

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

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

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL JURISDICTION

11 WHITNEY R. LEEMAN, PH.D.,

12 Plaintiff,

13 v.
14

15 HIGHGATE HOTELS, INC.; THE
16 BLACKSTONE GROUP L.P.; WYNDHAM
WORLDWIDE CORPORATION; LLC; BRE
17 PARC 55 OWNER LLC; and DOES 1-150,
inclusive,

18 Defendants.
19
20
21
22
23
24
25
26
27
28

Case No. CGC-13-533219

[PROPOSED] CONSENT JUDGMENT

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

CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Whitney R. Leeman and BRE Park 55 Owner, LLC**

3 This Consent Judgment is entered into by and between Whitney R. Leeman, Ph.D.
4 (“Leeman” or “Plaintiff”) and BRE Parc 55 Owner, LLC. (“Parc 55” or “Defendant”), with
5 Leeman and Parc 55 collectively referred to as the “Parties,” and each individually referred to as a
6 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 Leeman alleges that Parc 55 employs ten or more persons and is a person in the course of
13 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
14 Health and Safety Code section 25249.6 et seq. (“Proposition 65”).

15 **1.4 General Allegations**

16 Leeman alleges that Parc 55 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 *Traditional Angus Beef Burger*, containing the Listed Chemicals,
25 and which are sold or offered for sale in California by Parc 55 (collectively “Products”).

26 **1.6 Notice of Violation**

27 On or about May 17, 2013, Leeman served Parc 55, The Blackstone Group L.P., Highgate
28

1 Hotels, L.P., Highgate Hotels, Inc., Wyndham Worldwide Corporation, RP/Kinetic Parc 55
2 Owner, LLC, and various public prosecutors with a “Supplemental 60-Day Notice of Violation”
3 (“Notice”), alleging that Parc 55 was in violation of Proposition 65 for failing to warn its
4 customers and consumers that the Products expose consumers to the Listed Chemicals. To the
5 best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting
6 the allegations set forth in the Notice.

7 **1.7 Complaint**

8 On July 30, 2013, Leeman filed a complaint in San Francisco County Superior Court
9 against, among others, Parc 55 and Does 1 through 150 (the “Complaint” or “Action”), alleging
10 violations of Proposition 65, based on the alleged exposures to the Listed Chemicals contained in
11 the Products sold by Parc 55 to consumers in California.

12 **1.8 No Admission**

13 Parc 55 denies the material factual and legal allegations contained in the Notice and the
14 Complaint and maintains that all of the products it has sold in California, including the Products,
15 have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
16 construed as an admission by Parc 55 of any fact, finding, conclusion of law, issue of law, or
17 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as
18 an admission by Parc 55 of any fact, finding, conclusion of law, issue of law, or violation of law,
19 such being specifically denied by Parc 55. This Section shall not, however, diminish or otherwise
20 affect Parc 55’s obligations, responsibilities, and duties under this Consent Judgment.

21 **1.9 Consent to Jurisdiction**

22 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Parc 55 as to the allegations contained in the Complaint, that venue is proper in
24 San Francisco County, and that this Court has jurisdiction to enter and enforce the provisions of
25 this Consent Judgment, pursuant to California Code of Civil Procedure section 664.6, as a full and
26 binding resolution of all claims that were or could have been raised in the Complaint against Parc
27 55 based on the facts alleged therein and in the Notice.

1 The language of the Warning (“Warning Language”) shall consist of one the following:¹

2 **2.1.1 First Option**

3
4 **WARNING:** The foods and beverages listed below contain chemicals
5 known to the State of California to cause cancer [or birth
6 defects and other reproductive harm], including polycyclic
7 aromatic hydrocarbons (PAHs) [may add additional
8 chemicals known to be present].

9 *[list specific food and beverage products for which warning is required]*

10 **2.1.2 Second Option**

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

18 **2.1.1 Third Option**

19 **WARNING:** Chemicals known to the State of California to cause cancer,
20 or birth defects or other reproductive harm may be present
21 in foods or beverages sold or served here.

