

1 Laurence D. Haveson, State Bar No. 152631
2 David Lavine, State Bar No. 166744
3 HIRST & CHANLER LLP
4 2560 Ninth Street, Suite 214
5 Berkeley, CA 94710
6 Telephone: (510) 848-8880
7 Facsimile: (510) 848-8118

8 Attorneys for Plaintiff
9 Whitney R. Leeman, Ph.D.

10 Robert D. Phillips, Jr., State Bar No. 82639
11 Thomas A. Evans, State Bar No. 202841
12 Reed Smith LLP
13 1999 Harrison Street, Suite 2400
14 Oakland, CA 94612
15 Telephone: (510) 763-2000
16 Facsimile: (510) 273-8832

17 Attorney for Defendant
18 Raley's dba Nob Hill Foods

19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, Ph.D.)

Plaintiff,)

v.)

RALEY'S dba NOB HILL FOODS; and DOES)
1 through 150, inclusive,)

Defendants.)

CASE NO. RG 07 335317

STIPULATION AND [PROPOSED]
ORDER RE: CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Plaintiff and Settling Defendant.** This Consent Judgment is entered into by and
3 between Plaintiff Whitney R. Leeman, Ph.D., (hereafter “Plaintiff”) and Defendant Raley’s dba
4 Nob Hill Foods (hereafter “Defendant”), with Plaintiff and Defendant collectively referred to as
5 the “Parties” and each being a “Party.”

6 **1.2 Plaintiff.** Dr. Leeman is an individual residing in California whose complaint
7 alleges that she seeks to promote awareness of exposures to toxic chemicals and improve human
8 health by reducing or eliminating hazardous substances contained in consumer and industrial
9 products.

10 **1.3 Defendant.** Raley’s dba Nob Hill Foods is a person in the course of doing business
11 as defined in Health & Safety §25249.11(b).

12 **1.4 General Allegations.** Plaintiff alleges that Defendant has manufactured, distributed
13 and/or sold in the State of California glass soda bottles with colored artwork containing lead on the
14 exterior surface. Lead is listed pursuant to the Safe Drinking Water and Toxic Enforcement Act of
15 1986, California Health & Safety Code Sections 25249.6, *et seq.*, (“Proposition 65”), and known to
16 cause cancer, birth defects and other reproductive harm. Lead is referred to herein as the “Listed
17 Chemical.”

18 **1.5 Product Descriptions.** The products that are covered by this Consent Judgment are
19 defined as glass soda bottles with colored artwork or designs (containing lead) on the exterior
20 including, but not limited to, *Faygo Original Black Raspberry* (#0 73800 00492 9). Such products
21 collectively are referred to herein as the “Products.”

22 **1.6 Notices of Violation.** Beginning on May 4, 2007, Dr. Leeman served Defendant
23 and various public enforcement agencies with documents, each entitled “60-Day Notice of
24 Violation” (“Notice”), that provided Defendant and such public enforcers with notice alleging that
25
26
27
28

1 Defendant was in violation of Health & Safety Code Section 25249.6 for failing to warn
2 purchasers that the Products that it sold exposed users in California to lead.

3 **1.7 Complaint.** On July 12, 2007, Plaintiff, alleging that she was acting in the interest
4 of the general public in California, filed a complaint (hereafter referred to as the “Complaint” or
5 the “Action”) in the Superior Court for the County of Alameda against Raley’s dba Nob Hill Foods
6 and Does 1 through 150, alleging violations of Health & Safety Code Section 25249.6 based on the
7 alleged exposures to the Listed Chemical contained in the Products sold by Raley’s dba Nob Hill
8 Foods.
9

10 **1.8 No Admission.** Defendant denies the material factual and legal allegations
11 contained in Plaintiff’s Notice and Complaint, and maintains that all products that it has sold in
12 California, including the Products, have been and are in compliance with all laws. Nothing in this
13 Consent Judgment shall be construed as an admission by Defendant of any fact, finding, issue of
14 law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an
15 admission by Defendant of any fact, finding, conclusion, issue of law or violation of law.
16 However, this Section shall not diminish or otherwise affect the obligations, responsibilities and
17 duties of Defendant under this Consent Judgment.
18

