

ENDORSED
FILED
San Francisco County Superior Court

MAY 01 2007

GORDON PARK-LI, Clerk
JUN P. PANELO
Deputy Clerk

1 David S. Lavine, State Bar No. 166744
Keith G. Adams, State Bar No. 240497
2 HIRST & CHANLER LLP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

CASE MANAGEMENT CONFERENCE SET BY:

SEP 28 2007 -9⁰⁰AM

6 Attorneys for Plaintiff
WHITNEY R. LEEMAN, Ph.D.

DEPARTMENT 212

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF SAN FRANCISCO
11 UNLIMITED CIVIL JURISDICTION

13 WHITNEY R. LEEMAN, Ph.D.
14 Plaintiff,
15 v.
16 THE CHEESECAKE FACTORY INC., and
17 DOES 1 through 150, inclusive,
18 Defendants.

Case No. **CGC-07-462957**
**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**
(Cal. Health & Safety Code §25249.6 et seq.)

NATURE OF THE ACTION

1
2 1. This Complaint is a representative action brought by plaintiff WHITNEY R.
3 LEEMAN, Ph.D. in the public interest of the citizens of the State of California, to enforce the
4 People’s right to be informed of the presence of numerous carcinogenic chemicals known as
5 polycyclic aromatic hydrocarbons found in certain flame-broiled hamburgers sold by defendants in
6 California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to warn
8 California citizens about their exposure to various cancer-causing chemicals present in and/or on
9 certain flame-broiled hamburgers that defendant sells to consumers throughout the state of
10 California. These chemicals include: benz[a]anthracene, benzo[a]pyrene, benzo[k]fluoranthene and
11 indeno[1,2,3-cd]pyrene (commonly known as and hereinafter collectively referred to as “PAHs”).

12 3. PAHs are products of incomplete combustion and are normally found in smoke and
13 soot such as auto or diesel exhaust. High levels of PAHs are commonly found in smoke, including
14 smoke produced when a hamburger is flame-broiled.

15 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
16 California Health & Safety Code §25249.6 *et seq.* (hereinafter “Proposition 65”), “No person in the
17 course of doing business shall knowingly and intentionally expose any individual to a chemical
18 known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable
19 warning to such individual....” (*Cal. Health & Safety Code §25249.6.*)

20 5. Each of the PAHs is a chemical known to the State of California to cause cancer and
21 is listed as such pursuant to California Health & Safety Code §25249.8(a).

22 6. Defendants sell flame-broiled hamburgers, including the “Tons of Fun Burger,”
23 which contain excessive levels of PAHs. The “Tons of Fun Burger,” and all other flame-cooked
24 ground beef products, shall hereinafter be referred to as the “Flame Cooked Ground Beef Products.”

25 7. The PAHs in and/or on the Flame Cooked Ground Beef Products sold by defendant
26 primarily result from the burgers’ exposure to smoke contaminated with PAHs – specifically, when
27 fat drips onto a hot flame-broiler, smoke contaminated with PAHs surges upward to the burgers.
28 PAHs may also be produced when flames come into direct contact with the fat on the surface of the

1 Flame Cooked Ground Beef Products. Either way, PAHs are deposited onto the surfaces of the
2 Flame Cooked Ground Beef Products and remain there through consumption by consumers.

3 8. There are methods available by which ground beef can be flame-broiled without
4 being exposed to excessive amounts of smoke contaminated with carcinogenic PAHs, including
5 methods designed to minimize the amount of fat reaching the flame and the amount of smoke
6 reaching the burgers.

7 9. Defendants' failure to warn consumers about their exposure to PAHs in conjunction
8 with defendant's sale of the Flame Cooked Ground Beef Products is a violation of Proposition 65
9 and subjects defendant to enjoinder of such conduct as well as civil penalties for each such
10 violation.

11 10. For defendants' violations of Proposition 65, plaintiff seeks preliminary and
12 permanent injunctive relief to compel defendant to provide purchasers or users of the Flame Cooked
13 Ground Beef Products with the required warning regarding the health hazards of PAHs or to reduce
14 the level of generated PAHs to a level deemed safe by the State of California. (*Cal. Health & Safety*
15 *Code §25249.7(a).*)

16 11. Plaintiff also seeks civil penalties against defendant for its violations of Proposition
17 65, as provided for by California Health & Safety Code §25249.7(b).

