

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
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 WHITNEY R. LEEMAN, PH.D.

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SANTA CLARA
10 UNLIMITED CIVIL JURISDICTION

11
12 WHITNEY R. LEEMAN, PH.D.,

13 Plaintiff,

14 v.

15 THE HABIT RESTAURANTS, LLC; and
16 DOES 1-150, inclusive,

17 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”).
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

1.6 Notice of Violation

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

1.7 Complaint

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

1.8 No Admission

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

1.9 Consent to Jurisdiction

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

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 June 28,
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, provide a warning as set forth in this Section 2.1
10 (“Warning”), 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 Exhibit 1, and will be posted so that it is clearly
16 visible to consumers in each of the following locations if such location exists now or in the future:
17 (1) at each take-away or to-go doorway or window; (2) at each counter where food is purchased
18 and within view of each menu board.

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

20 **WARNING:** Chemicals known to the State of California to cause cancer or birth
21 defects or other reproductive harm are present in the food or
22 beverages sold here. For example, many grilled foods, such as
23 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].

24
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.

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

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.

2.3 Cooking Modification

Defendant agrees to investigate methods of cooking or equipment modifications that may substantially reduce or eliminate the Listed Chemicals from their Products. All documentation regarding methods implemented or modifications made shall be retained by Defendant for at least one year, 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.

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

7 **3. MONETARY TERMS**

8 **3.1 Civil Penalties**

9 In settlement of all the claims referred to in this Consent Judgment, Defendant shall pay a
10 maximum of \$60,000 in civil penalties in accordance with this Section. Each penalty payment
11 will be allocated in accordance with Health and Safety Code section 25249.12(c)(1) and (d), with
12 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment
13 (“OEHHA”), in the form of a check issued to “OEHHA,” and the remaining 25% of the penalty
14 remitted to Leeman, in the form of a check made payable to “The Chanler Group in Trust for
15 Whitney R. Leeman.”

16 **3.1.1 Initial Civil Penalty**

17 On or before the Effective Date The Habit shall notify Leeman in writing which Warning
18 Habit has chosen and pay a penalty of \$30,000. The amount of initial civil penalty due shall be
19 reduced by twenty-five percent if The Habit certifies, in writing received by Leeman on or before
20 the Effective Date, that it shall, within forty-five (45) days, modify its cooking equipment or
21 method to reduce or eliminate consumer exposure to the Listed Chemicals.

22 **3.1.2 Final Civil Penalty**

23 Within ten days of July 1, 2013, The Habit shall pay a second civil penalty of \$30,000.
24 The second civil penalty shall be waived in its entirety upon receipt by Leeman, within ten days of
25 July 1, 2013, of written certification from The Habit of (1) compliance with Section 2.2 and, and
26 (2) that The Habit has modified its cooking methods such that none of its flame-cooked ground
27 beef menu items exceeds the Warning Threshold, as defined in Section 2.3.

1 **3.2 Reimbursement of Leeman’s Fees and Costs**

2 The parties acknowledge that Leeman and her counsel offered to resolve this dispute
3 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
4 this fee issue to be resolved after the material terms of the agreement had been settled. Leeman
5 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
6 been finalized. The parties then attempted to (and did) reach an accord on the compensation due
7 to Leeman and her counsel under general contract principles and the private attorney general
8 doctrine, codified at Code of Civil Procedure section 1021.5, for all work performed through the
9 mutual execution of this agreement. Defendant shall pay \$51,000 for fees, attorneys’ fees, and
10 costs incurred which are related to and a result of investigating, bringing this matter to
11 Defendant’s attention, negotiating a settlement and consent judgment in the public interest, and all
12 other actions required to secure the entry of a final consent judgment in this matter. Except as
13 provided in this agreement, each party shall bear its own attorney fees.