19 **1.9 Consent to Jurisdiction.** For purposes of this Consent Judgment only, the Parties
20 stipulate that this Court has jurisdiction over the allegations of violations contained in the
21 Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that
22 venue is proper in the County of Alameda, that this Court has jurisdiction to enter this Consent
23 Judgment as a full and final settlement and resolution of the allegations contained in the Complaint
24 and of all claims which were or could have been raised based on the facts alleged therein or arising
25 therefrom, and to enforce the provisions thereof.
26
27

28 ////

1 **1.10 Effective Date.** For purposes of this Consent Judgment, the “Effective Date” shall
2 be May 31, 2008.

3 **2. INJUNCTIVE RELIEF: PROPOSITION 65**

4 **2.1** After the Effective Date, Defendant shall not knowingly sell Products within the
5 state of California unless such Products are sold in compliance with the requirements set forth in
6 Section 2.2 or comply with the Reformulation Standards set forth in Section 2.3.

7
8 Any warning issued for Products pursuant to this Section 2.2 below shall be prominently
9 placed with such conspicuousness as compared with other words, statements, designs, or devices
10 as to render it likely to be read and understood by an ordinary individual under customary
11 conditions before purchase or, for Products shipped directly to an individual in California, before
12 use.

13
14 **2.2 Product Warnings**

15 **2.2.1 Clear and Reasonable Warnings.** This Section describes Defendant’s
16 options for satisfying the warning obligations required by Section 2.1, depending, in part, on the
17 manner of sale:

18 **(a) Retail Store Sales**

19 **(i) Product Labeling.** From the Effective Date, a warning may
20 be affixed to the packaging, labeling or directly on the Product by Defendant or its agent, that
21 states:
22

23 **WARNING: The materials used as colored decorations on the exterior of this**
24 **product contain lead, a chemical known to the State of California**
25 **to cause birth defects and other reproductive harm.**

26
27 **(ii) Point-of-Sale Warnings.** Defendant may perform its
28 warning obligations by insuring to the greatest extent possible that signs are posted at retail outlets

1 in the State of California where the Products are sold. Point-of-sale warnings shall be provided
2 through signs posted in close proximity to the point of display of the Products that state:

3 **WARNING: The materials used as colored decorations on the exterior of this**
4 **product contain lead, a chemical known to the State of California**
5 **to cause birth defects and other reproductive harm.**

6 (b) **Internet Sales.** Defendants shall satisfy its warning obligations for
7 Products that are sold from the Internet to California residents, by providing a warning: (a) on the
8 website; or (b) with the Product when it is shipped to an address in California. Warnings given on
9 the website shall identify the specific Product to which the warning applies as further specified in
10 Sections 2.2.1(b)(i), (ii) and/or (iii) as applicable:

11 (i) **Internet Web Sites and Pages.** A warning may be given in
12 conjunction with the sale of the Product via the Internet, provided it appears either: (a) on the
13 same web page on which the Product is displayed; or (b) on the same web page as the order form
14 for the Product; or (c) on the same page as the price for any Product; or (d) on one or more web
15 pages displayed to a purchaser during the checkout process. The following warning statement
16 shall be used and shall appear in any of the above instances adjacent to or immediately following
17 the display, description, or price of the Product for which it is given in the same type size or larger
18 as the product description text:

19 **WARNING: The materials used as colored decorations on the exterior of this**
20 **product contain lead, a chemical known to the State of California**
21 **to cause birth defects and other reproductive harm.**

22 Alternatively, the Designated Symbol may appear adjacent to or immediately following the
23 display, description or price of the Product for which a warning is being given, provided that the
24 following warning statement also appears elsewhere on the same web page:

25 **WARNING: Products identified on this page with the following symbol use**
26 **materials that contain lead as colored decorations on their**
27 **exterior, a chemical known to the State of California to cause**
28 **birth defects and other reproductive harm: ▼.**