22 **2.2 Compliance Review**

23 Beginning on the date that is thirty days following the Compliance Deadline and
24 continuing at least once every year for three years thereafter, Parc 55 shall perform a compliance
25 review, as to each of its locations in California selling any Products, to assess and ensure that each
26 location is in compliance with all of the requirements of Sections 2.1 and 2.3. The compliance
27 review shall be documented in writing, noting with specificity at a minimum: any deficiencies
28 regarding compliance, the date those deficiencies were discovered, and the date by which the

¹ Parc 55 may add the bracketed language appearing in the Warning, and language regarding additional chemicals and/or products, only if Parc 55 has knowledge—based on testing conducted by a U.S.-based 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 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 California.

1 deficiencies were corrected. All documentation regarding this compliance review shall be
2 retained by Parc 55 for at least one year from the date produced, and shall be promptly shared
3 with Leeman, upon Leeman's written request. Each location of Parc 55 shall, within fourteen
4 days of the compliance review or notification of noncompliance by any other means, correct any
5 deficiencies, including replacing damaged or missing Warning Signs.

6 **2.3 Cooking Modification**

7 Commencing no later than sixty (60) days after the Entry Date (the 60th day after the Entry
8 Date is referred to herein as the "Compliance Deadline"), Parc 55 shall not sell or offer for sale in
9 California any ground beef menu items that are flame grilled or flame broiled with direct
10 exposure to an open flame. To that end, Parc 55 shall complete installation of cooking equipment
11 at each location in California where Parc 55 prepares or cooks Products, as necessary to ensure
12 compliance with this Section by the Compliance Deadline.

13 Parc 55 shall certify, in writing, within ten (10) business days after the Compliance
14 Deadline, that the new cooking equipment has been installed by the Compliance Deadline at each
15 of Parc 55's California locations serving Products ("Cooking Equipment Certification"). The
16 obligation to warn pursuant to Section 2.1 is relieved upon Leeman's receipt of the Cooking
17 Equipment Certification.

18 Prior to installation of the new cooking equipment, Warnings consistent with Section 2.1
19 need not be posted if consumption of a single serving of one flame-cooked ground beef menu
20 item, of normal size and lipid content for that item, cooked to well done, results in an exposure of
21 equal to or greater than 0.033 µg benz(a)anthracene, 0.06 µg benzo(a)pyrene, or 0.096 µg
22 benzo(b)fluoranthene, in a test performed by a laboratory within the United States which is agreed
23 upon by the parties ("Warning Threshold").

24 All documentation regarding modifications made to Parc 55's cooking equipment or
25 methods, and testing of Products in accordance with this Section 2.4 shall be retained by Parc 55
26 for at least three (3) years, and shall be promptly shared with Leeman, upon Leeman's written
27 request.

1 **3. MONETARY TERMS**

2 **3.1 Civil Penalties**

3 In settlement of all the claims referred to in this Consent Judgment, Parc 55 shall pay a
4 total of up to \$15,000 in civil penalties in accordance with this Section. Each penalty payment
5 will be allocated in accordance with Health and Safety Code section 25249.12(c)(1) and (d), with
6 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment
7 (“OEHHA”), in the form of a check issued to “OEHHA,” and the remaining 25% of the penalty
8 remitted to Leeman, in the form of a check made payable to “The Chanler Group in Trust for
9 Whitney R. Leeman.” All penalty payments shall be delivered to the addresses listed in Section
10 3.3.1 below.