18 **PARTIES**

19 12. Plaintiff WHITNEY R. LEEMAN, Ph.D. ("PLAINTIFF") is a citizen of the State of
20 California currently residing in Sacramento County who is dedicated to protecting the health of
21 California citizens through the elimination or reduction of toxic exposures from certain food
22 products, and brings this action in the public interest pursuant to California Health & Safety Code
23 §25249.7.

24 13. Defendant THE CHEESECAKE FACTORY, INC. ("CHEESECAKE") either
25 directly or through its subsidiaries, franchisees, and/or licensees, operates approximately 28 "The
26 Cheesecake Factory" restaurants located throughout California, including a restaurant in the City
27 and County of San Francisco, and is a person in the course of doing business within the meaning of
28 California Health & Safety Code §25249.11.

1 14. CHEESECAKE, either directly or through its subsidiaries, franchisees, and/or
2 licensees manufactures, distributes and/or offer Flame Cooked Ground Beef Products for sale or use
3 in the State of California or implies by its conduct that it manufactures, distributes and/or offers the
4 Flame Cooked Ground Beef Products for sale or use in the State of California.

5 15. Defendants DOES 1 through 150 are persons within the course of doing business
6 within the meaning of California Health & Safety Code §25249.11, and either directly or through
7 their subsidiaries, franchisees, and/or licensees manufactures, distributes and/or offers Flame
8 Cooked Ground Beef Products for sale or use in the State of California without offering a “clear and
9 reasonable warning.” At this time, the true names of Defendants DOES 1 through 150, inclusive,
10 are unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to
11 Code of Civil Procedure §474. Plaintiff is informed and believes, and on that basis alleges, that
12 each of the fictitiously named defendants is responsible for the acts and occurrences herein alleged.
13 When ascertained, their true names shall be reflected in an amended complaint.

14 **VENUE AND JURISDICTION**

15 16. Venue is proper in the San Francisco Superior Court, pursuant to Code of Civil
16 Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because one or
17 more instances of wrongful conduct occurred, and continues to occur, in the City and County of San
18 Francisco and/or because CHEESECAKE conducted, and continues to conduct, business in the City
19 and County of San Francisco with respect to the Flame Cooked Ground Beef Products.

20 17. The California Superior Court has jurisdiction over this action pursuant to California
21 Constitution Article VI, §10, which grants the Superior Court “original jurisdiction in all causes
22 except those given by statute to other trial courts.” The statute under which this action is brought
23 does not specify any other basis of subject matter jurisdiction.

24 18. The California Superior Court has jurisdiction over CHEESECAKE based on
25 plaintiff’s information and good faith belief that CHEESECAKE is a person, firm, corporation or
26 association that either is a citizen of the State of California, has sufficient minimum contacts in the
27 State of California, or otherwise purposefully avails itself of the California market.
28

1 CHEESECAKE’S purposeful availment renders the exercise of personal jurisdiction by California
2 courts consistent with traditional notions of fair play and substantial justice.

3
4 **FIRST CAUSE OF ACTION**
(Violation of Proposition 65)

5 19. Plaintiff realleges and incorporates by reference, as is fully set forth herein,
6 paragraphs 1 through 18, inclusive.

7 20. The citizens of the State of California have expressly stated in Proposition 65 that
8 they must be informed about their exposure to chemicals that cause cancer, birth defects and other
9 reproductive harm. (*Cal. Health & Safety Code §25249.6.*)

10 21. Proposition 65 states, “No person in the course of doing business shall knowingly
11 and intentionally expose any individual to a chemical known to the state to cause cancer or
12 reproductive toxicity without first giving clear and reasonable warning to such individual....” (*Id.*)

13 22. On July 1, 1987, the State of California listed benz[a]anthracene, benzo[a]pyrene,
14 and benzo[k]fluoranthene as chemicals known to the state to cause cancer.

15 23. On January 1, 1988, the State of California listed indeno[1,2,3-cd]pyrene as a
16 chemical known to the state to cause cancer.

17 24. The PAHs became subject to the Proposition 65 warning requirement one year after
18 being listed as chemicals known to the State of California to cause cancer. (*Cal. Health & Safety*
19 *Code §25249.10(b).*)

20 25. On February 14, 2007, a 60-Day Notice of Violation, together with the requisite
21 certificate of merit, was provided to CHEESECAKE and various public enforcement agencies
22 stating that as a result of CHEESECAKE’S sale of the Flame Cooked Ground Beef Products,
23 purchasers and users in the State of California were being exposed to PAHs through ingestion
24 resulting from the reasonably foreseeable use of the Flame Cooked Ground Beef Products without
25 the individual purchasers and/or consumers of the burgers having first been provided a “clear and
26 reasonable warning” regarding such toxic exposures.

