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ENDORSED
FILED
ALAMEDA COUNTY

NOV 15 2012

CLERK OF THE SUPERIOR COURT

By Kmel Dhillon Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF ALAMEDA

13 UNLIMITED CIVIL JURISDICTION

14 WHITNEY R. LEEMAN, PH.D.,

15 Plaintiff,

16 v.

17 PACIFIC HOSPITALITY GROUP, LLC,
18 ESTANCIA HOTEL, LLC; and DOES 1-150,
19 inclusive,

20 Defendants.

Case No. RG12 656269

21 **COMPLAINT FOR CIVIL PENALTIES
22 AND INJUNCTIVE RELIEF**

23 (Health & Safety Code. § 25249.6 *et seq.*)

1 NATURE OF THE ACTION

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 or grilled hamburgers sold by
6 defendants in California.

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

13 3. PAHs are products of incomplete combustion at high temperatures. High levels
14 of PAHs are commonly found in soot and smoke, including smoke produced when meat is
15 flame-broiled or grilled in restaurants.

16 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
17 Health and Safety Code § 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course of
18 doing business shall knowingly and intentionally expose any individual to a chemical known to
19 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
20 warning to such individual” Health & Safety Code § 25249.6.

21 5. Pursuant to Proposition 65, on July 1, 1987, California identified and listed
22 benz[a]anthracene, benzo[a]pyrene, and benzo[k]fluoranthene as chemicals known to cause
23 cancer. Benz[a]anthracene, benzo[a]pyrene, and benzo[k]fluoranthene became subject to the
24 “clear and reasonable warning” requirements of the act one year later on July 1, 1988. Cal.
25 Code Regs. tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 & 25249.10(b).

26 6. Pursuant to Proposition 65, on January 1, 1988, California identified and listed
27 indeno[1,2,3-cd]pyrene as a chemical known to cause cancer. Indeno[1,2,3-cd]pyrene became
28

1 subject to the “clear and reasonable warning” requirements of the act one year later on January
2 1, 1989. Cal. Code Regs. tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 & 25249.10(b).

3 7. Defendants manufacture, distribute, and sell flame-broiled or grilled ground beef
4 burgers that contain PAHs at levels that require a warning under Proposition 65, including, but
5 not limited to, the *Natural Burger*. All such flame cooked ground beef burgers containing one
6 or more of the PAHs are referred to collectively hereinafter as “PRODUCTS.”

7 8. The PAHs in and/or on the PRODUCTS manufactured, distributed, and/or sold by
8 defendants primarily result from the burgers’ exposure to smoke contaminated with PAHs—
9 specifically, when fat drips onto a hot flame-broiler or grill, it thereby creates smoke
10 contaminated with PAHs. PAHs may also be produced when flames come into contact with the
11 fat on the surface of the PRODUCTS. Either way, PAHs are deposited onto the surface of the
12 PRODUCTS and remain there through consumption.

13 9. There are methods by which ground beef can be flame-broiled and grilled without
14 being exposed to excessive amounts of smoke contaminated with carcinogenic PAHs, including
15 methods designed to minimize the amount of fat reaching the flame and the amount of smoke
16 reaching the ground beef.

17 10. Defendants’ failure to warn consumers in the state of California about their
18 exposure to PAHs in conjunction with defendants’ sale of the PRODUCTS is a violation of
19 Proposition 65, and subjects defendants to enjoinder of such conduct as well as civil penalties
20 for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

21 11. For defendants’ violations of Proposition 65, plaintiff seeks preliminary and
22 permanent injunctive relief to compel defendants to provide purchasers or consumers of the
23 PRODUCTS with the required warning regarding the health hazards of the PAHs. Health &
24 Safety Code § 25249.7(a).

25 12. Pursuant to Health and Safety Code section 25249.7(b), plaintiff also seeks civil
26 penalties against defendants for their violations of Proposition 65.

1 **PARTIES**

2 13. Plaintiff WHITNEY R. LEEMAN, Ph.D. is a citizen of the state of California
3 who is dedicated to protecting the health of California citizens through the elimination or
4 reduction of toxic exposures from consumer products; and she brings this action in the public
5 interest pursuant to Health and Safety Code section 25249.7(d).

6 14. Defendant PACIFIC HOSPITALITY GROUP, LLC (“PACIFIC”) is a person in
7 the course of doing business within the meaning of Health and Safety Code section 25249.11.

8 15. Defendant ESTANCIA HOTEL, LLC (“ESTANCIA”) is a person in the course of
9 doing business within the meaning of Health and Safety Code section 25249.11.

10 16. PACIFIC and ESTANCIA offer the PRODUCTS for sale in the state of California
11 without a “clear and reasonable warning.”

