

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 FIREHOUSE RESTAURANT, INC.; and
16 DOES 1-150, inclusive,

17 Defendants.

Case No. 113CV246814

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 **1.1 Whitney R. Leeman and Firehouse Restaurant, Inc.**

3 This Consent Judgment is entered into by and between Whitney R. Leeman, Ph.D.
4 (“Leeman” or “Plaintiff”) and Firehouse Restaurant, Inc. (“Firehouse” or “Defendant”), with
5 Leeman and Firehouse collectively referred to as the “Parties,” and each individually referred to
6 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 Firehouse 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 section 25249.6 et seq. (“Proposition 65”).

15 **1.4 General Allegations**

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

22 **1.5 Product Description**

23 The products covered by this Consent Judgment are flame cooked ground beef products,
24 including, but not limited to, the *FIREHOUSE Burger*, containing the Listed Chemicals, and
25 which are sold or offered for sale in California by Firehouse (collectively “Products”).

26 **1.6 Notice of Violation**

27 On or about August 31, 2012, Leeman served Firehouse and various public prosecutors
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1 with a “60-Day Notice of Violation” (“Notice”), alleging that Firehouse was in violation of
2 Proposition 65 for failing to warn its customers and consumers that the Products expose
3 consumers to the Listed Chemicals. To the best of the Parties’ knowledge, no public enforcer has
4 commenced and is diligently prosecuting the allegations set forth in the Notice.

5 **1.7 Complaint**

6 On May 23, 2013, Leeman filed a complaint in Santa Clara County Superior Court against
7 Firehouse and Does 1 through 150 (the “Complaint” or “Action”), alleging violations of
8 Proposition 65, based on the alleged exposures to the Listed Chemicals contained in the Products
9 sold by Firehouse to consumers in California.

10 **1.8 No Admission**

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

19 **1.9 Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over Firehouse as to the allegations contained in the Complaint, that venue is proper
22 in Santa Clara County, and that this Court has jurisdiction to enter and enforce the provisions of
23 this Consent Judgment, pursuant to California Code of Civil Procedure section 664.6, as a full and
24 binding resolution of all claims that were or could have been raised in the Complaint against
25 Firehouse based on the facts alleged therein and in the Notice.

26 **1.10 Effective Date**

27 For purposes of this Consent Judgment, the term “Effective Date” shall mean October 31,
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1 2013.

2 **2. INJUNCTIVE RELIEF**

3 **2.1 Product Warnings**

4 Commencing upon of execution of this agreement and continuing thereafter, Firehouse
5 shall, for all Products sold in California, provide the warning (“Warning”) set forth in this Section
6 2.1, except as provided by Section 2.3.

7 The Warning shall be prominently placed with such conspicuousness as compared with
8 other words, statements, designs, or devices so as to render it likely to be read and understood by
9 an ordinary individual under customary conditions before purchase or consumption. A Warning
10 will be displayed on a sign (“Warning Sign”), that is at least ten inches by ten inches (10 x 10),
11 containing only the Warning Language, of substantially the same presentation (dimensions, text
12 font and size, and colors) as that attached as Exhibit 1, and will be posted so that it is clearly
13 visible to consumers in each of the following locations, if such location exists now or in the
14 future: (1) at each take-away or to-go doorway or window, and (2) at each counter where food is
15 purchased.

16 The language of the Warning shall consist of the following:¹

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

21 **2.2 Compliance Review**

22 Beginning on the date that is thirty days following the Effective Date and continuing at

23 _____
24 ¹ Firehouse may add the bracketed language appearing in the Warning, and language regarding
25 additional chemicals and/or products, only if Firehouse has knowledge—based on testing
26 conducted by a U.S.-based laboratory employing methods for detection and analysis of chemicals
27 authorized by state or federal agencies, or grounded in facts that are generally accepted by a
28 recognized authoritative body, as that term is defined in Health and 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 products it sells, offers for sale, or distributes in

1 least once every six months for three years thereafter, Firehouse shall perform a compliance
2 review, as to each of its locations in California selling any Products, to assess and ensure that each
3 location is in compliance with all of the requirements of Sections 2.1 and 2.3. The compliance
4 review shall be documented in writing, noting with specificity at a minimum: any deficiencies
5 regarding compliance, the date those deficiencies were discovered, and the date by which the
6 deficiencies were corrected. All documentation regarding this compliance review shall be
7 retained by Firehouse for at least one year from the date produced, and shall be promptly shared
8 with Leeman, upon Leeman's written request. Each location of Firehouse shall, within fourteen
9 days of the compliance review or notification of noncompliance by any other means, correct any
10 deficiencies, including replacing damaged or missing Warning Signs.