1
2 (ii) **Package Insert or Label.** For all Products sold by catalog or
3 via the Internet, a warning may be provided with the Product when it is shipped directly to an
4 individual in California, by either: (a) affixing the following warning language to the packaging,
5 labeling or directly to a specific Product; or (b) inserting a warning card measuring at least 4" x 6"
6 in the shipping carton which contains the following warning language; or (c) by placing the
7 following warning statement on the packing slip or customer invoice on the line directly below the
8 description of the Product on the packing slip or customer invoice:
9

10 **WARNING: The materials used on this product as exterior decorations**
11 **contain lead, a chemical known to the State of California to**
12 **cause birth defects and other reproductive harm.**

13 Alternatively, Defendant may place the following language on the packing slip or invoice
14 and specifically identifying the Product in lettering of the same size or larger as the description of
15 the Product:

16 **WARNING: The materials used as colored decorations on the exterior of the**
17 **following product(s) contain lead, a chemical known to the State**
18 **of California to cause birth defects or other reproductive harm.**

19 *[list products for which warning is given].*

20 The Defendants shall, in any of these instances identified in Section 2.2.1(b)(ii), in
21 conjunction with providing the warning, also inform the consumer, in a conspicuous manner, that
22 he or she may return the Product for a full refund (including shipping costs for both the receipt and
23 the return of the Product) within thirty (30) days of his or her receipt of the Product.

24 **2.2.2 Exceptions**

25 The warning requirements set forth in Section 2.2.1 shall not apply to:

- 26 (i) Any Products shipped to a third party before the Effective Date; or
27 (ii) Reformulated Products (as defined in Section 2.3 below).

28 **2.3 Reformulation Standards**

1 Products satisfying the conditions of Section 2.3 are referred to as "Lead Free."

2 (a) For Products containing colored artwork or designs on the exterior of the soda
3 bottle, the Product must utilize paints, decals, or other materials for colored artwork, designs or
4 markings containing six one-hundredths of one percent (0.06%) lead by weight or less as measured
5 at Defendant's option, either before or after the material is fired onto (or otherwise affixed to) the
6 Product, using a sample size of the materials in question measuring approximately 50-100 mg and
7 a test method of sufficient sensitivity to establish a limit of quantitation (as distinguished from
8 detection) of less than 600 parts per million ("ppm").
9

10 For Products with decorations within the "Lip and Rim Area,"¹ the paints, decals, or other
11 materials shall contain two one-hundredths of one percent (0.02%) lead by weight or less, as
12 measured at Defendant's option, either before or after the material is fired onto (or otherwise
13 affixed to) the Product, using a sample size of the materials in question measuring approximately
14 50-100 mg and a test method of sufficient sensitivity to establish a limit of quantitation (as
15 distinguished from detection) of less than 200 parts per million ("ppm").
16
17

18 **3. MONETARY PAYMENTS**

19 **3.1** In settlement of all the claims referred to in this Settlement Agreement against
20 Defendant, it shall pay \$1,000 in civil penalties to be apportioned in accordance with California
21 Health & Safety Code §25192, with 75% of these funds remitted to the State of California's Office
22 of Environmental Health Hazard Assessment and the remaining 25% of these penalty monies
23 remitted to Plaintiff as provided by California Health & Safety Code §25249.12(d). Defendant
24 shall issue two separate checks for the penalty payment:
25

26 (a) one check made payable to Hirst & Chanler LLP in Trust for the State of
27

28 _____
¹"Lip and Rim Area" is defined as the exterior top 20 millimeters of the soda bottle.

1 California's Office of Environmental Health Hazard Assessment (OEHHA) in the amount
2 of \$750.00, representing 75% of the total penalty; and

3 (b) one check to "Hirst & Chanler LLP in Trust For Dr. Whitney R. Leeman," in the
4 amount of \$250.00, representing 25% of the total penalty.

5
6 Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued
7 to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$750.00.