14 **3.3 Payment Procedures**

15 **3.3.1 Issuance of Payments**

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

18 The Chanler Group
19 Attn: Proposition 65 Controller
20 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710

21 (b) All payments owed to OEHHA pursuant to Sections 3.1, shall be delivered
22 directly to OEHHA (Memo line “Prop 65 Penalties”) at one of the following addresses, as
23 appropriate:

24 For United States Postal Service:

25 Mike Gyrics
26 Fiscal Operations Branch Chief
27 Office of Environmental Health Hazard Assessment
 P.O. Box 4010
 Sacramento, CA 95812-4010

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

2 Mike Gyrics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 1001 I Street
6 Sacramento, CA 95814

7 **3.3.2 Proof of Payment**

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

11 **3.3.3 Tax Documentation**

12 Upon making each payment required by this Section 3, Defendant shall issue separate
13 1099 forms as follows: For each penalty payment to OEHHA, a 1099 shall be issued to the
14 Office of Environmental Health Hazard Assessment, 1001 I Street, Sacramento, CA 95814 (EIN:
15 68-0284486); for each penalty payment to Whitney Leeman, a 1099 shall be issued to “Whitney
16 R. Leeman,” whose address and tax identification number shall be furnished upon request after
17 this Settlement Agreement is fully executed by the Parties; for each payment in reimbursement of
18 fees and costs, Defendant shall issue a separate 1099 form to “The Chanler Group” (EIN: 94-
19 3171522).

20 **4 CLAIMS COVERED AND RELEASED**

21 **4.1 Plaintiff’s Public Release of Proposition 65 Claims**

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

27 **4.2 Plaintiff’s Individual Release of Claims**

28 Plaintiff also, in her individual capacity only and *not* in her representative capacity,
provides a release herein which shall be effective as a full and final accord and satisfaction, as a

1 bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses,
2 claims, liabilities and demands of plaintiff of any nature, character or kind, whether known or
3 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
4 the Listed Chemicals in the Products sold by Defendant.

5 **4.3 Defendant's Release of Plaintiff**

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

12 **5 COURT APPROVAL**

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

18 **6 SEVERABILITY**

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

22 **7 GOVERNING LAW**

23 The terms of this Consent Judgment shall be governed by the laws of the State of
24 California.

25 **8 NOTICES**

26 Unless specified herein, all correspondence and notices required to be provided pursuant
27 to this Consent Judgment shall be in writing and sent by (i) personal delivery, (ii) first-class,
28

1 registered or certified mail, return receipt requested, or (iii) overnight courier on any party by the
2 other party at the following addresses:

3 For Habit:

4 James M. Mattesich
5 Greenberg Traurig LLP
6 1201 K Street
7 Suite 1100
8 Sacramento, CA 95814 _____

9 Attorneys for The Habit Restaurants, LLC

10 For Leeman:

11 Proposition 65 Coordinator
12 The Chanler Group
13 2560 Ninth Street
14 Parker Plaza, Suite 214
15 Berkeley, CA 94710

16 Attorneys for Dr. Whitney R. Leeman

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

19 **9 COUNTERPARTS; FACSIMILE SIGNATURES**

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

23 **10 POST EXECUTION ACTIVITIES**

24 Leeman agrees to comply with the reporting form requirements referenced in Health and
25 Safety Code section 25249.7(f). In addition, the Parties acknowledge that, pursuant to Health and
26 Safety Code section 25249.7, a noticed motion is required to obtain judicial approval of this
27 Consent Judgment. Leeman shall prepare and file such motion to approve this Consent Judgment,
28 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.

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

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 Leeman
WHITNEY R. LEEMAN, PH.D.

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

Date: 6/29/13

Date: _____

1 **11 MODIFICATION**

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

3 **12 AUTHORIZATION**

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

7 **AGREED TO:**

AGREED TO:

8
9
10 By: _____
11 WHITNEY R. LEEMAN, PH.D.

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

13 Date: _____

13 Date: 6-27-13
14 _____

15
16
17
18
19
20
21
22
23
24
25
26
27
28

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].