11 **2.3 Cooking Modification**

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

18 However, in no case should a warning be necessary after December 27, 2013, as Firehouse
19 will change its methods of cooking or make modifications to its equipment as necessary to ensure
20 that none of its flame-cooked ground beef menu items exceeds the Warning Threshold. All
21 documentation regarding methods implemented or modifications made, including lab test results,
22 shall be retained by Firehouse for at least three years, and shall be promptly shared with Leeman,
23 upon Leeman's written request.

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27 California.

1 **3. MONETARY TERMS**

2 **3.1 Civil Penalties**

3 In settlement of all the claims referred to in this Consent Judgment, Firehouse shall, by
4 October 31, 2013, pay \$2,000 in civil penalties in accordance with this Section. The penalty
5 payment will be allocated in accordance with Health and Safety Code section 25249.12(c)(1) and
6 (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard
7 Assessment (“OEHHA”), in the form of a check issued to “OEHHA,” and the remaining 25% of
8 the penalty remitted to Leeman, in the form of a check made payable to “The Chanler Group in
9 Trust for Whitney R. Leeman.” All penalty payments shall be delivered to the addresses listed in
10 Section 3.3.1 below.

11 **3.2 Reimbursement of Leeman’s Fees and Costs**

12 The Parties acknowledge that Leeman and her counsel offered to resolve this dispute
13 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
14 this fee issue to be resolved after the material terms of the agreement had been settled. Leeman
15 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
16 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due
17 to Leeman and her counsel under general contract principles and the private attorney general
18 doctrine, codified at Code of Civil Procedure section 1021.5, for all work performed through the
19 mutual execution of this agreement. Firehouse will pay \$14,000 for fees and costs incurred as a
20 result of investigating, bringing this matter to Firehouse’s attention, and negotiating a settlement
21 in the public interest. Payments of fees and costs will be made as follows:

- 22 a) \$3,000 due by October 31, 2013;
23 b) \$3,000 due by November 29, 2013; and
24 c) \$8,000 due by December 27, 2013.

25 These funds shall remain in the trust account of The Chanler Group until the Entry Date.
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1 **3.3 Payment Procedures**

2 **3.3.1 Issuance of Payments**

3 All payments owed to Leeman, pursuant to Sections 3.1 and 3.2, shall be delivered to the
4 following address:

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

10 All payments owed to OEHHA pursuant to Section 3.1, shall be delivered to OEHHA
11 (Memo line “Prop 65 Penalties”) at one of the following addresses, as appropriate:

12 For United States Postal Service Delivery:

13 Mike Gyurics
14 Fiscal Operations Branch Chief
15 Office of Environmental Health Hazard Assessment
16 P.O. Box 4010
17 Sacramento, CA 95812-4010

18 For Non-United States Postal Service Delivery:

19 Mike Gyurics
20 Fiscal Operations Branch Chief
21 Office of Environmental Health Hazard Assessment
22 1001 I Street
23 Sacramento, CA 95814

24 **3.3.2 Proof of Payment**

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

28 **3.3.3 Tax Documentation**

 Upon making each payment required by this Sections 3.1 and 3.2, Firehouse shall issue
separate 1099 forms as follows: For each penalty payment to OEHHA, a 1099 shall be issued to
the Office of Environmental Health Hazard Assessment, 1001 I Street, Sacramento, CA 95814
(EIN: 68-0284486); for each penalty payment to Whitney Leeman, a 1099 shall be issued to
“Whitney R. Leeman,” whose address and tax identification number shall be furnished upon

1 request after this Consent Judgment is fully executed by the Parties; for each payment in
2 reimbursement of fees and costs, Firehouse shall issue a separate 1099 form to “The Chanler
3 Group” (EIN: 94-3171522).