11 **3.1.1 Initial Civil Penalty**

12 Within ten days of the Entry Date Parc 55 shall notify Leeman in writing which Warning
13 Message Parc 55 has chosen and pay an initial civil penalty as follows: \$2,000 upon election of
14 the First Option (Section 2.1.1); \$3,000 upon election of the Second Option (Section 2.1.2); or
15 \$4,000 upon election of the Third Option (Section 2.1.3). The amount of initial civil penalty due
16 shall be reduced by fifty percent if Parc 55 certifies in writing, sent to Leeman on or before ten
17 days after the Entry Date, that it shall, within thirty days of the Entry Date, modify its cooking
18 equipment or method to reduce or eliminate consumer exposure to the Listed Chemicals. The
19 certification in lieu of a portion of the initial civil penalty payment provided by this Section is a
20 material term, and time is of the essence.

21 The initial civil penalty shall be delivered within ten days of the Entry Date.

22 **3.1.2 Civil Penalty for Failure to Install New Cooking Equipment**

23 Within ten days of the Compliance Deadline, Parc 55 shall notify Leeman which Warning
24 Language is posted and shall pay a final civil penalty as follows: \$2,000 if the First Option is in
25 operation as of that date (Section 2.1.1); \$6,000 if the Second Option is in operation as of that
26 date (Section 2.1.2); \$10,000 if the Third Option is in operation as of that date (Section 2.1.3); or
27 \$25,000 if no Section 2.1 Warning is provided. The final civil penalty shall be waived in its
28

1 entirety upon receipt by Leeman, within ten days of the Compliance Deadline, of the Cooking
2 Equipment Certification The certification in lieu of a civil penalty payment provided by this
3 Section is a material term, and time is of the essence.

4 **3.2 Reimbursement of Leeman's Fees and Costs**

5 The Parties acknowledge that Leeman and her counsel offered to resolve this dispute
6 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
7 this fee issue to be resolved after the material terms of the agreement had been settled. Leeman
8 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
9 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due
10 to Leeman and her counsel under general contract principles and the private attorney general
11 doctrine, codified at Code of Civil Procedure section 1021.5, for all work performed through the
12 mutual execution of this agreement. Parc 55 shall pay \$36,000 on or before ten days after the
13 Entry Date for fees and costs incurred as a result of investigating, bringing this matter to Parc 55's
14 attention, and negotiating a settlement in the public interest.

15 **3.3 Payment Procedures**

16 **3.3.1 Issuance of Payments**

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

19 The Chanler Group
20 Attn: Proposition 65 Controller
21 2560 Ninth Street
22 Parker Plaza, Suite 214
23 Berkeley, CA 94710

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

25 For United States Postal Service Delivery:

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

1 For Non-United States Postal Service Delivery:

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

5 **3.3.2 Proof of Payment**

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

9 **3.3.3 Tax Documentation**

10 Upon making each payment required by Sections 3.1 and 3.2, Parc 55 shall issue separate
11 1099 forms as follows: For each penalty payment to OEHHA, a 1099 shall be issued to the
12 Office of Environmental Health Hazard Assessment, 1001 I Street, Sacramento, CA 95814 (EIN:
13 68-0284486); for each penalty payment to Whitney Leeman, a 1099 shall be issued to “Whitney
14 R. Leeman,” whose address and tax identification number shall be furnished upon request after
15 this Consent Judgment is fully executed by the Parties; for each payment in reimbursement of fees
16 and costs, Parc 55 shall issue a separate 1099 form to “The Chanler Group” (EIN: 94-3171522).

17 **3.4 Accuracy of Information**

18 Parc 55 understands that the sales, ownership, and management information it provided to
19 Leeman are material factors upon which Leeman has relied to determine the amount of civil
20 penalties assessed pursuant to Health and Safety Code section 25249.7 in this Consent Judgment.
21 To the best of Parc 55’s knowledge the sales, ownership, and management information provided
22 by Parc 55 to Leeman is full and complete, and is a true and accurate reflection of any and all
23 sales of the Products in California during the relevant period and of the ownership and
24 management of the hotel known as the Parc 55 Wyndham San Francisco (“Hotel”) and the
25 Cityhouse Restaurant (“Cityhouse”) located therein during the relevant period.

