California, has sufficient minimum contacts in the
8 State of California, or otherwise purposefully avails itself of the California market, in that each
9 defendant manufactures, distributes, ships, targets, directs and/or offers the PRODUCTS for sale,
10 use or consumption in the State of California, or implies by its conduct that it manufactures,
11 distributes, ships, targets, directs and/or offers the PRODUCTS for sale, use or consumption in State
12 of California, at retail locations in numerous cities throughout the State of California including
13 Berkeley, Colma, Dublin, Fremont, Newport Beach, Pismo Beach, Redwood City, Sacramento, San
14 Francisco, San Jose, San Luis Obispo, Sunnyvale, Valencia and Walnut Creek. DEFENDANTS’
15 purposeful availment renders the exercise of jurisdiction by California courts consistent with
16 traditional notions of fair play and substantial justice.

17 **FIRST CAUSE OF ACTION**

18 **(Violation of Proposition 65)**

19 24. LEEMAN realleges and incorporates by reference, as if specifically set forth herein,
20 Paragraphs 1 through 23, inclusive.

21 25. The citizens of the State of California have expressly stated in the Safe Drinking
22 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.6, *et seq.* (“Proposition
23 65”) that they must be informed “about exposures to chemicals that cause cancer, birth defects and
24 other reproductive harm.” (Health & Safety Code §25249.6.)

25 26. Proposition 65 further states that, “No person in the course of doing business shall
26 knowingly and intentionally expose any individual to a chemical known to the state to cause cancer
27 or reproductive toxicity without first giving clear and reasonable warning to such individual...”
28 (Health & Safety Code §25249.6.)

1 27. Based on information and good faith belief, LEEMAN alleges that, at all times
2 relevant to this Complaint, DEFENDANTS have engaged in the sale of these PRODUCTS in
3 violation Health & Safety Code §25249.6, *et seq.*, and that DEFENDANTS' sales of these
4 PRODUCTS continues to occur after DEFENDANTS' receipt of LEEMAN'S 60-Day Notice of
5 Violation. LEEMAN also alleges and believes that such violations will continue to occur in the
6 future.

7 28. On March 17, 2006, a "60-Day Notice" of Proposition 65 violation, containing a
8 Certificate of Merit pursuant to California Health & Safety Code §25249.7(d)(1), was provided on
9 behalf of LEEMAN to public enforcement agencies and to DEFENDANTS, stating that exposures
10 to the LISTED CHEMICAL were occurring in the State of California from the reasonably
11 foreseeable use and consumption of the PRODUCTS, without the individual consumers first having
12 been provided with a "clear and reasonable warning" regarding such exposure.

13 29. The appropriate public enforcement agencies have failed to commence and diligently
14 prosecute a cause of action, under Health & Safety Code §25249.6, *et seq.*, against DEFENDANTS
15 based on the claims asserted in Plaintiff's 60-Day Notice.

16 30. At all times relevant to this action, the PRODUCTS contained the LISTED
17 CHEMICAL.

18 31. At all times relevant to this action, DEFENDANTS knew or should have known that
19 the PRODUCTS contained the LISTED CHEMICAL.

20 32. At all times relevant to this action, the LISTED CHEMICAL was present in or on the
21 PRODUCTS in such a way as to be available for transfer or release from PRODUCTS to
22 individuals through dermal contact and/or ingestion during the reasonably foreseeable use and
23 consumption of PRODUCTS causing exposures to the LISTED CHEMICAL.

24 33. The normal and reasonably foreseeable use and consumption of the PRODUCTS has
25 caused and continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined
26 by 22 CCR §12601.

27 34. Based on information and good faith belief, LEEMAN alleges that at all times
28 relevant to this action, DEFENDANTS had knowledge that the individuals' normal and reasonably

1 foreseeable use and consumption of the PRODUCTS would cause such an exposure to the LISTED
2 CHEMICAL.

3 35. At all times relevant to this action, DEFENDANTS intended that such exposures to
4 the LISTED CHEMICAL from the reasonably foreseeable use and consumption of the PRODUCTS
5 would occur by their deliberate, non-accidental participation in the manufacture, distribution and/or
6 sale of PRODUCTS to individuals.

7 36. At all times relevant to this action, DEFENDANTS failed to provide a “clear and
8 reasonable warning” of reproductive toxicity to those consumers or other individuals in the State of
9 California who were or could become exposed to the LISTED CHEMICAL contained in the
10 PRODUCTS.

11 37. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
12 directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the
13 PRODUCTS, without “clear and reasonable warning” have suffered and continue to suffer
14 irreparable harm, for which they have no plain, speedy or adequate remedy at law.

15 38. As a consequence of the above-described acts, DEFENDANTS are liable, pursuant
16 to Health & Safety Code §25249.7(b), for a maximum civil penalty of \$2,500 per day for each
17 violation.

18 39. As a consequence of the above-described acts, Health & Safety Code §25249.7 also
19 specifically authorizes the grant of injunctive relief under Proposition 65.

20 Wherefore, LEEMAN prays for judgment against DEFENDANTS as set forth
21 hereafter.

22 **PRAYER FOR RELIEF**

23 Wherefore, LEEMAN prays for judgment against DEFENDANTS as follows:

24 1. That the Court, pursuant to Health & Safety Code §25249.7(b), assess civil penalties
25 against DEFENDANTS in the amount of \$2,500 per day for each violation alleged herein;

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1 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
2 permanently enjoin DEFENDANTS from offering the PRODUCTS for sale, use or consumption in
3 California, without providing a “clear and reasonable warning,” as specified in further application to
4 the Court;

5 3. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
6 permanently enjoin DEFENDANTS from the continued sale, use or consumption in California of
7 those PRODUCTS that were offered for sale, use or consumption in California in the past without
8 providing an identification of the LISTED CHEMICAL in the PRODUCTS as well as “clear and
9 reasonable warning[s]” as defined by 22 CCR §12601 as specified in further application to the
10 Court by ordering DEFENDANTS to correct those sales of PRODUCTS that have already occurred
11 and remain available for sale in California;

12 4. That the Court grant LEEMAN her reasonable fees and costs incurred in this
13 enforcement action; and

14 5. That the Court grant such other and further relief as may be just and proper.

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16 Dated: June 1, 2006

HIRST & CHANLER LLP

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19 By: 

D. Joshua Voorhees

20 Attorneys for Plaintiff
21 Whitney R. Leeman, Ph.D.
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