12 17. Defendants DOES 1-150 are each persons in the course of doing business within
13 the meaning of Health and Safety Code section 25249.11, which manufacture, distribute, and/or
14 offer for sale the PRODUCTS in the state of California. At this time, the true names of
15 defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who, therefore, sues said
16 defendants by their fictitious names pursuant to Code of Civil Procedure section 474. Plaintiff
17 is informed and believes, and on that basis alleges, that each of the fictitiously named
18 defendants is responsible for the acts and occurrences alleged herein. When ascertained, their
19 true names shall be reflected in an amended complaint.

20 **VENUE AND JURISDICTION**

21 18. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
22 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
23 because one or more instances of wrongful conduct occurred, and continue to occur, in Alameda
24 County, and/or because PACIFIC and ESTANCIA conducted, and continue to conduct,
25 business in this county with respect to the PRODUCTS.

26 19. The California Superior Court has jurisdiction over this action pursuant to
27 California Constitution Article VI, section 10, which grants the Superior Court “original
28

1 jurisdiction in all causes except those given by statute to other trial courts.” The statute under
2 which this action is brought does not specify any other basis of subject matter jurisdiction.

3 20. The California Superior Court has jurisdiction over defendants based on
4 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
5 association that is a citizen of the state of California, has sufficient minimum contacts in the
6 state of California, and/or otherwise purposefully avails itself of the California market.
7 Defendants’ purposeful availment renders the exercise of personal jurisdiction by California
8 courts consistent with traditional notions of fair play and substantial justice.

9 **FIRST CAUSE OF ACTION**

10 **(Violation of Proposition 65 - Against All Defendants)**

11 21. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
12 Paragraphs 1 through 20, inclusive.

13 22. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
14 Enforcement Act of 1986, the People of California expressly declared their right “[t]o be
15 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
16 harm.”

17 23. Proposition 65 states, “[n]o person in the course of doing business shall
18 knowingly and intentionally expose any individual to a chemical known to the state to cause
19 cancer or reproductive toxicity without first giving clear and reasonable warning to such
20 individual” Health & Safety Code § 25249.6.

21 24. On August 31, 2012, plaintiff’s sixty-day notice of violation, together with the
22 requisite certificate of merit, was provided to PACIFIC and ESTANCIA and certain public
23 enforcement agencies stating that, as a result of defendants’ sales of the PRODUCTS containing
24 PAHs, purchasers and consumers in the state of California were being exposed to PAHs
25 resulting from their reasonably foreseeable consumption of the PRODUCTS, without having
26 been provided with a “clear and reasonable warning” regarding such toxic exposures, as
27 required by Proposition 65.
28

1 25. Defendants have engaged in the manufacture, distribution, and offering of the
2 PRODUCTS for sale or consumption in violation of Health and Safety Code section 25249.6,
3 and defendants' violations have continued to occur beyond their receipt of plaintiff's sixty-day
4 notice of violation. As such, defendants' violations are ongoing and continuous in nature, and
5 will continue to occur in the future.

6 26. After receiving the claims asserted in the sixty-day notice of violation, the
7 appropriate public enforcement agencies have failed to commence and diligently prosecute a
8 cause of action against defendants under Proposition 65.

9 27. PACIFIC and ESTANCIA have allowed fat to drip onto the hot flame-broiler or
10 grill, thereby causing PAH-contaminated smoke to contact the PRODUCTS, and/or have
11 allowed flames to come into contact with the fat on the surface of the PRODUCTS, thereby
12 creating PAHs which collected in or on these PRODUCTS.

13 28. PAHs have been present in and/or on the PRODUCTS in such a way as to expose
14 individuals to PAHs through ingestion during the reasonably foreseeable use of the
15 PRODUCTS.

16 29. The normal and reasonably foreseeable consumption of the PRODUCTS have
17 caused, and continue to cause, consumer exposures to PAHs, as such exposures are defined by
18 California Code of Regulations title 27, section 25602(b).

19 30. Defendants had knowledge that the normal and reasonably foreseeable
20 consumption of the PRODUCTS expose individuals to PAHs through ingestion.

21 31. Defendants intended that such exposures to PAHs from the reasonably
22 foreseeable consumption of the PRODUCTS would occur by their deliberate, non-accidental
23 participation in the preparation, cooking, and/or offering of the PRODUCTS for sale to
24 individuals in the state of California.

25 32. Defendants failed to provide a "clear and reasonable warning" to those consumers
26 and other individuals in the state of California who were or who would become exposed to
27 PAHs through ingestion during the consumption of the PRODUCTS.