4 **3.4 Representations**

5 Firehouse, and any other entity released by this Consent Judgment, understands that the
6 sales and other data it provided to Leeman was a material factor upon which Leeman has relied to
7 determine the amount of civil penalties assessed pursuant to Health & Safety Code section
8 25249.7 in this Consent Judgment. To the best of Firehouse’s knowledge the data provided by
9 Firehouse to Leeman is full and complete, and is a true and accurate reflection of any and all sales
10 of the Products in California during the relevant period and Firehouse’s financial status during the
11 same time period.

12 **4. CLAIMS COVERED AND RELEASED**

13 **4.1 Plaintiff’s Public Release of Proposition 65 Claims**

14 This Consent Judgment is a final and binding resolution between the Plaintiff and
15 Defendant, satisfying and releasing Defendant and its past and present parents, subsidiaries,
16 affiliates, divisions, predecessors, successors, officers, directors, employees, suppliers,
17 distributors, licensees, and customers (Collectively, “Defendant’s Releasees”) from any and all
18 causes of action, damages, costs, penalties, attorneys’ fees and claims of any kind that were made
19 or could have been made in the Complaint, based upon alleged violations of Proposition 65 or
20 exposure to Listed Chemicals in the Products for which Defendant or Defendant’s Releasees are
21 responsible. Compliance with this Consent Judgment in the future by Defendant shall be deemed
22 compliance by Defendant with its respective obligations under Proposition 65, with respect to
23 claims made in the Notice and/or the Complaint.

24 In further consideration of the representations, warranties, and commitments herein
25 contained, and for the payments to be made pursuant to this Consent Judgment, Plaintiff, acting
26 on behalf of herself, her past and current agents, representatives, attorneys, successors, assigns, or
27 any person or entity who may now or in the future claim through her in a derivative manner, and
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1 in the public interest, hereby waives and releases Defendant from all claims, known or unknown,
2 for violations of Proposition 65 up through and including the Effective Date based on exposure to
3 the Listed Chemicals from the Products as set forth in the Notice. Compliance with the terms of
4 this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to
5 the Listed Chemicals from the Products as set forth in the Notice.

6 **4.2 Plaintiff's Individual Release of Claims**

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

13 **4.3 Defendant's Release of Plaintiff**

14 Defendant, on behalf of itself, and on behalf of each of its past and current agents,
15 representatives, attorneys, successors, and/or assignees, hereby waive any and all claims against
16 Plaintiff and her attorneys and other representatives, for any and all actions taken or statements
17 made (or those that could have been taken or made) by Plaintiff and her attorneys and other
18 representatives, whether in the course of investigating claims or otherwise seeking to enforce
19 Proposition 65 against it in this matter with respect to the Products.

20 **4.4 Reservation of Rights**

21 Nothing in Section 4 limits or affects any Party's right to seek to enforce the terms of this
22 Consent Judgment.

23 **5. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court and
25 shall be null and void if, for any reason, it is not approved and entered by the Court within
26 one year after it has been fully executed by the Parties, in which event any monies that have been
27 paid to Leeman or her counsel pursuant to Section **Error! Reference source not found.** above
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1 shall be refunded within fifteen days after Leeman's receipt of written notice from Defendant that
2 the one-year period has expired.

3 **6. SEVERABILITY**

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

7 **7. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the State of
9 California.

10 **8. NOTICES**

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

15 For Firehouse:

16 Matthew Spencer
17 President
18 Firehouse Restaurant, Inc.
19 722 Grand Avenue
20 San Diego, CA 92109

21 With a copy to:

22 Alden J. Parker, Esq.
23 Weintraub Tobin
24 400 Capitol Mall, 11th Floor
25 Sacramento, CA 95814

26 Attorneys for Firehouse Restaurant, Inc.

27 For Leeman:

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

1 Attorneys for Dr. Whitney R. Leeman

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

4 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

8 **10. POST EXECUTION ACTIVITIES**

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

17 **11. MODIFICATION**

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

19 **12. AUTHORIZATION**

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

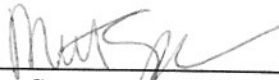
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AGREED TO:

AGREED TO:

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

By:  _____
Matthew Spencer, President
FIREHOUSE RESTAURANT, INC.

Date: _____

Date: 10/17/13 _____

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AGREED TO:

AGREED TO:

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

By: _____
Matthew Spencer, President
FIREHOUSE RESTAURANT, INC.

Date: 10/21/13

Date: _____

Exhibit 1

WARNING

Chemicals known to the State of California to cause cancer[and 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].