

1 Josh Voorhees, State Bar No. 241436
2 Rachel S. Doughty, State Bar No. 255904
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone:(510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 WHITNEY R. LEEMAN, PH.D.

ENDORSED

2013 SEP -5 P 12:51

David H. Yamaseki, Clerk of the Superior Court
County of Santa Clara, California

By: David H. Mahan
Deputy Clerk

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SANTA CLARA

13 UNLIMITED CIVIL JURISDICTION

14 WHITNEY R. LEEMAN, PH.D.,

15 Plaintiff,

16 v.

17 THE HABIT RESTAURANTS, LLC; and
18 DOES 1-150, inclusive,

19 Defendants.

Case No. 113-CV-243442

**[PROPOSED] JUDGMENT PURSUANT TO
TERMS OF PROPOSITION 65
SETTLEMENT AND CONSENT
JUDGMENT**

Date: September 3, 2013

Time: 9:00 a.m.

Dept. 5

Judge: Hon. Carol Overton

1 Plaintiff Whitney R. Leeman, Ph.D., and defendant The Habit Restaurants, LLC,
2 having agreed through their respective counsel that Judgment be entered pursuant to the
3 terms of their settlement agreement in the form of a Consent Judgment, and following this
4 Court's issuance of an Order approving this Proposition 65 settlement and Consent
5 Judgment,

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to
7 Health and Safety Code section 25249.7(f)(4) and Code of Civil Procedure section 664.6,
8 judgment is hereby entered in accordance with the terms of the Consent Judgment attached
9 hereto as Exhibit 1. By stipulation of the parties, the Court will retain jurisdiction to
10 enforce the settlement under Code of Civil Procedure section 664.6.

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12 **IT IS SO ORDERED.**

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15 Dated: SEP 03 2013

James L. Stoelker
16 JUDGE OF THE SUPERIOR COURT

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EXHIBIT 1

1 Josh Voorhees, State Bar No. 241436
Rachel S. Doughty, State Bar No. 255904
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710
4 Telephone: (510) 848-8880
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5 Attorneys for Plaintiff
6 WHITNEY R. LEEMAN, PH.D.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, PH.D.,
Plaintiff,
v.
THE HABIT RESTAURANTS, LLC; and
DOES 1-150, inclusive,
Defendants.

Case No. 113-CV-243442
[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 1.1 **Whitney R. Leeman and The Habit Restaurants, LLC**

3 This Consent Judgment is entered into by and between Whitney R. Leeman, Ph.D.
4 (“Leeman” or “Plaintiff”) on the one hand, and The Habit Restaurants, LLC (“Habit” or
5 “Defendant”) on the other hand, with Leeman and Habit collectively referred to as the “Parties,”
6 and each individually referred to as a Party.

7 1.2 **Plaintiff**

8 Leeman is an individual residing in California who seeks to promote awareness of
9 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous
10 substances contained in consumer and commercial products.

11 1.3 **Defendant**

12 Habit employs ten or more persons and is a person in the course of doing business for
13 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
14 Code § 25249.6 et seq. (“Proposition 65”).

15 1.4 **General Allegations**

16 Leeman alleges that Defendant has sold in the State of California, without the requisite
17 Proposition 65 health hazard warning, flame-cooked ground beef burgers containing
18 benz[a]anthracene, benzo[a]pyrene, benz[b]fluoranthene, benzo[k]fluoranthene, and indeno[1,2,3-
19 cd]pyrene, which are cancer-causing chemicals listed pursuant to Proposition 65.
20 Benz[a]anthracene, benzo[a]pyrene, benz[b]fluoranthene, benzo[k]fluoranthene, and
21 indeno[1,2,3-cd]pyrene shall be referred to as the “Listed Chemicals” or “PAHs.”