26 If, within nine months of the Effective Date, Leeman discovers and presents to Parc 55
27 evidence that prior to execution of this Consent Judgment (1) the Product has been distributed by
28

1 Parc 55 in sales volumes materially different than those identified by Parc 55 prior to execution of
2 this Consent Judgment, or (2) the ownership or management of the Cityhouse or Hotel differs
3 materially from that represented by Parc 55 to Leeman prior to execution of this agreement, then
4 Parc 55 and/or other parties released by this Consent Judgment may be liable for an additional
5 penalty amount as well as additional attorney fees expended by Leeman in the public interest. In
6 the event Leeman believes there is evidence that the Product has been distributed by Parc 55 in
7 sales volumes materially different than those identified by Parc 55, or that ownership or
8 management of the Hotel and/or Cityhouse is materially different than represented by Parc 55,
9 Leeman shall provide Parc 55 with a written demand for additional penalties and attorney fees
10 under this Section. After service of such demand, Parc 55 and Leeman shall have thirty days to
11 meet and confer regarding the demand and submit such payment to Leeman in accordance with
12 the method of payment of penalties identified in this Section 3. Should this thirty day period pass
13 without any such resolution between the Parties and payment of such additional penalties and
14 fees, Leeman shall be entitled to file a formal legal claim including, but not limited to, a claim for
15 damages for breach of this contract, and the prevailing party shall be entitled to all reasonable
16 attorney fees and costs relating to that action.

17 **4. CLAIMS COVERED AND RELEASED**

18 **4.1 Plaintiff's Public Release of Proposition 65 Claims**

19 This Consent Judgment is a final and binding resolution between the Plaintiff and Parc 55,
20 satisfying and releasing Parc 55 and its past and present parents, subsidiaries, affiliates, divisions,
21 predecessors, successors, officers, directors, employees, suppliers, agents, distributors, licensees,
22 and customers, including all defendants named in the complaint, (Collectively, "Defendant's
23 Releasees") from any and all causes of action, damages, costs, penalties, attorneys' fees and
24 claims of any kind that were made or could have been made in the Complaint, based upon alleged
25 violations of Proposition 65 or exposure to Listed Chemicals in the Products for which Parc 55 or
26 Parc 55's Releasees are responsible. Compliance with this Consent Judgment in the future by
27 Defendant shall be deemed compliance by Defendant with its respective obligations under

1 Proposition 65, with respect to claims made in the Notice and/or the Complaint.

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

12 **4.2 Plaintiff's Individual Release of Claims**

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

19 **4.3 Defendant's Release of Plaintiff**

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

26 **4.4 Reservation of Rights**

27 Nothing in Section 4 limits or affects any Party's right to seek to enforce the terms of this
28

1 Consent Judgment.

2 **5. COURT APPROVAL**

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

8 **6. SEVERABILITY**

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

12 **7. GOVERNING LAW**

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

15 **8. NOTICES**

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

20 For Parc 55:

21 Robert Rubenstein
22 General Counsel and Senior Vice President
23 BRE Parc 55 Owner LLC
24 501 E. Camino Real
25 Boca Raton, FL 33432
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

With a copy to:

Stephen L. Marsh, Esq.
McKenna Long & Aldridge LLP
600 West Broadway, Suite 2600
San Diego, CA 92101

Attorneys for BRE Parc 55 Owner LLC

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.

9. 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.

10. POST EXECUTION ACTIVITIES

Leeman agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). In addition, the Parties acknowledge that, pursuant to Health and Safety Code section 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 Parc 55 shall not oppose such motion. In furtherance of obtaining such approval, Leeman and Parc 55 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.

11. MODIFICATION

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

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


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, PH.D.

By: 
ROBERT RUBENSTEIN, GENERAL
COUNSEL AND SENIOR VICE
PRESIDENT
BRE PARC 55 OWNER, LLC

Date: 1/5/14

Date: 1/27/14