27 26. After receipt of the claims asserted in the 60-Day Notice of Violation, the appropriate
28 public enforcement agencies have failed to commence and diligently prosecute a cause of action

1 against CHEESECAKE under Proposition 65.

2 27. CHEESECAKE has allowed fat to drip onto the hot flame-broiler, thereby causing
3 PAH-contaminated smoke to contact the Flame Cooked Ground Beef Products, and/or has allowed
4 flames to come into contact with fat on the surface of the Flame Cooked Ground Beef Products,
5 thereby creating PAHs which collected in or on these products.

6 28. CHEESECAKE has failed to utilize sufficient means, such as reducing the amount of
7 contaminated smoke coming into contact with the Flame Cooked Ground Beef Products, to decrease
8 the amount of PAHs in or on the Flame Cooked Ground Beef Products, so as to exempt
9 CHEESECAKE from having to provide a clear and reasonable warning regarding the risk of cancer
10 associated with exposure to PAHs.

11 29. PAHs have been present in and/or on the Flame Cooked Ground Beef Products in
12 such a way as to expose individuals to PAHs through ingestion during the reasonably foreseeable
13 use of the Flame Cooked Ground Beef Products.

14 30. The normal and reasonably foreseeable use of the Flame Cooked Ground Beef
15 Products caused and continues to cause consumer exposures to PAHs, as consumer exposure is
16 defined by 22 CCR §12601(b).

17 31. CHEESECAKE knew that the normal and reasonably foreseeable use of the Flame
18 Cooked Ground Beef Products would expose individuals to PAHs through ingestion.

19 32. CHEESECAKE intended that such exposures to PAHs from the reasonably
20 foreseeable use of the Flame Cooked Ground Beef Products would occur by its preparation, cooking
21 and/or offering for sale or use of Flame Cooked Ground Beef Products to individuals in the State of
22 California, as part of its normal course of business.

23 33. The Flame Cooked Ground Beef Products manufactured, distributed, and/or offered
24 for sale or use in California by CHEESECAKE contained PAHs in levels requiring a warning, in
25 that PAHs are found in quantities above the allowable state limits where such limits have been set
26 pursuant to Health & Safety Code §25249.10(c); or in detectable quantities requiring a warning
27 pursuant to Health & Safety Code §25249.6 in the cases of listed chemicals without limits set
28 pursuant to §25249.10(c).

1 34. CHEESECAKE failed to provide consistently, if at all, “clear and reasonable
2 warning” to consumers or other individuals in the State of California who were or who could
3 become exposed to PAHs through ingestion during the reasonably foreseeable use of the Flame
4 Cooked Ground Beef Products, as is required by law.

5 35. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
6 directly by California voters, those individuals exposed to PAHs through ingestion resulting from
7 the reasonably foreseeable use of the Flame Cooked Ground Beef Products sold by CHEESECAKE
8 without “clear and reasonable warning” have suffered, and continue to suffer, irreparable harm, for
9 which they have no plain, speedy or adequate remedy at law.

10 36. As a consequence of the above-described acts, CHEESECAKE is liable for a
11 maximum civil penalty of \$2,500 per day for each violation pursuant to California Health & Safety
12 Code §25249.7(b).

13 37. As a consequence of the above-described acts, California Health & Safety Code
14 §25249.7(a) specifically authorizes the Court to grant injunctive relief against CHEESECAKE.

15 **PRAYER FOR RELIEF**

16 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

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

20 2. That the Court, pursuant to California Health & Safety Code §25249.7(a),
21 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing or offering
22 the Flame Cooked Ground Beef Products for sale or use in California, without providing “clear and
23 reasonable warnings,” as defined by 22 CCR §12601, as to the harms associated with exposure to
24 certain toxins.

25 ///

26 ///

27 ///

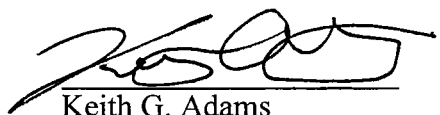
28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 3. That the Court grant plaintiff her reasonable attorney's fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: May 1, 2007

Respectfully submitted,
HIRST & CHANLER LLP



Keith G. Adams
Attorneys for Plaintiff
WHITNEY R. LEEMAN, Ph.D.