22 1.5 **Product Description**

23 The products covered by this Consent Judgment are flame-cooked ground beef burgers,
24 including, but not limited to, the *Double Charburger*, containing the Listed Chemicals, that are
25 sold or offered for sale in California by Defendant (collectively “Products”).
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1 **1.6 Notice of Violation**

2 On or about July 11, 2012, Leeman served Defendant and various public prosecutors with
3 a “60-Day Notice of Violation” (“Notice”), alleging that Defendant was in violation of
4 Proposition 65 for failing to warn its customers and consumers that flame-cooked ground beef
5 burgers containing the Listed Chemicals, sold by Defendant in California, expose consumers to
6 the Listed Chemicals. To the best of the Parties’ knowledge, no public enforcer has commenced
7 and is diligently prosecuting the allegations set forth in the Notice.

8 **1.7 Complaint**

9 On March 21, 2013, Leeman filed a complaint in Santa Clara County Superior Court
10 against Defendant and Does 1 through 150 (the “Complaint” or “Action”), alleging violations of
11 Proposition 65, based on the alleged exposures to the Listed Chemicals contained in the Products
12 sold by Defendant to consumers in California.

13 **1.8 No Admission**

14 Defendant denies the material factual and legal allegations contained in the Notice and
15 Complaint and maintains that all of the products it has sold in California, including the Products,
16 have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
17 construed as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or
18 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as
19 an admission by Defendant of any fact, finding, conclusion of law, issue of law, or violation of
20 law, such being specifically denied by Defendant. This Section shall not, however, diminish or
21 otherwise affect Defendant’s obligations, responsibilities, and duties under this Consent
22 Judgment.

23 **1.9 Consent to Jurisdiction**

24 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
25 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper
26 in Santa Clara County, and that this Court has jurisdiction to enter and enforce the provisions of
27 this Consent Judgment, pursuant to California Code of Civil Procedure § 664.6, as a full and
28

1 binding resolution of all claims that were or could have been raised in the Complaint against
2 Defendant based on the facts alleged therein and in the Notice.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall mean May 7,
5 2013.

6 **2. INJUNCTIVE RELIEF**

7 **2.1 Product Warnings**

8 Commencing upon of execution of this agreement and continuing thereafter, The Habit
9 shall, for all Products sold in California, select from and provide one of the two warning messages
10 (“Warning”) set forth in Sections 2.1.1 and 2.1.2, except as provided by Section 2.3.

11 The Warning shall be prominently placed with such conspicuousness as compared with
12 other words, statements, designs, or devices so as to render it likely to be read and understood by
13 an ordinary individual under customary conditions before purchase or consumption. A Warning
14 will be displayed on a sign (“Warning Sign”), of substantially the same presentation (dimensions,
15 text font and size, and colors) as that attached as Exhibits 1 or 2, depending on the Warning
16 selected, will be posted so that it is clearly visible to consumers in each of the following locations
17 if such location exists now or in the future: (1) at each take-away or to-go doorway or window;
18 (2) adjacent to each wall menu; and (3) at each counter where food is purchased.

19 The language of the Warning shall consist of one of the following:¹

20 **2.1.1 First Option**

21 **WARNING:** Chemicals known to the State of California to cause cancer[and
22 reproductive harm] are present in the food or beverages sold here.
23 For example, many grilled foods, such as flame-cooked beef,
24 contain polycyclic aromatic hydrocarbons (PAHs)[and many
browned foods, like fried potatoes, contain acrylamide] which are
formed as a byproduct of grilling[and browning].

25 ¹ The Habit may add the bracketed language appearing in the First and Second Options, and language regarding
26 additional chemicals and/or products, only if The Habit has knowledge—based on testing conducted by a U.S.-based
27 laboratory employing methods for detection and analysis of chemicals authorized by state or federal agencies, or
grounded in facts that are generally accepted by a recognized authoritative body, as that term is defined in Health and
28 Safety Code section 25306(b)—that chemicals known to the State of California to cause cancer, birth defects, or other
reproductive harm are contained in food or beverage products it sells, offers for sale, or distributes in California.

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2.1.2 Second Option

WARNING: Chemicals known to the State of California to cause cancer[, or birth defects or other reproductive harm] are present in foods [or beverages]sold or served here.

If The Habit elects to use the warnings is Section 2.1.1, and should another private plaintiff or the Attorney General or any other public officer later serve a Proposition 65 60-day notice of [alleged] violation or action against The Habit in which it is alleged that The Habit has violated Proposition 65 by failing to use a proper warning for the Products, The Habit shall be allowed to use the warning in Section 2.1.2, at no additional penalty above what The Habit has paid as specified in sections 3.1.1(a) and (c), and 3.1.2(a) and (c).

2.2 Compliance Review

Beginning on the date that is thirty days following the Effective Date and continuing at least once every six months for three years thereafter, The Habit shall perform a compliance review, as to each of its locations in California selling any Products, to assess and ensure that each location is in compliance with all of the requirements of Sections 2.1 and 2.3. The compliance review shall be documented in writing, noting with specificity at a minimum: any deficiencies regarding compliance, the date those deficiencies were discovered, and the date by which the deficiencies were corrected. All documentation regarding this compliance review shall be retained by The Habit for at least one year from the date produced, and shall be promptly shared with Leeman, upon Leeman’s written request. Such information shall be treated as highly confidential and sensitive business information, which cannot be seen by anyone other than Leeman and her counsel absent written permission by The Habit. The Habit agrees that it shall correct any deficiencies noted during the review, or otherwise brought to its attention by any person at any time, within fourteen (14) days of such notice and confirm continuing compliance at the location where the alleged deficiency occurred within three (3) months. If Leeman identifies a compliance deficiency, or otherwise becomes aware of a deficiency, prior to seeking court enforcement of this agreement, Leeman shall notify The Habit of the deficiency and the parties shall in good faith attempt to resolve any such deficiency.

1 **2.3 Cooking Modification**

2 Defendant agrees to investigate methods of cooking or equipment modifications that may
3 substantially reduce or eliminate the Listed Chemicals from their Products. All documentation
4 regarding methods implemented or modifications made shall be retained by Defendant for at least
5 one year, and shall be promptly shared with Leeman, upon Leeman’s written request. Such
6 information shall be treated as highly confidential and sensitive business information, which
7 cannot be seen by anyone other than Leeman and her counsel absent written permission by The
8 Habit.

9 Warnings consistent with Section 2.1 must be posted if consumption of a single serving of
10 one flame-cooked ground beef menu item, of normal size and lipid content for that item, cooked
11 to well done, results in an exposure of equal to or greater than 0.033 µg benz[a]anthracene, 0.06
12 µg benzo[a]pyrene, or 0.096 µg benzo[b]fluoranthene, in a test performed by a laboratory within
13 the United States which is agreed upon by the parties (“Warning Threshold”). A Warning must
14 be provided if one or more menu items contain PAHs in excess of the Warning Threshold.

15 **3. MONETARY TERMS**

16 **3.1 Civil Penalties**

17 In settlement of all the claims referred to in this Consent Judgment, Defendant shall pay a
18 maximum of \$180,000 in civil penalties in accordance with this Section. Each penalty payment
19 will be allocated in accordance with Health and Safety Code § 25249.12(c)(1) and (d), with 75%
20 of the funds remitted to the California Office of Environmental Health Hazard Assessment
21 (“OEHHA”), in the form of a check issued to “OEHHA,” and the remaining 25% of the penalty
22 remitted to Leeman, in the form of a check made payable to “The Chanler Group in Trust for
23 Whitney R. Leeman.”

24 **3.1.1 Initial Civil Penalty**

25 On or before the Effective Date The Habit shall notify Leeman in writing which Warning
26 Habit has chosen and pay a penalty as follows:

- 27 (a) \$30,000 upon election of the First Option (section 2.1.1);

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1 (b) \$60,000 upon election of the Second Option (section 2.1.2).