8 The second 1099 shall be issued to Plaintiff in the amount of \$250.00, whose address and tax
9 identification number shall be furnished, upon request, five calendar days before payment is due.

10 **4. REIMBURSEMENT OF FEES AND COSTS**

11 **4.1** The Parties acknowledge that Leeman and her counsel offered to resolve this
12 dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
13 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
14 Defendant then expressed a desire to resolve the fee and cost issue shortly after the other
15 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on the
16 compensation due to Leeman and her counsel under the private attorney general doctrine codified
17 at California Code of Civil Procedure §1021.5 for all work performed through the Court's approval
18 of this agreement. Under the private attorney general doctrine, Defendant shall reimburse Leeman
19 and her counsel for fees and costs incurred as a result of investigating, bringing this matter to
20 Defendant's attention, litigating and negotiating a settlement in the public interest and seeking the
21 Court's approval of the settlement agreement. Defendant shall pay Leeman and her counsel
22 \$9,000.00 for all attorneys' fees, expert and investigation fees, litigation and related costs. A
23 check made payable to HIRST & CHANLER LLP shall be delivered by the close of business within
24 ten days following execution of this agreement, at the following address:

25
26
27
28 HIRST & CHANLER LLP
Attn: Proposition 65 Controller

1 2560 Ninth Street
2 Parker Plaza, Suite 214
Berkeley, CA 94710-2565

3 Defendant shall issue a 1099 for this payment for Hirst & Chanler LLP, 455 Capitol Mall,
4 Suite 605, Sacramento, CA 95814 (EIN: 20-3929984).

5 **5. RELEASE OF ALL CLAIMS**

6 **5.1 Plaintiff's Release of Defendant.** In further consideration of the promises and
7 agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4,
8 Plaintiff, on behalf of herself, her past and current agents, representatives, attorneys, successors
9 and/or assignees, and in the interest of the general public, hereby waives all rights to institute or
10 participate in, directly or indirectly, any form of legal action and releases all claims, including,
11 without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands,
12 obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to,
13 investigation fees, expert fees and attorneys' fees) of any nature whatsoever, whether known or
14 unknown, fixed or contingent (collectively "Claims"), against Defendant and each of its retailers,
15 franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates,
16 subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders,
17 agents, and employees (collectively "Releasees"). This release is limited to those claims that arise
18 under Proposition 65, as such claims relate to Defendant's alleged failure to warn about exposures
19 to or identification of the Listed Chemical contained in the Products.
20
21
22

23 The Parties further understand and agree that this release shall not extend upstream to any
24 entities that manufactured the Products or any component parts thereof, or any distributors or
25 suppliers who sold the Products or any component parts thereof to Defendant.

26 **5.2 Defendant's Release of Plaintiff.** Defendant waives all rights to institute any form
27 of legal action and all claims against Plaintiff, and her attorneys or representatives, for all actions
28

1 taken or statements made by Plaintiff and her attorneys or representatives, in the course of seeking
2 enforcement of Proposition 65 in this action.

3 **6. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and
5 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
6 after it has been fully executed by all Parties, in which event any monies that have been provided
7 to Plaintiff or her counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within
8 fifteen days of their receipt of any such demand from Defendant.

9 **7. SEVERABILITY**

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

13 **8. ATTORNEYS' FEES**

14 In the event that, after Court approval: (1) a dispute arises with respect to any provision of
15 this Consent Judgment; (2) Defendant or any third party seeks modification of this Consent
16 Judgment pursuant to Section 15 below; or (3) Leeman takes reasonable and necessary steps to
17 enforce the terms of this Consent Judgment, the prevailing party in any such dispute shall be
18 entitled to his or its reasonable attorneys' fees pursuant to CCP §1021.5.

19 **9. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the State of California
21 and apply within the State of California. In the event that Proposition 65 is repealed or is
22 otherwise rendered inapplicable by reason of law generally, or as to the Products specifically, then
23 Defendant shall have no further injunctive obligations pursuant to this Consent Judgment with
24 respect to, and to the extent that, those Products are so affected.