2 (c) The amount of initial civil penalty due shall be reduced by twenty-five
3 percent, if The Habit certifies in writing, received by Leeman on or before the
4 Effective Date, that it shall, within forty-five (45) days, modify its cooking
5 equipment or method to reduce or eliminate consumer exposure to the Listed
6 Chemicals.

7 **3.1.2 Final Civil Penalty**

8 Within ten days of July 1, 2013, The Habit shall notify Leeman in writing which Warning
9 is in operation and shall pay a second civil penalty as follows:

10 (a) \$30,000 if the First Option (Section 2.1.1) is in use;

11 (b) or a penalty of \$120,000 if the Second Option (Section 2.1.2) is in use.

12 (c) The second civil penalty shall be waived in its entirety upon receipt by
13 Leeman, within ten days of July 1, 2013, of written certification from The Habit of
14 (1) compliance with Section 2.2 and, and (2) that The Habit has modified its
15 cooking methods such that none of its flame-cooked ground beef menu items
16 exceeds the Warning Threshold, as defined in Section 2.3.

17 **3.2 Reimbursement of Leeman's Fees and Costs**

18 The parties acknowledge that Leeman and her counsel offered to resolve this dispute
19 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
20 this fee issue to be resolved after the material terms of the agreement had been settled. Leeman
21 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
22 been finalized. The parties then attempted to (and did) reach an accord on the compensation due
23 to Leeman and her counsel under general contract principles and the private attorney general
24 doctrine, codified at Code of Civil Procedure § 1021.5, for all work performed through the mutual
25 execution of this agreement. Defendant shall pay \$51,000 for fees, attorneys' fees, and costs
26 incurred which are related to and a result of investigating, bringing this matter to Defendant's
27 attention, negotiating a settlement and consent judgment in the public interest, and all other

1 actions required to secure the entry of a final consent judgment in this matter. Except as provided
2 in this agreement, each party shall bear its own attorney fees.

3 **3.3 Payment Procedures**

4 **3.3.1 Issuance of Payments**

5 (a) All payments owed to Leeman, pursuant to Sections 3.1 and 3.2, shall be
6 delivered to the following address:

7 The Chanler Group
8 Attn: Proposition 65 Controller
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710

12 (b) All payments owed to OEHHA pursuant to Sections 3.1, shall be delivered
13 directly to OEHHA (Memo line "Prop 65 Penalties") at one of the following addresses, as
14 appropriate:

15 For United States Postal Service:

16 Mike Gyrics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 P.O. Box 4010
20 Sacramento, CA 95812-4010

21 For delivery by other than the United States Postal Service:

22 Mike Gyrics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
25 1001 I Street
26 Sacramento, CA 95814

27 **3.3.2 Proof of Payment**

28 A copy of each check payable to OEHHA shall be mailed, simultaneous with payment, to
The Chanler Group at the address set forth above in Section 3.3.1(a), as proof of payment to
OEHHA.

3.3.3 Tax Documentation

Upon making each payment required by this Section 3, Defendant shall issue separate
1099 forms as follows: For each penalty payment to OEHHA, a 1099 shall be issued to the

1 Office of Environmental Health Hazard Assessment, 1001 I Street, Sacramento, CA 95814 (EIN:
2 68-0284486); for each penalty payment to Whitney Leeman, a 1099 shall be issued to “Whitney
3 R. Leeman,” whose address and tax identification number shall be furnished upon request after
4 this Settlement Agreement is fully executed by the Parties; for each payment in reimbursement of
5 fees and costs, Defendant shall issue a separate 1099 form to “The Chanler Group” (EIN: 94-
6 3171522).

7 **4 CLAIMS COVERED AND RELEASED**

8 **4.1 Plaintiff’s Public Release of Proposition 65 Claims**

9 Plaintiff, acting on her own behalf and in the public interest, releases Defendant from all
10 claims for violations of Proposition 65 up through the Effective Date based on exposure to the
11 Listed Chemicals from the Products as set forth in the Notice. Compliance with the terms of this
12 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to the
13 Listed Chemicals from the Products as set forth in the Notice.

14 **4.2 Plaintiff’s Individual Release of Claims**

15 Plaintiff also, in her individual capacity only and *not* in her representative capacity,
16 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
17 bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,
18 claims, liabilities and demands of plaintiff of any nature, character or kind, whether known or
19 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
20 the Listed Chemicals in the Products sold by Defendant.

21 **4.3 Defendant’s Release of Plaintiff**

22 Defendant, on behalf itself, its past and current agents, representatives, attorneys,
23 successors, and/or assignees, hereby waives any and all claims against Plaintiff and her attorneys
24 and other representatives, for any and all actions taken or statements made (or those that could
25 have been taken or made) by Plaintiff and her attorneys and other representatives, whether in the
26 course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this
27 matter with respect to the Products.

1 **5** COURT APPROVAL

2 This Consent Judgment is not effective until it is approved and entered by the Court and
3 shall be null and void if, for any reason, it is not approved and entered by the Court within 1 year
4 after it has been fully executed by the Parties, in which event any monies that have been paid to
5 Leeman or her counsel pursuant to Section 3 above shall be refunded within fifteen (15) days
6 after Leeman's receipt of written notice from Defendant that the 1-year period has expired.

7 **6** SEVERABILITY

8 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
9 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
10 provisions remaining shall not be adversely affected.

11 **7** GOVERNING LAW

12 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California.

14 **8** NOTICES

15 Unless specified herein, all correspondence and notices required to be provided pursuant
16 to this Consent Judgment shall be in writing and sent by (i) personal delivery, (ii) first-class,
17 registered or certified mail, return receipt requested, or (iii) overnight courier on any party by the
18 other party at the following addresses:

19 For Habit:

20 James M. Mattesich
21 Nancy Doig
22 Greenberg Traurig LLP
23 1201 K Street
Suite 1100
Sacramento, CA 95814 _____

Attorneys for The Habit Restaurants, LLC

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For Leeman:

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

Attorneys for Dr. Whitney R. Leeman

Any party, from time to time, may specify in writing to the other party a change of address to which all notices and other communications shall be sent.

COUNTERPARTS; FACSIMILE SIGNATURES

This Consent Judgment may be executed in counterparts and by facsimile or PDF signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

POST EXECUTION ACTIVITIES

Leeman agrees to comply with the reporting form requirements referenced in Health and Safety Code § 25249.7(f). In addition, the Parties acknowledge that, pursuant to Health and Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment. Leeman shall prepare and file such motion to approve this Consent Judgment, and Defendant shall not oppose such motion. In furtherance of obtaining such approval, Leeman and Defendant and their respective counsel agree to mutually employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner.

MODIFICATION

This Consent Judgment may be modified only by written agreement of the Parties.

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11 MODIFICATION

This Consent Judgment may be modified only by written agreement of the Parties.

12 AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties, and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

AGREED TO:

By: *Whitney R. Leeman*
WHITNEY R. LEEMAN, PH.D.

By: _____
Russell Bendel, President
THE HABIT RESTAURANTS, LLC,

Date: *6/29/13*

Date: _____

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AGREED TO:

AGREED TO:

By: _____
WHITNEY R. LEEMAN, PH.D.

By: 
Russell Bendel, President
THE HABIT RESTAURANTS, LLC,

Date: _____

Date: 6-27-13

Exhibit 1

WARNING

Chemicals known to the State of California to cause cancer or birth defects or other reproductive harm are present in the food or beverages sold here. For example, many grilled foods, such as flame-cooked beef, contain polycyclic aromatic hydrocarbons (PAHs)[and many browned foods, like fried potatoes, contain acrylamide] which are formed as a byproduct of grilling[and browning].