1 **10. NOTICES**

2 All correspondence and notices required to be provided pursuant to this Consent Judgment
3 shall be in writing and personally delivered or sent by: (1) first-class, registered, certified mail,
4 return receipt requested or (ii) overnight delivery from either Party to the other at the following
5 addresses. (Either Party, from time to time, may, pursuant to the methods prescribed above,
6 specify a change of address to which all future notices and other communications shall be sent.)
7

8
9 To Defendant:

To Plaintiff:

10 REED SMITH LLP
11 Attn: Thomas A. Evans, Esq.
12 1999 Harrison Street, Suite 2400
13 Oakland, CA 94612

HIRST & CHANLER LLP
Attn: David Lavine, Esq.
2560 Ninth Street, Suite 214
Berkeley, CA 94710

14 **12. COUNTERPARTS; FACSIMILE SIGNATURES**

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

18 **13. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

19 Plaintiff agrees to comply with the reporting form requirements referenced in Health &
20 Safety Code Section 25249.7(f). Pursuant to regulations promulgated under that section, Plaintiff
21 shall present this Consent Judgment to the California Attorney General’s Office within two (2)
22 days after receiving all of the necessary signatures. A noticed motion to enter the Consent
23 Judgment will then be served on the Attorney General’s Office at least forty-five (45) days prior to
24 the date a hearing is scheduled on such motion in the Superior Court for the County of Alameda
25 unless the Court allows a shorter period of time.

26 **14. ADDITIONAL POST EXECUTION ACTIVITIES**

27 The Parties shall mutually employ their best efforts to support the entry of this Agreement
28 as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
manner. The Parties acknowledge that, pursuant to Health & Safety Code Section 25249.7, a

1 noticed motion is required to obtain judicial approval of this Consent Judgment. Accordingly, the
2 Plaintiff agrees to file a Motion to Approve the Agreement (“Joint Motion”), which shall be
3 prepared, within a reasonable period of time after the Execution Date (*i.e.*, not to exceed thirty
4 days unless otherwise agreed to by the Parties’ counsel based on unanticipated circumstances).
5 Defendant shall have no additional responsibility to Plaintiff’s counsel pursuant to Code of Civil
6 Procedure Section 1021.5 or otherwise with regard to reimbursement of any fees and costs incurred
7 with respect to the preparation and filing of the Joint Motion and its supporting declaration or with
8 regard to Plaintiff’s counsel appearing for a hearing or related proceedings thereon.

9 **15. MODIFICATION**

10 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
11 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
12 of any Party and entry of a modified Consent Judgment by the Court. The Attorney General shall
13 be served with notice of any proposed modification to this Consent Judgment at least fifteen days
14 in advance of its consideration by the Court.

15 **16. AUTHORIZATION**

16 The undersigned are authorized to execute this Consent Judgment on behalf of their
17 respective Parties and have read, understood and agree to all of the terms and conditions of this
18 Consent Judgment.
19
20
21
22
23
24
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

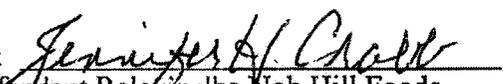
AGREED TO:

AGREED TO:

Date: 7/16/08

Date: 7/2/08

By: 
Plaintiff Whitney R. Leeman, Ph.D

By: 
Defendant Raley's dba Nob Hill Foods

APPROVED AS TO FORM:

APPROVED AS TO FORM:

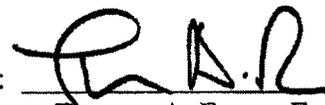
Date: 7/16/08

Date: 7/2/08

HIRST & CHANLER LLP

REED SMITH LLP

By: 
~~David Lavine, Esq.~~ Laurence D. Haveson
Attorneys for Plaintiff
WHITNEY R. LEEMAN, Ph.D.

By: 
Thomas A. Evans, Esq.
Attorneys for Defendant
RALEY'S DBA NOB HILL FOODS.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT